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

[2010] IIROC No. 55

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

Heard: December 7, 8, 9, 10, 11, 14, 15, 16, 17 & 18, 2009,
January 25, 26, 27, 28, 29, February 1, 2, 3, 4, 8, 9, 10, March 30 & 31, 2010
Decision: Released November 30, 2010, Revised April 30, 2011
(466 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

Reasons and Decision

INTRODUCTION

¶ 1 The Investment Industry Regulatory Organization ("**IIROC**") was created in 2008 through the consolidation of the Investment Dealers Association of Canada and Market Regulation Services Inc. ("**RS**"). These Reasons will not distinguish between IIROC and RS, and will cite IIROC as the regulator throughout.

¶ 2 IIROC is recognized under the *Securities Act*[1] as a self-regulatory organization to monitor and regulate trading of equity securities on marketplaces that retain IIROC to be their regulation services provider. Subsection 1.1 of the *Securities Act* states that the purpose of the securities regulatory regime is "to provide protection to investors" and "to foster fair and efficient capital markets and confidence in capital markets."

¶ 3 All of the **TSX-V** trade transactions that are the subject of these proceedings were carried out through the facilities of the Toronto Stock Exchange ("**TSX**"), the TSX Venture Exchange ("**TSX-V**") or the NEX Market Place ("**NEX**") (collectively, the "**Exchanges**"). Each of these Exchanges is regulated by IIROC.

¶ 4 RS introduced and IIROC continues the Universal Market Integrity Rules and Policy ("**UMIIR Rules**"

[1] R.S.O. 1990, c. S. 5 (as amended).

and "**UMIR Policy**") as a set of equities trading rules designed to uphold the integrity of the marketplace, ensure fairness and maintain investor confidence.

¶ 5 TD Securities Inc. ("**TDSI**") is and was a registered investment dealer and IIROC member and carried on an integrated securities business. Its business included trading on the above mentioned Exchanges and other market places.

¶ 6 Kenneth Nott, Aidin Sadeghi, Christopher Kaplan, Robert Nemy and Jake Poulstrup (collectively called the "**Individual Respondents**" and individually referred to by their **surname**) were traders employed by TDSI. UMIR Rule 10.4(1) extends the application of UMIR Rules to employees of a Participant.

¶ 7 UMIR Rule 2.2(2)(b) prohibits entering orders with the intention of establishing an artificial closing bid price.

¶ 8 IIROC Staff says that over the course of the period from May 1 to October 31, 2005 ("**Relevant Period**")[2] each of the Individual Respondents contravened this provision by entering high closing bids on either NEX, TSX-V or TSX to purchase one or more of five stocks (collectively called "**Five Stocks**") without any intention that the orders would be executed and for no *bona fide* purpose. IIROC Staff says 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.

¶ 9 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**").

¶ 10 IIROC Staff says 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.

¶ 11 Stemming from the allegation that the Individual Respondents contravened UMIR Rule 2.2(2)(b) IIROC Staff alleges that during the Relevant Period TDSI failed to comply with its trading supervision obligations contrary to UMIR Rule 7.1 and UMIR Policy7.1.

STRUCTURE AND SYNOPSIS OF THESE REASONS

¶ 12 The remainder of these reasons is divided into twelve **PARTS**.

¶ 13 **PART I** (paragraphs [35]-[53]) sets out background facts and information not in dispute.

¶ 14 **PART II** (paragraphs [54]-[79]) details the allegations and submissions by IIROC Staff against the Individual Respondents.

¶ 15 **PART III** (paragraphs [80]-[98]) sets out the responding submissions of Nemy, Poulstrup and Kaplan.

¶ 16 **PART IV** (paragraphs [99]-[191]) analyses the opposing submissions and concludes that an artificial bid price results when there is an intention to establish a price that is not justified by real demand or supply in a security. The intention of the trader entering the bid price is the key to determining whether a bid is artificial. Thus, the Panel must decide whether an improper intention can be inferred from the circumstances relating to the closing bids that were entered.

¶ 17 Adopting a purposive approach that supports subsection 1.1 of the *Securities Act* ("provide protection to investors" and "foster fair and efficient capital markets and confidence in capital markets.") the Panel reviews 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).

¶ 18 On the basis of this evidence the Panel concludes that IIROC Staff has made out a *prima facie* case, on a

[2] All dates herein are in 2005 unless otherwise stated.

balance of probabilities, that the Individual Respondents intended to engage in the improper practice of entering the alleged Artificial Closing Bids ("**ACBs**") in the Five Securities. This finding is buttressed by direct evidence of instant messages and telephone calls between the Respondents. The Report of Dean Holley (**"Holley**"), an expert retained by IIROC, substantiates this conclusion with respect to ACBs by Nemy, Poulstrup and Sadeghi in TIC.

¶ 19 However, the final decision with respect to each Individual Respondent can only be made on the whole of the evidence. The evidence and submissions presented by each Individual Respondent is discussed in the **PARTS** outlined below.

¶ 20 In **PART V** (paragraphs [192]-[208]) a critique of instant messages between Nemy and Rob Dingwall, Vice-President and Director of the Trade Execution Group[3]) ("**Dingwall**") on August 31, 2005 shows that Nemy was concerned about the value of his holdings in TIC and that he was not averse to manipulating the market. Discussion of the messages and Nemy's conduct relating thereto cast doubt on Nemy's credibility.

¶ 21 **PART VI** (paragraphs [209]-[227]) evaluates the Report of John Boddie ("**Boddie**") an expert retained by TDSI.

¶ 22 Boddie confined his interpretation of UMIR Rule 2.2 and UMIR Policy 2.2 to empirical trading data within the context of the market. This is contrary to the purposive approach that should be adopted in the analysis of artificial trades and disregards statements in UMIR Policy that the explicitly enumerated categories of manipulation are not finite or closed. Thus, the opinions and conclusions set out in the Summary of the Boddie Report are founded on an erroneous interpretation of UMIR Policy 2.2. Consequently, the Boddie Report is not helpful with respect to the allegations of Artificial Closing Bids.

¶ 23 **PART VII** (paragraphs [228]-[231]) deals with the allegations against Nott. On the basis of admissions by Nott when he testified, the Panel finds that the Artificial Closing Bids in the Statement of Allegations have been proved.

¶ 24 **PART VIII** (paragraphs [232]-[275) deals with the allegations against Sadeghi.

¶ 25 The Panel finds that Sadeghi entered a single Artificial Closing Bid in PEC on July 15 and two Artificial Closing Bids in CDF.A, one on October 14 and one on October 21. None of these bids was part of a pattern of entering Artificial Closing Bids. All other allegations of entering Artificial Closing Bids are dismissed.

¶ 26 In **PART IX** (paragraphs [276]-[320]) the Panel reviews the whole of the evidence and the submissions relating to Nemy.

¶ 27 The Panel concludes that the relative illiquidity of TIC and the pattern of 39 of the 79 alleged Artificial Closing Bids by Nemy detailed below in paragraph [28] (small board lots entered in the closing seconds of trading or large board lots entered in the last five seconds of trading detailed below in paragraphs [302]-[309]) all increasing the best bid price, resulted in a low probability of execution. These patterns of bidding coupled with Nemy's indisputable motive for maintaining the share value of TIC and other considerations reviewed in **PART IX** negate the plausibility of Nemy's explanation that this 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. The Panel does not accept this explanation. The doubt cast on Nemy's credibility by the analysis in **PART V** of the instant messages on August 31 between Nemy and Dingwall and Nemy's contradictory evidence regarding his reason for withdrawing four bids late in the day on August 31 add weight to the Panel's conclusion regarding Nemy's lack of credibility.

¶ 28 The Panel finds that Nemy entered 39 Artificial Closing Bids with the improper intention of maintaining the value of TIC on the following dates specified in Table 5 of the Statement of Allegations:

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)

[3] The Trade Execution Group is explained below at paragraph [41].

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

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

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

October 7, 18, 27. (total 3)

¶ 29 In **PART X** (paragraphs [320]-[341]) the whole of the evidence and the submissions relating to Poulstrup are reviewed.

¶ 30 The Panel finds that Poulstrup entered 14 Artificial Closing Bids with the improper intention of maintaining the value of TIC on July 4, 5, 6, 7, 8, 11, 12, 14, 15, 18, 19, 20, 21 and August 9 as specified in Table 5 of the Statement of Allegations.

¶ 31 In **PART XI** paragraphs [342-392]) the whole of the evidence and the submissions relating to Kaplan are reviewed.

¶ 32 The Panel finds that Kaplan entered 19 Artificial Closing Bids consisting of eight bids with less than two seconds remaining on May 12, 17, 31, July 13, August 29, 30, 31, October 13 plus 11 bids with less than one second remaining on June 14, 16, 17, 20, 28, July 8, 11, 12, 14, 21, September 6 and 14.

¶ 33 In addition, Kaplan entered 18 Artificial Closing Bids earlier in the day on May 13, 20, 26, June 1, 2, 3, 6, 8, 22, 23, July 22, August 9, 11, 24, September 1, 13, October 11 and 25.

¶ 34 **PART XII** (paragraphs [393]-[465]) deals with allegation that TDSI failed to comply with its trading supervision obligations contrary to UMIR Rule 7.1 and UMIR Policy 7.1. The allegation is dismissed.

PART I

BACKGROUND FACTS AND INFORMATION

TDSI Burlington Office

¶ 35 As part of a business plan to increase its volume of trading business TDSI opened a trading office sub-branch in Burlington ("**Burlington Office**") with the expectation of generating approximately $6,000,000.00 gross profit annually. This expectation was communicated to the Individual Respondents. The location was chosen to accommodate the traders hired by TDSI who all lived in the Burlington area and wanted to avoid the commute to Toronto.

¶ 36 The Individual Respondents were all Registered Traders[4] hired by TDSI to work as Inventory Traders[5] (also called Proprietary Traders). Nott worked in the Toronto Office and was responsible for client order flow from the United States for TSXV trading.

¶ 37 Nemy and Poulstrup each brought long positions in TIC to TDSI when they were hired. During the Relevant Period the Individual Respondents in the Burlington Office held between 392,650 and 685,550 shares of TIC. Nemy was the largest single holder of TIC in the Burlington Office, holding from 271,450 to 449,550 shares of TIC. Dingwall and Ray Tucker, Managing Director of TEG Trade Execution Group ("**Tucker**") held unspecified amounts of TIC stock.

Method of calculating trader compensation

¶ 38 TDSI agreed that the Individual Respondents would receive 50 per cent of the gross realized and unrealized profits they generated less expenses and a salary draw of $50,000 per year which was advanced monthly.

¶ 39 Gross realized profits were calculated by deducting from realized sale proceeds for each stock, the cost

[4] Registered Trader is a Trader that is allowed to manage a stock or stocks specified by the TSX in accordance with the rules of the TSX which include a responsibility to maintain a spread on the stock(s) specified by the TSX at all times. He(she) trades for the dealer. These trades go through an Inventory account of the Dealer.

[5] A trader that trades for the dealer with the dealer's money.

of that stock as recorded by TDSI on its books. Unrealized profits and losses were calculated by first calculating the value of each stock owned in a trader's inventory account. This was done for any particular day by multiplying the closing *bid price* **(**as opposed to actual price of the last trade)[6] for each security by the number of shares held to arrive at the mark to market[7] value. Profit or loss was calculated by deducting from that value amount, the recorded cost of the position on TDSI's books. At the end of each month the cost of the inventory position for the ensuing month was reset by using the closing bid price for that stock at the close of the month end to value the position. As a consequence of the cost-reset the inventory held at month end was deemed to be disposed of at the closing bid price at that date. Any profit or loss arising from that deemed disposition was treated as realized profit or loss.

¶ 40 This performance-based compensation was paid to Nemy, Poulstrup, Kaplan and Sadeghi quarterly at the end of January, April, July and October. Nott's remuneration was calculated in the same fashion but his payouts were bi-annual (the end of April and October).

Capital

¶ 41 The TDSI traders in the Toronto Office and the Burlington Office were called the Trade Execution Group ("**TEG**"). They had access to $40,000,000.00 of capital during the Relevant Period. Formal capital limits were not imposed on any TDSI Inventory Trader. Each Trader was given capital according to his needs, experience and demonstrated performance in managing market risk. This was regularly reviewed by Tucker.

¶ 42 Tucker said that the capital available to TEG Proprietary Traders was determined by seniority, historical track record and profitability. If a Trader demonstrated a lack of profitability it might cause him to retract the amount of capital available to the Proprietary Trader. Tucker agreed that the greater access to capital a Trader had, the larger the potential profits for the firm and the Trader.

TDSI Head Office profit and loss surveillance of the Burlington Office

¶ 43 Tucker and Dingwall tracked the daily profitability of the Inventory Traders. Each day at or after the close of the market the Burlington Office Traders were required to provide an estimate of the day's profit and loss. A daily estimate of the Burlington Office profits was sent at the end of each trading day to the TDSI Head Office for internal control purposes. Monthly profit rankings for TEG Proprietary Traders were circulated by TDSI by via e-mail to the various Proprietary Traders. These showed the rank order of profitability for TEG Proprietary Traders, not the actual profit figures. The Proprietary Traders were made aware of who the top performers were through these rankings.

¶ 44 The Individual Respondents knew that the TDSI Head Office looked at individual and group profitability on a daily basis both through the overnight report and intra-day using real-time inventory software that was available to the trade desk supervisors and the Traders. Tucker said that a Trader holding a losing position ran the risk of being asked to liquidate the position. The loss would be allocated to the Trader's profit and loss in the normal course.

Events leading up to these proceedings

¶ 45 On October 4, 2005 Nott reported a large increase in his holdings of CDF.A to Dingwall. Nott told Dingwall he had accidentally "fat fingered" an order for CDF.A and wound up purchasing 154,000 shares in error. This transaction brought his position in that stock to over 350,000 shares. The trade was large for Nott, representing roughly $150,000.00. As a result of this accidental acquisition Dingwall and Tucker conducted monitoring and investigation procedures leading up to the suspension of Nott and Sadeghi on October 27, 2005 and dismissal on November 30, 2005.

¶ 46 The matter was reported to IIROC on November 16, 2004 ("**Gatekeeper Report").** This precipitated an

[6] This is a critical fact in this case.
[7] The mark to market formula uses the closing bid price for long positions to calculate the unrealized profit and loss position of inventory accounts.

exhaustive investigation by IIROC Staff[8] culminating in service of the Statement of Allegations on TDSI on February 22, 2008.

Witnesses and evidence at this hearing

¶ 47 Kim Stewart ("**Stewart**"), senior investigator of market related issues at RS and subsequently IIROC, conducted the gargantuan task of tracking down and assembling the trading data pertaining to each of the Five Stocks during the Relevant Period from information provided by the TSX[9] plus instant messages and recorded telephone calls[10] provided by TDSI[11]. Stewart entered this information in a composite document called the Annotated Market Reports **(**"**AMRs**").[12] Each trading data item is entered on a numbered line permitting ready identification. The date, time and content of each instant message and telephone call is set out on a numbered line in time sequence with the trading data[13] [14] [15]

¶ 48 The AMRs constitute the bedrock source of information for IIROC Staff and the Respondents. The Individual Respondents did not dispute the accuracy of the trading data set out in the AMRs except the closing bid price used by IIROC Staff in calculating the quarterly inventory position of the Individual Respondents.

¶ 49 The witnesses on behalf of IIROC were Stewart, Holley, and Alexis Meanchoff (**"Meanchoff"**), Senior Investigator/Manager of Investigations. TDSI called Nemy, Poulstrup, Kaplan, Dingwall, Tucker, Mathew Cooper, Acting Chief Compliance Officer for TDSI and Boddie. Counsel filed written submissions followed by oral submissions.

¶ 50 Sadeghi filed a Reply denying the allegations, testified at the hearing, called a witness, provided written submissions and made oral submissions. Nott did not present a defence to the allegations other than to testify that he did not consider his closing bids "high closing" but that he was simply "maintaining the bid".[16]

The allegations against the Individual Respondents

¶ 51 The Statement of Allegations[17] identifies 461 Artificial Closing Bids that IIROC Staff alleges were entered in respect of the Five Stocks by each of the Individual 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).

¶ 52 Counsel for IIROC says it is not necessary to prove each and every Artificial Closing Bid. If the Panel finds any one (or more) of the 461 closing bid orders is artificial, a contravention of UMIR Rule 2.2(2)(b) has been established. Counsel says the number of proven breaches goes to the issue of sanction, not to the issue of

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[8] Exhibit 32 (Chronology of Relevant Events) sets out the dates of correspondence by IIROC an TDSI between November 18, 2005 and October 22, 2007. In addition, IIROC sought interviews of the seven traders then in the employ of TDSI as well as two trading supervisors.

[9] This consisted of detailed information on every order entered into the market timed to one-hundredth of a second including the resulting bid - ask quotation, size of both bid and ask, the broker trading number (#7 for TDSI), the individual identification of the trader entering the order, executed trades showing number of shares traded and specifically by whom, the bid-ask including all above details following every trade and order entry, cancelled orders, type of order such as inventory, client, non-client. Each entry was shown on a numbered line in the AMRs for each of the Five Stocks permitting ready identification of any item by counsel and the panel.

[10] Approximately 7000 telephone calls were reviewed.

[11] Stewart said TDSI was very co-operative throughout the investigation.

[12] Mathew Cooper , Acting Chief Compliance Officer for TDSI said the following about the AMRs:

> "I would just describe the amount of effort required in that as being monumental. One of the things that impressed me about those when I looked at them and flipped through them was just clearly the amount of work that went into producing them." (Transcript page 2725)

[13] Annotated Market Report filed as Exhibit 18 is organized under separate tabs for ACU (59 pages with 3,976 lines, CDF (101 pages with 7,468 lines), CAN (118 pages with 8,300 lines) and PEC (65 pages with 4,654 lines).

[14] Annotated Market Report filed as Exhibit 19 consists of 352 pages with 26,333 lines of data for TIC.

[15] The total for the Exhibits 18 and 19 is 695 pages and 50,731 lines.

[16] Transcript, Nott pages 3655-3659 and 3668-3669.

[17] Pleadings Brief, paragraph 22.

liability.

¶ 53 Counsel for TDSI does not take issue with the foregoing. However, he says the IIROC Statement of Allegations, written submissions and oral submissions allege a *consistent pattern* of Artificial Closing Bids with respect to the Five Stocks over the Relevant Period and that is really what this case is all about[18]. The Panel agrees.

PART II

ALLEGATIONS AND SUBMISSIONS BY IIROC STAFF

¶ 54 Over the Relevant Period the trading by the Individual Respondents set out in the AMRs coupled with their contemporaneous communications proves on a balance of probabilities that the Individual Respondents regularly and systematically engaged in the manipulative or deceptive practice of entering Artificial Closing Bids for each of the Five Stocks as detailed in Schedule "B" to the Statement of Allegations, contrary to UMIR Rule 2.2(2)(b).

¶ 55 The motive for the improper conduct was to improve the daily profit and loss calculations for the long inventory positions each of them held in one or more of the Five Stocks that were valued on the basis of the closing bid: (i) daily for internal control purposes, (ii) monthly for the purpose of ranking in relation to the inventory traders, and (iii) quarterly for the purpose of remuneration except Nott who was paid bi-annually. Access to TDSI trading capital was a further incentive for maximizing gross realized profit.

¶ 56 The instant messages and telephone calls distinguish this case from market manipulation cases based only on suspicious trading activity. Viewed in juxtaposition to the trading at the time of the instant messages and telephone calls, they provide clear, convincing and cogent evidence of the improper intent of the Individual Respondents. The fact that there is no message or telephone call on a given day does not negate the continuous state of mind.

¶ 57 No credence should be given to the *ex post facto* explanations and rationalizations proffered by the Individual Respondents that attempt to explain away their activity at the time of the message or phone call.

¶ 58 The test of an Artificial Closing Bid is whether the entry of the closing bid order was for a *bona fide* purpose, and therefore reflective of genuine demand, or whether the particular circumstances of its entry (and surrounding its entry) demonstrate the intention was that the bid would not trade but instead would stand as the closing bid at the end of the trading day.

¶ 59 The analysis of these closing bids shows a pattern of the following identifiable characteristics that synergistically combine to conceal the improper activity of the Individual Respondents in a cloak of legitimacy: (i) frequency of setting the closing bids, (ii) late time of closing bids, (iii) bidding in small lots, and (iv) illiquid nature of the stocks.

Patterns or characteristics of the Closing Bids

(i) Frequency of setting the closing bids

¶ 60 Cooper agreed that if a trader does something three or more times this can look like a deliberate pattern:[19]

> Q. So that, you know, one time when someone does something, it may be a mistake. Is that fair?
>
> A. Yes.

[18] Transcript, Steep oral submissions, page 4108:

> Technically, that's absolutely correct. I take no issue with that. But fundamentally, let's be frank, that's not what the case is about, that there was a single ACB. What is alleged, and it was replete in the Notice of Allegations, in the written argument and in the oral argument is that there is a consistent pattern of ACBs over five stocks over six months. And that's the case that IIROC has put to you and that's the case that I will address.

[19] Transcript pp. 2901-2907.

Q. Or it may be just aberrant behavior. Is that correct?

A. Okay. Yes.

Q. And two times might also be unplanned, a mistake; is that fair?

A. Yes.

Q. But once you get up to three times or more, it starts to look deliberate; does it not?

A. That's what I said there, yeah, and I would still maintain that term largely.

Q. You would still agree with that; is that fair?

A. Yes.

¶ 61 Boddie, the TDSI expert witness, conceded the foregoing. He said:

Q. When he was being asked questions about the late activity by Mr. Sadeghi and Mr. Nott, Mr. Cooper said words to this effect: One day might be a mistake, Two days might be a mistake. Three days starts to look like a pattern. Is that something you would ascribe to?

A. Well, I don't know if three days is the magic day. But fundamentally I would say that's not a bad premise. 20

…………

Q. I'm not talking about uncovered bids. Puts in a bid day after day after day after day, late in the day, you would agree with me that that's demonstrative of deliberate activity?

A. Yes.

Q. And then, if someone is not there, or not there very often, and then suddenly someone else in the office is away for a period of time, and the person who remains in the office is then there day after day after day, putting in a late bid, you agree with me that's a pattern?

A. It sounds to me like a pattern.

Q. You would agree with me that it would be deliberate?

¶ 62 A. Presumably.[21]The following chart reproduced from Paragraph 22 of the Pleadings Brief summarizes the number of closing bids entered by each of the Individual Respondents in each of the Five Stocks:

	ACU (1)	CAN.H/ CAN (2)	CDF.A (3)	PEC (2)	TIC (4)	Totals
Individual Respondents						
Nott	1	53	91	85		230
Sadeghi	50		4	1	2	57
Kaplan		61	4	1		66

[20] Transcript page 3245.
[21] Transcript page 3246.

Nemy					79	79
Poulstrup		2			27	29
Total number of closing bids	**51**	**116**	**99**	**87**	**108**	**461**
Total number of trade days (5)	61	124	118	124	126	
Number of days with closing bids (6)	60	124	114	112	125	
Percentage of closing bids by Individual Respondents to days with closing bids	85%	94%	87%	78%	86%	

(1) Trading at TDSI for the period August 2 through October 27, 2005

(2) Trading at TDSI for the period May 2 through Oct 27, 2005

(3) Trading at TDSI for the period May 10 through Oct 27, 2005

(4) Trading at TDSI for the period May 2 through Oct 31, 2005

(5) Number of trade dates within period reviewed

(6) Number of closing bids entered on days for period reviewed. Closing bids are buy orders that were entered on the review date and became the last, or closing, bid for the stock at issue. Closing bids that resulted from “good till cancel” (“GTC”) orders were not included as the decision to enter those orders was not linked to closing bids on any subsequent dates.

¶ 63 The highlighted information shows the total number of closing bids by the Individual Respondents and the percentage of the closing bids by the Individual Respondents to days with closing bids. The disproportionate frequency of closing bids entered by Sadeghi in ACU, Kaplan and Nott in CAN, Nott in CDF.A and PEC, and Nemy and Poulstrup in TIC establishes a deliberate intention on the part of each of them to set the closing bids.

¶ 64 A member of the Panel noted that a closing bid could have been the result of a bid that had been placed earlier in the day being “uncovered” because of trading that took place subsequently. Another Panel member observed that a closing bid could have been entered before the opening or early in the day but no trading took place and the bid stood the entire day.

¶ 65 In response, Counsel for IIROC says those bids do not fall outside IIROC’s theory of setting the closing bid. The Individual Respondents admitted in evidence that they watched the stock over the course of the day. Thus, if a bid is uncovered and they are satisfied that the uncovered price is the price they intend or want it to be, there would be no need to come back into the market. The same would apply to bids entered early in the day or before the opening.

(ii) Late time of the closing bid orders

¶ 66 The following five tables reproduced from paragraph 57 of IIROC Staff Written Submissions provide a breakdown of the closing bid orders entered by each of the Individual Respondents for the Five Stocks as compared to the timing of the closing bid orders entered by independent traders[22]. The tables demonstrate that in each of the Five Stocks the Individual Respondents dominated the frequency of closing bid entries compared to Independent Traders at all times of the day and especially after 15.55, five minutes before the close of daily trading on each of the Exchanges.

[22] An independent trader is anyone other than one of the Individual Respondents except in the case of CDF.A and PEC where a Kevin Moorhead, a trader for Cannacord has not been considered independent.

ACU (African Copper)

Closing Bid Trader	# of Closing Bids before 15:45	# of Closing Bids 15:45 – 15:54	# of Closing Bids After 15:55	Total # of Closing Bids
Sadeghi	20	10	20	50
Nott			1	1
Independent	8		1	9

CAN.H/CAN (Canaco Resources)

Closing Bid Trader	# of Closing Bids Before 15:45	#of Closing Bids 15:45 – 15:54	# of Closing Bids After 15:55	Total # of Closing Bids
Kaplan	21	12	28	61
Nott	35	5	13	53
Poulstrop	1		1	2
Independent	7		1	8

CDF.A (Central Canada Food)

Closing Bid Trader	# of Closing Bids Before 15:45	#of Closing Bids 15:45 – 15:54	# of Closing Bids After 15:55	Total # of Closing Bids
Nott	29	13	49	91
Kaplan	2	1	1	4
Sadeghi	2	1	1	4
Moorhead	2		1	
Independent	10		2	12

PEC (Peterborough Capital)

Closing Bid Trader	# of Closing Bids Before 15:45	# of Closing Bids 15:45 – 15:54	# of Closing Bids After 15:55	Total # of Closing Bids
Nott	47	12	26	85
Sadeghi	1			1
Kaplan	1			1
Moorhead	4	1		5
Independent	19		1	20

TIC (Titanium Corporation)

Closing Bid Trader	# of Closing Bids Before 15:45	# of Closing Bids 15:45 – 15:54	# of Closing Bids After 15:55	Total # of Closing Bids
Nemy	18	17	44 **(31 at/after 15:59.00)**	79
Poulstrop	14	5	8	27
Sadeghi	1	1		2

Independent	11	3	3	17

¶ 67 The Tables confirm the deliberate intention of the Individual Respondents to set the closing bid particularly in the last five minutes and in the case of Nemy, in the last second.

¶ 68 Cooper made the following statements relevant to the matter of timing of bid orders:

- You really have to question the motives of people who are just involved at the end of the day, especially when they have large positions.[23]
- If you don't see a stock trading throughout the course of the day the last trade or last event is not a random event[24].
- If there is little or no activity in a stock, the closing bid can be established well before the last two minutes of the trading session.[25]

¶ 69 Holley said Orders entered late in the day for a thinly traded stock have a limited probability of execution.[26]

(iii) Bidding in small lots

¶ 70 A closing bid can be established by any size of buy order provided it is at least one standard trading unit.[27] Thus, if a closing bid happened to be filled, the incremental cost to the inventory account for the stock would be negligible. On the other hand, an unfilled closing bid would have a beneficial impact on the valuation position of the Individual Respondents.

¶ 71 Small orders in low-priced stocks have a low probability of execution because they are unattractive to sellers who face minimum commission charges on partial fills.[28] [29]

¶ 72 A review of the closing bid orders entered by the Individual Respondents in the Five Stocks shows a consistent (i.e. deliberate) pattern of entry of one or two board lots. Nemy, Poulstrup and Sadeghi collectively posted 60 Closing Quote Buy Orders ("**CQBOs**") in TIC for only one board lot. All but one raised the existing bid[30]

¶ 73 Cooper made the following statements relevant to size of bid orders:

- It is fair to say that if somebody holds a large position in a stock, then bidding for a single board lot at the end of the day is suggestive of something other than a legitimate purpose.[31]
- If the objective of the bid is not to buy a stock you would bid small.[32]

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[23] Transcript page 2911.
[24] Transcript page 2914.
[25] Transcript page 2951.
[26] Report of Dean Holley, paragraph 95 a).
[27] Commonly referred to as a "board lot": a standard trading unit is defined in UMIR 1.1 with respect to an equity as (i) 1,000 units of a security trading at less than $0.10 per unit, (ii) 500 units of a security trading at $0.10 or more per unit and less than $1.00 per unit, and (iii) 100 units of a security trading at $1.00 or more per unit.
[28] Report of Dean Holley, paragraph 95 a).
[29] The Boddie Report amplifies this comment at page 50:

In this case the TDSI Traders paid a trade cost of approximately $5.00 per day, per side of the market, for each stock they participated in. This means that for $10.00 a day they had unlimited access to trade a security and their incremental cost was zero. However, client orders are normally subject to higher commission charges per transaction. Naturally, the existence of these larger trade costs frequently results in fewer and larger orders so that the cost of treading for the client can be minimized.

[30] Holley Report paragraph 95a).
[31] Transcript page 2910.
[32] Transcript page 2882.

(iv) Illiquid nature of the stocks

¶ 74 The Five Stocks had varying degrees of liquidity. Counsel for IIROC described them as "thinly traded" or "illiquid"[33]. Counsel for TDSI said they were illiquid[34]. Dingwall said he did not think TIC fell into the definition of illiquid during the Relevant Period.[35] Nemy said it was "a generally liquid volatile stock".[36] Tucker said TIC had a higher level of liquidity than the other Five Securities but like any small cap stock it tended to trade on news and around earnings periods and then would go relatively dormant otherwise.[37]

¶ 75 In cross-examination Cooper agreed that it is much easier to manufacture or manipulate the closing price or closing bid price of a stock that is illiquid.[38]

¶ 76 The significance of a security being thinly-traded is that passive bids[39] are less likely to be filled and the closer to the end of the trading day a bid is entered the less likely it is that the bid will be filled since the market for a security which has little volume or interest has less time to react or form a judgment about the price of the bid.

¶ 77 As acknowledged by Cooper, in a thinly-traded security a trader can establish the closing bid with orders entered some time before the close. Thus, as in the present case, where there is compelling evidence of an intention and course of conduct on the part of a trader to establish the closing bid price the fact that an order was entered well before the close should not excuse it as an artificial closing bid.

Summary

¶ 78 This is not a typical stock manipulation case. The conduct of the Individual Respondents is much more subtle than a readily discernable format of ramping up or laddering bids at or about the time of quarterly valuation dates. Rather, day after day, week after week and month after month the Individual Respondents made closing bids in the context of the market with the intention that the bids would not trade but instead would stand as the closing bid at the end of the trading day thereby increasing the value of their inventory positions (which were calculated on the basis of the closing bids) and increasing their compensation and access to capital.

¶ 79 This conclusion is substantiated by the Holley Report with respect to Artificial Closing Bids by Nemy, Poulstrup and Sadeghi in TIC.

PART III

SUBMISSIONS ON BEHALF OF NEMY, POULSTRUP AND KAPLAN

¶ 80 The submissions will be set out under the following headings: (i) Standard of Proof, (ii) Interpretation of UMIR Rule 2.2(2) and UMIR Policy 2.2, (iii) Trading patterns alleged by IIROC Staff (frequency of orders, late time of closing bid orders, bidding in small lots, liquidity of the stock), (iii) Motive, and (iv) Summary.

(i) Standard of Proof

¶ 81 In *F.H. v. McDougall*,[40] the Supreme Court of Canada affirmed that the standard of proof to be applied in civil cases is on a balance of probabilities. Mr. Justice Rothstein stressed the care with which evidence should be reviewed in cases where liberty or livelihood is at stake. For this reason, the evidence adduced by IIROC must meet the standard of clear and convincing proof based on cogent evidence. Put another way, the evidence "must be reliable and very convincing".[41]

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[33] Written Submissions paragraph 55.
[34] Written Submissions paragraph 1.
[35] Transcript page 2329.
[36] Transcript page 1292.
[37] Transcript page 2602.
[38] Transcript page 2914.
[39] A passive bid is one which is placed at a price below the offering, and will only be filled by someone selling into it. An active bid is one which is entered at the offering price and will therefore result in an immediate transaction.
[40] *[2008] 3 S.C.R. 4*.
[41] *Luc St. Pierre* RS Discipline Notice dated December 31, 2007, DN 2007-006 at page 25.

¶ 82 IIROC must prove a want of genuineness in the bids made by the Individual Respondents. Where an inappropriate motive or improper intent is alleged – a required element of artificial pricing – proof of it cannot rest on a tenuous evidentiary foundation.[42] Trading practices such as the entry of small orders, or the entry of late orders, are not by themselves proof of impropriety and do not conclusively establish the truth of the IIROC's allegations.[43] Motive for entering an artificial bid must be convincingly proven separately.

¶ 83 Where the allegations of improper motive turn on circumstantial evidence requiring that inferences be drawn from facts the evidence has to clearly and cogently support the inference of improper intent.[44] If two inferences are plausible and one of them is consistent with proper intent, it is wrong to infer the improper intent.[45] In *Anderson*, the Alberta Securities Commission held:[46]

> … in analyzing the circumstantial evidence, the decision-maker must consider the alternative possible inferences. Applying the degree of care and the standard of proof appropriate to a case such as the one before us, it would be insufficient to conclude that two alternative inferences are equally plausible and then to infer the improper intent. The evidence would have to clearly and cogently support the inference of improper intent.

¶ 84 Where competing motives are advanced it is appropriate - and necessary - for the decision-maker to consider the plausibility of each motive in light of the evidence.[47] Each of the TDSI Individual Respondents has given testimony about their reasons for bid entry and the genuineness of their buying interest. Their evidence supports an inference of proper intent.

¶ 85 The explanations given by the Individual Respondents cannot be rejected out of hand. There must be an explanation of the reasons for not accepting the evidence.[48]

(ii) Interpretation of UMIR Rule 2.2 (2) and UMIR Policy 2.2

¶ 86 The underlying purpose of the UMIR Rules and the UMIR Policy is to protect the marketplace from manipulative and deceptive activities which erode investor confidence. So this is, at its essence, a market impact Rule and Policy. This statement is verified by numerous references to the market set out in the UMIR Rules and UMIR Policy:

- UMIR Rule 2.2 (2)(b) states that a "participant shall not directly or indirectly enter an order or execute a trade *on a market place"* that will create or could reasonably be expected to create and artificial bid price.

- Part 2 of UMIR Policy 2.2 states that "… if any of the following *activities are undertaken on a market place* and create or could reasonably be expected to create … an artificial bid price … the entry of the order shall constitute a violation of subsection (2) of Rule 2.2." The activities that are then set out can only take place on the market.

- Part 3 of UMIR Policy 2.2 explains "what will be considered artificial" for the purposes of UMIR Rule (2) 2.2. Part 3 states that "[W]hether or not a particular price is 'artificial' depends on the particular circumstances." This is *clearly a market context reference* as shown by the itemized considerations subsequently listed[49] all of which with one exception[50] can only be gleaned from

[42] *Roche Securities Ltd (re)* [2004] A.S.C.D. No. 400 paragraphs 109-111.
[43] *Anderson (Re)* 2007 LNABASC 72 at paragraph 230.
[44] *Podorieszach (Re)* [2004] A.S.C.D. No. 360 at paragraphs 76 -78.
[45] *Re Hennig* 2008 LNABSC 289at paragraph 1217.
[46] *Anderson* citing *Podorieszach* at paragraphs 76 -78.
[47] *Anderson* at paragraph 50.
[48] *Law Society of Upper Canada v Neinstein* (2010) 99 O.R. (3d) 1.
[49] (a) prices of the preceding trades and succeeding trades, (b) change in the last best ask price,(c) recent liquidity, and (d) time of the order.
[50] (e) motive.

market data.

¶ 87 On the basis of the foregoing it can only be concluded that analysis of whether a closing bid is artificial within the meaning of UMIR Rule 2.2 (2) and UMIR Policy 2.2 must focus primarily on empirical trading data within the context of the market. This is the approach adopted by Boddie.

¶ 88 If there is no appearance of artificiality or a distortion when you look at the market, that is compelling, although not conclusive evidence that the UMIR Rule has not been breached.

(iii) Trading patterns alleged by IIROC Staff

¶ 89 In asserting that there were patterns of bidding over the Relevant Period, IIROC has failed to adopt the analytical approach mandated by UMIR Rule 2.2 (2) and UMIR Policy 2.2. In order to establish a pattern of frequency of setting the closing bids, late time of closing bids *etc.* each order must first be examined in the context of the market to determine its characteristics. When this has been done over the Relevant Period, **then** you look back to determine whether the characteristics can be described as a pattern.

¶ 90 Re frequency of orders: Traders can be in the market as actively or inactively as they decide. They can put in a large number of orders because they like a stock and are pursuing it at a particular period of time. This is the essence of trading. The number of orders at any given time as a starting proposition is completely neutral.

¶ 91 Re late time of closing bid orders: There is no presumption of lateness under UMIR Policy 2.2: There is no definition of lateness. There is no prohibition about putting in a bid at any particular time. So time in and of itself is an entirely neutral factor.

¶ 92 Re bidding in small lots: There is no prohibition against bidding for a board lot or two board lots. There is no prescription in UMIR Policy 2.2 concerning the size of a bid. Thus, the starting proposition is that size of the bid is a neutral fact. It just tells you that at a certain time, a certain bid for a certain amount was put in.

¶ 93 Re liquidity of the stock: There is no presumption of artificiality or indicia of artificiality because a trader put in a bid for a stock that is lightly traded or illiquid. Again, this is a completely neutral fact.

(iv) Motive

¶ 94 Motive is a purely neutral consideration. Investment dealers and traders are in the business of trading for profit. It can be assumed that all the Individual Respondents would rather make profits than suffer losses. It is natural for traders to grouse when the value of their inventories goes down rather than up. This is as consistent with good conduct as it is with bad conduct. Again this is a neutral consideration.

¶ 95 In any event, the success of Nemy, Kaplan and Poulstrup belies a need or motive to engage in the alleged prohibited activity. For the twelve months ending October 2005 Nemy generated $2,901,453.00 in gross profits and Poulstrup $473,642.00. For the seven months ending December 31, 2005 Kaplan produced $276,396.00 in gross profits.

¶ 96 With respect to motive there is no clear, convincing or cogent evidence in the instant messages or telephone calls or otherwise that access to capital motivated any of the Individual Respondents. This is a theory argument by IIROC not evidence.

Summary

¶ 97 No negative inference or presumption is raised by frequency, time, size or liquidity. Each is a circumstance, even when proven, that must be assessed within the context of the market**.**

¶ 98 UMIR Rule 2.2 (2)(b) states that an order must not be entered that "will create or could reasonably be expected to create" an artificial bid price. UMIR Policy 2.2 repeats the same prohibition. The Panel must decide whether one or more of the 461 alleged Closing Bids is or could be Artificial. The character of each bid can only be ascertained from empirical market data within the context of the market. IIROC has failed to discharge the onus of proving the Artificial Closing Bids on a balance of probabilities.

PART IV

ANALYSIS

***Standard of Proof in* F.H. v. McDougall**

¶ 99 IIROC must prove the allegations on a balance of probabilities. The submissions of counsel for Nemy, Kaplan and Poulstrup regarding balance of probabilities require comment.

¶ 100 Counsel for TDSI correctly referred to *F.H. v. McDougall* as the authority defining the standard of proof on a balance of probabilities in civil proceedings. Counsel emphasized the care with which evidence should be reviewed in cases where livelihood is at stake. He (repeatedly) said the evidence adduced by IIROC must meet the standard of clear and convincing proof based on cogent evidence. He said the evidence "must be reliable and **very convincing**". (my emphasis)

¶ 101 As to the quality of the "clear, convincing and cogent evidence" Counsel said:

> So keep in mind these things. The onus is on my friends. If at the end of the day you assess all of the evidence and say, "There's not enough clear, cogent and convincing evidence to rule out all these other alternatives," then you're left with two or three alternatives. No inference is possible. That's the rule. The evidence would have to be sufficiently **powerful** that it ousts the possibility of the competing inference. (my emphasis)

¶ 102 The submissions regarding "very convincing" and "powerful" evidence imply a standard of proof that is higher than the standard set out in *F.H. v. McDougall*. The following excerpts from the reasons delivered by Rothstein J. succinctly state the civil standard of proof:

> (4) The Approach Canadian Courts Should Now Adopt
>
> [40] Like the House of Lords, I think it is time to say, once and for all in Canada, that **there is only one civil standard of proof at common law and that is proof on a balance of probabilities. Of course, context is all important and a judge should not be unmindful, where appropriate, of inherent probabilities or improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof.**
>
> ....
>
> [45] To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. **I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.**
>
> [46] Similarly, **evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test**. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. **If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.**
>
> **............**
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> (5) Conclusion on Standard of Proof
>
> [49] In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. **In all civil cases, the trial judge must scrutinize**

the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

¶ 103 The highlighted portions of the above reasons encapsulate the substance of *F.H v. McDougall* and will be diligently applied to all aspects of the issues herein.

Meaning of Artificial Bid

¶ 104 "Manipulative and Deceptive Activities" is the heading for UMIR Rule 2.2 and UMIR Policy 2.2. The Policy complements the Rule. The Rule and the Policy are of equal force and weight and must be read together.[51]

¶ 105 UMIR Rule 2.2(2)(b) sets out the prohibition against an artificial ask price, bid price or sale price for a security. IIROC alleges the Individual Respondents contravened UMIR Rule 2.2(2)(b) which reads:

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

¶ 106 In *Re Podorieszach*[52] the Alberta Securities Commission interpreted the meaning of "artificial price" under subsection 93(b) of the *Alberta Securities Act*. This provision is virtually the same as UMIR Rule 2.2 (2)(b). Although the Alberta case deals with closing trades and we are dealing with closing bids, the allegations and issues in *Podorieszach* are similar to the case before this Panel, that is, both cases deal with artificial price, be it a trade or a bid.

¶ 107 The Podorieszach brothers were charged with purchasing shares of Anthony Clark International Insurance Brokers Ltd (**"ACL**") on the TSX at a price higher than the previous price (an uptick) in a way that caused these purchases to be the last trade of the day. Staff alleged that the Respondents made these purchases when they knew or ought reasonably to have known that the purchases created or may have resulted in an artificial price for the ACL shares contrary to subsection 93(b) of the *Alberta Securities Act* and the public interest.

¶ 108 This is part of what the Alberta Securities Commission said about artificial price:

> **89** Our conclusion is that in assessing whether a price is artificial, it is relevant to consider whether one party or another to a transaction is or is not acting in response to real demand for or supply of a security.

¶ 109 The description of "artificial price" in *Podorieszach* was accepted in two subsequent cases before the Alberta Securities Commission.[53] In *Re Sears Canada Inc.*[54] the Ontario Securities Commission referred to *Podorieszach* and said:[55]

> What is "an artificial price" for a security? An artificial for a security is one that differs from the price that would prevail had the market operated freely and fairly on the basis of true market supply and demand.

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[51] UMIR Rule 1.1 defines the Rules and the Policies as "Requirements" under UMIR Rules. The compliance part of UMIR (Part 10), and specifically UMIR 10.1 and UMIR 10.4 reference either Requirements or, in the case of 10.4, the Rules and the Policies.

[52] [2004] A.S.C.D. No. 360
[53] *Roche Securities Ltd.*, [2004] A.S.C.D. No. 400, paragraphs. 53-62; *Re Anderson*, 2007 ABASC 97, paragraph. 44; overturned on other grounds in *Anderson v. Alberta Securities Commission*, [2008] A.J. No. 516**.**
[54] 2006 LNONOSC 1044.
[55] Paragraph 127.

¶ 110 In *Re Shambleau* [56] an R.S disciplinary hearing held pursuant to section 11.26 of the *Toronto Stock Exchange General By-law* (a predecessor of UMIR Rules), the Hearing Panel said a bid late in the day that would not reasonably have allowed a response from the market was evidence that there was no genuine intent to complete a purchase of the shares.

¶ 111 Under the heading *"Mens Rea* or Intent" in *Podorieszach* the Alberta Securities Commission said:[57]

> ... 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.

¶ 112 The above cases 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. In the present case the issue is 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.

¶ 113 Succinctly stated, the intention of the person entering the bid price is the key to determining whether the bid is artificial. The panel must decide whether an improper intention can be inferred from the circumstances relating to the bids that were entered.

What evidence may be considered relating to the bids that were entered?

¶ 114 Counsel for Nemy, Kaplan and Poulstrup says the evidence relevant to whether a closing bid is artificial within the meaning of Rule 2.2 (2) and Policy 2.2 must focus primarily on empirical trading data within the context of the market. He says this is the approach adopted by Boddie.

¶ 115 The Panel does not agree with this submission.

¶ 116 In deciding what evidence is relevant to whether a bid is artificial, the Panel concludes that an approach should be adopted that is consistent with and supports subsection 1.1 of the *Securities Act* which states that the purpose of the securities regulatory regime is "to provide protection to investors" and "to foster fair and efficient capital markets and confidence in capital markets." UMIR Rules and UMIR Policy have been enacted in furtherance of these objectives as a set of equities trading rules designed to embody the cardinal values of the *Securities Act*.

¶ 117 The following case law validates a "purposive approach" to the interpretation of UMIR Rules and UMIR Policy.

¶ 118 In *Kasman (Re)* 2008, 31 OSCB 11605 the issue was whether the Staff of the Investment Dealers Association of Canada ("**IDA"**) had authority under section 27.1 of the *Securities Ac* to file a Notice of Request to the Ontario Securities Commission (**"the Commission"**) for a Hearing and Review of a Decision of the IDA disciplinary panel. In its written decision the Commission said:

> **48** We accept that in interpreting section 21.7 of the Act, we should adopt a purposive approach, reading the words of the Act "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" … Accordingly, the words of section 21.7 should be interpreted in a contextual manner in light of all the circumstances before us in this matter ….
>
> …………
>
> **55** Accordingly, we accept that section 21.7 of the Act should be interpreted in a

[56] [2003] R.S.D.D. No.3.
[57] Paragraph 75.

> purposive way that gives effect to the overarching regulatory objectives of the Act and the important role of the IDA in attaining those objectives. In our view, it is consistent with the IDA's self-regulatory role that it should have standing to apply to the Commission under section 21.7 of the Act for a hearing and review of a decision of a hearing panel that directly affects its ability to fulfill its regulatory mandate.

¶ 119 In *Taub v. Investment Dealers Assn. of Canada* (2009) (98) O.R. (3d) 169 the Ontario Court of Appeal interpreted the meaning of section 21.1 (3) of the *Securities Act* which authorizes the IDA, a self-regulatory organization recognized by the Commission, to regulate the conduct of its members.

¶ 120 Taub resigned his membership in the IDA in 2004. The IDA commenced disciplinary proceedings against Taub in 2005. Taub argued that the IDA had no jurisdiction over him because his status as a member had expired before the proceedings against him were initiated. The IDA disciplinary hearing panel concluded that it retained jurisdiction. The Commission upheld this decision holding that hearing panel made no error of law, *i.e*., its interpretation of the Act was correct. The Divisional Court found that section 21.1 (3) limited the disciplinary jurisdiction of the IDA to current members and that the provision could not be stretched to include the discipline of former members without doing violence to the meaning of the Act.

¶ 121 In restoring the decision of the Commission the Court of Appeal confirmed that as a matter of policy the interpretation of section 21.1(3) should be consistent with the purposes and objects of the legislation and regulatory scheme. Feldman J.A. said:

> **44** Finally, the OSC concluded that as a matter of policy, because the by-laws and other rules of the IDA constitute "part of the fabric of securities regulation" in Ontario, "it would be contrary to the public interest to allow the applicant to avoid such regulation by simply resigning his membership in the IDA." The OSC agreed with the submission of IDA staff that the respondent's interpretation would undermine the IDA's ability to discipline its members and in that way would be inconsistent with its duty to protect the public interest.
>
> ………..
>
> **52** Finally, in making its decision on the proper interpretation of s. 21.1(3), the OSC applied its expertise in the securities industry and considered whether it was consistent with the purposes and objects of the legislative and regulatory scheme for SROs [self-regulatory organizations] to have the authority to discipline former members for misconduct they are alleged to have engaged in while they were members.

¶ 122 A purposive approach to determining whether a bid is artificial goes hand in hand with the provisions of UMIR Policy 2.2 that indicate the enumerated categories of manipulation are not finite or closed:

- UMIR Policy 2.2 describes what is prohibited by UMIR Rule 2.2(2) "without limiting the generality of that subsection"
- In addressing the concept of "artificial price" Part 3 of UMIR Policy 2.2 does not set out a restricted series of prescribed tests, or a particularized set of indicia for artificial pricing. Part 3 sets out "**some**" of the relevant considerations. (my emphasis)

¶ 123 In *Podorieszach* the Alberta Securities Commission said:

> **84** The Act does not define "artificial price", and we found few helpful cases on this point. In our view, the meaning can best be determined by considering it in the context of the Act and the framework of securities regulation established by the Act.

¶ 124 Adopting a purposive approach, the Alberta Securities Commission considered relevant circumstances *outside* the context of the market. It cited a number of possible motivations for the high closings including the fact that the Respondents had a great deal invested in ACL. The Commission concluded that the Respondents repeatedly, over the course of the relevant trading period, entered purchase orders that were, in most cases, for only one or two board lots of ACL shares at a price higher than the previous purchase price entered shortly before the close of trading and filled as the final trade, setting the closing price for the day. (Note the similarities to the characteristics of the TIC closing bids re motive, size and time). On the basis of these facts the Alberta Securities Commission found that on at least nine days during the relevant trading period the Respondents engaged in "high closing" purchases.[58]

Conclusions re evidence that may be considered

¶ 125 In deciding what evidence is relevant to whether a bid is artificial a purposive approach should be adopted, that is to say, an approach that supports subsection 1.1 of the *Securities Act* which states that the purpose of the securities regulatory regime is "to provide protection to investors" and "to foster fair and efficient capital markets and confidence in capital markets." UMIR Rules and UMIR Policy have been enacted in furtherance of these objectives as a set of equities trading rules designed to embody the cardinal values of the *Securities Act*.

¶ 126 Part 3 of UMIR Policy 2.2 states: "Whether or not a particular price is 'artificial' depends on the particular circumstances." This does not mean that circumstances are restricted to or should focus primarily on empirical trading data within the context of the market (as suggested by Counsel for Nemy, Kaplan and Poulstrup).

¶ 127 Part 3 of UMIR Policy 2.2 lists "some" of the relevant considerations in determining whether a price is artificial"[59]. The use of the word "some" leaves the door open to additional considerations. In the particular circumstances of this case there is the circumstantial evidence of the frequency of setting the closing bids, the late time of closing bids, bidding in small lots, the illiquid nature of the stocks and motive. In addition, there is the direct evidence of intention revealed by the contemporaneous instant messages and telephone calls.

Discussion of the evidence adduced in this case by IIROC Staff

¶ 128 The following evidence will be discussed: motive, trading patterns alleged by IIROC Staff (frequency of setting the closing bids, late time of the closing bids, bidding in small lots, illiquid nature of the stocks) instant messages and the Holley Report.

Motive

¶ 129 Counsel for Nemy, Kaplan and Poulstrup says that motive is purely a neutral consideration. Investment dealers and traders are in the business of trading for profit. It can be assumed that all the Individual Respondents would rather make profits than suffer losses. Counsel says the success of Nemy, Kaplan and Poulstrup belies a need or motive to engage in the alleged prohibited activity and he cites the very impressive gross earnings of these traders (especially Nemy) in 2005.

¶ 130 The following evidence shows that motive is not a neutral consideration with respect to TIC not only for Nemy but also other traders at the Burlington Office.

¶ 131 In cross examination Nemy said his inventory account for TIC over the Relevant Period was generally one million dollars. If the value of TIC fell (as it did over the Relevant Period from $3.45 to about $2.00[60] or about one third of its value) Nemy said that generally speaking he would increase his holdings. If the stock went up he would decrease his holdings except in July/August when there was a big stock issue and he decided to lighten up at lower prices.[61] Nemy guessed he personally held 250,000 to 350,000 shares of TIC in his wife's RRSP and children's RESP.[62]

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[58] High Closing is defined by Holley as "… the practice of entering one or a series of purchase orders for a publicly traded security for the purpose of raising the closing trade price or the closing bid price for the security from what it otherwise would be if left to the ordinary forces of supply and demand." *Re Podoriesczach* paragraph 54.

[59] This is wording of the Artificial Pricing provision of UMIR Policy 2.2 Part 3.

[60] Holley Report, page 7, paragraph 11.

[61] Transcript pages 1418-1421.

[62] Transcript page 1402.

¶ 132 On May 2, 2005 Nemy held 367,250 shares in his Inventory Account at an average cost of $3.40 making the total value of his holdings $1,248,650.00.[63] The value of the holdings of the other traders at the Burlington Office was $942,820.00 making the total Burlington Office value $2,300,000.00. The total shareholding of the Burlington Office was 644,550 shares. Thus, a one cent drop in the closing bid price translates into an unrealized loss of $6,445.00; ten cents translates to $64,455.00.[64]

¶ 133 At the end of May 2005 Nemy had an unrealized loss in TIC of $100,819.19 plus a realized loss of $89,939.02 for a total loss of $190,758.91.[65] His profit for that month was $283,216.06. Without the TIC loss his profit for May would have been $473,000. Thus, in May 2005 Nemy suffered a 40 per cent loss of income due to TIC.[66]

¶ 134 Nemy described June as "a flat month". His realized profit was $7,618.24 and unrealized profit was $8,505.28 for a total profit of $16,124.02. During the month the market value of Nemy's TIC inventory holdings fell by approximately $70,000.00.[67]

¶ 135 Nemy agreed that in July (the month he was on vacation from July 4th to July 22nd the price of TIC "took a beating", dropping 20 cents a share.[68] He had an unrealized loss of $9,799.34 and a realized loss of $41,784.29 for a total loss of $51,583.73.[69] For the quarter ending July TIC reduced his earnings by $65,000.00.

¶ 136 In August the total loss in TIC was $139,991.50.[70] In September there was a total realized and unrealized profit of $33,000.00. For the month of October 2005 the TIC loss was $73,372.71.[71]

¶ 137 Thus, for the pay period ending July 31 TIC reduced Nemy's earnings by $65,000.00[72] and for the next pay period ending October 31 the TIC loss cost Nemy $90,000.00. The total TIC loss over the Relevant Period amounted to $155,000.00.

¶ 138 In addition to the foregoing the overall profitability of the Burlington office would have been important to Nemy because he knew that Tucker had an expectation that the office would generate approximately $6,000,000.00 in annual gross profits.

¶ 139 *Conclusion:* Nemy and other traders in the Burlington Office holding TIC had a financial incentive (i.e. motive) to maintain or sustain a closing bid price for TIC (above the prevailing bid price) in order to raise the price with which their inventory positions were calculated and thereby minimize the financial impact of the declining value of TIC on compensation.

Trading patterns alleged by IIROC Staff

¶ 140 Counsel for Nemy, Kaplan and Poulstrup says no negative inference can be drawn from frequency of bids, small bid sizes, late bids and bids in illiquid stocks. Counsel says each of these elements is a neutral fact. The evidence of Cooper elicited in cross-examination, contradicts this submission.

Frequency of setting the closing bids

¶ 141 Cooper said if a trader does something three or more times this can look like a deliberate pattern.[73] Boddie said "fundamentally that's not a bad premise.[74] Boddie also agreed that if a trader puts in a bid "day

[63] Transcript pages 1421-23.
[64] Transcript page 1427.
[65] Transcript pages 1434-435.
[66] Transcript page 1436.
[67] Transcript page 1438- 439.
[68] Transcript page 1430.
[69] Transcript page 1441.
[70] Transcript page 1444.
[71] Transcript page 1445.
[72] Transcript page 1441.
[73] Transcript pages. 2901-2907.
[74] Transcript page 3245.

after day after day, late in the day … that's demonstrative of deliberate activity."[75]

¶ 142 The Individual Respondents entered 461 closing bids in the Five Stocks during the Relevant Period. These closing bids represented 85% of the total closing bids in ACU, 87 % in CDF.A, 94% in CAN.H/ CAN) and 86 % in TIC. [76] On the basis of the foregoing evidence it can be concluded on a balance of probabilities that setting the closing bids was intentional.

Late time of closing bids

¶ 143 Cooper said you really have to question the motives of people who are just involved at the end of the day, especially when they have large positions. Nemy and the other Individual Respondents in the Burlington Office had substantial holdings in TIC.

¶ 144 Holley said that orders entered late in the day for an illiquid stock have a limited probability of execution. It is acknowledged that the Five Stocks were illiquid.

¶ 145 The significance of the lateness of a closing bid is demonstrated in *Re Shambleau*. In concluding that there was no genuine intent to complete a purchase the Hearing Panel said "the timing of the bid would not reasonably have allowed a response from the market".[77]

¶ 146 The evidence of late closing bids set out in the five Tables in paragraph [63] shows that in the last five minutes of trading Sadeghi entered 20 closing bids in ACU; Kaplan entered 28 closing bids in CAN.H/CAN; Nott entered 49 closing bids in CDF.A and 26 in PEC; Poulstrup entered 8 closing bids in TIC and Nemy entered 44 closing bids in TIC*, 31 of which were entered in the last minute of trading.*

¶ 147 After returning from holidays on July 24 Nemy entered a closing bid in the last five seconds on each of the last five days of trading for 20 or more board lots that set the closing quote for that day. None of the bids resulted in the purchase of any TIC shares.[78] All set the Closing Quote Bid Order.

Bidding in small lots

¶ 148 Cooper said that if somebody holds a large position in a stock, then bidding for a single board lot at the end of the day is suggestive of something other than a legitimate purpose. He said that if the objective of the bid is not to buy a stock you would bid small. Holley said that small orders in low-priced stocks have a low probability of execution because they are unattractive to sellers who face minimum commission charges on partial fills.[79]

¶ 149 A review of the closing bid orders entered by the Individual Respondents in the Five Stocks shows a consistent (i.e. deliberate) pattern of entry of one or two board lots. The Holley Report shows that in May, 2005 fifteen of 21 Closing Quote Bid Orders entered by Nemy, Poulstrup and Sadeghi were single board lots.[80] In June there were 17 single lot Closing Quote Bid Orders.[81] In July Poulstrup entered 11 Closing Quote Bid Orders for single board lots[82]. (Nemy was on holidays from July 4th until July 22nd.) In October Nemy entered 12 single lot Closing Quote Bid Orders.[83]

Illiquid nature of the stocks

¶ 150 Cooper said it is much easier to manufacture or manipulate the closing price or closing bid price of a stock that is illiquid. He acknowledged that in a thinly traded stock, a trader can establish the closing bid with orders entered some time before the close.

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[75] Transcript page 3246.
[76] See Chart at paragraph 59.
[77] [2003] R.S.D.D. No. 3 at paragraph [17].
[78] Holley Report paragraph 55.
[79] Holley Report paragraph 95 a)
[80] Holley Report paragraph 39.b).
[81] Holley Report paragraph 46.
[82] Holley Report paragraph 54.
[83] Holley Report paragraph 80.

¶ 151 *Conclusion:* Separately, each of the foregoing trading patterns does not raise an inference of the improper intention component of the Artificial Closing Bids. Collectively, however, the circumstantial evidence of orders in illiquid stocks very late in the day in small lots that set the closing bids day after day, week after week, month after month supports an inference on a balance of probabilities that Nemy, Kaplan and Poulstrup intended to engage in the improper practice of entering Artificial Closing Bids in TIC. The direct evidence of instant messages and telephone calls adds weight to this conclusion.

¶ 152 There is similar evidence regarding Poulstrup and Kaplan in CAN.H/CAN; Nott in CAN.H/CAN, CDF.A and PEC; Sadeghi in ACU and PEC; and Kaplan in CAN.H/CAN.

Instant messages

¶ 153 The instant messages between Nemy and Dingwall during the Relevant Period reinforce the conclusion that the profit and loss of the TIC position was significant to Nemy both from a personal standpoint and from the standpoint of the overall profitability of the Burlington Office. On May 10, 2005 Nemy indicated to Dingwall that TIC was "hurting a bit" and specifically mentions that "we were down 55-60k on TIC". On May 11, 2005, Nemy advised Dingwall that Burlington was down on the day and that it was "all TIC once again." On May 17, 2005, Nemy told Dingwall that he was "up …. so lon[g] as TIC stays here."

¶ 154 The instant messages on August 31, 2005 between Nemy and Dingwall are extremely significant. These messages are discussed in detail below in **PART V**.

The Holley Report

¶ 155 Holley was specifically asked to address the question of whether or not the pattern of trading and order activity by Nemy, Poulstrup and Sadeghi in the shares of TIC late in the trading day during the Relevant Period reflected bona fide demand to purchase the shares or instead, reflected an effort to influence the closing price of TIC shares.

¶ 156 Holley examined the daily empirical market data for the Relevant Period relating to Nemy, Poulstrup and Sadeghi. The approach he adopted in formulating his opinion was not limited to this information. He looked at the method of calculating trader compensation, the daily monitoring by Dingwall and Tucker of unrealized profit and loss positions, the ranking of TEG traders, the size of the share holdings of Nemy, Poulstrup and Sadeghi as well as the Burlington Office and the effect of a one cent price change in TIC on the value of the holdings. He analysed patterns of the timing, price and volume of the daily orders. He looked at the impact of the orders on market prices and published quotations for TIC, the nature and substance of communications among the Nemy, Poulstrup and Sadeghi and by them and others in relation to trading activity, and the impact the orders and transactions had on the value attributed to their holdings of TIC.[84]

¶ 157 The approach adopted by Holley falls within the purview of UMIR Rule 2.2(2)(b) and UMIR Policy 2.2.

¶ 158 The Holley Report analyzes the trading data during the Relevant Period and summarizes the CQBO for each day on a monthly basis. Following is a summary of Holley's analysis for each month showing the characteristics of the CQBO's for TIC. (The Table Summary after each month has been prepared by the writer of these Reasons.)

May 2005 [85]

¶ 159 There were 21 trading days in May. On each of those days there would be a CQBO that posted the best bid available at the end of the trading session and so formed the bid side of the closing quotations. These orders could be entered at any time before the close and become the CQBO by being the best bid still posted at the end of the day.

¶ 160 For May 2005 the schedule shows that Nemy and Poulstrup posted the CQBOs for TIC on every trading

[84] Holley Report, pages 5-6.
[85] Holley Report paragraphs 38-42.

day in May. Nemy was responsible for 17 of the 21 CQBOs while Poulstrup was responsible for the other four. Fifteen of the CQBOs were board lot orders. Twelve were entered by Nemy and three were entered by Poulstrup.

¶ 161 On 18 of the 21 trading days the CQBO entered by Nemy and Poulstrup improved on their own previous bid. Those CQBOs moved the closing bid for TIC from $0.01 to $0.08 higher than the previous bid. Every bid in May except one was equal to or slightly below the price of the last trade. (On one day – May 5 – the CQBO raised the closing bid ($3.30) to a price above the last trade price ($3.25).

¶ 162 Nineteen of the 21 CQBOs entered by Nemy and Poulstrup were entered in the last 30 minutes of the trading session. Fifteen were entered in the last ten minutes of the session and eight were entered in the last minute of the session.

¶ 163 The pattern of late-in-the-day buy orders by Nemy and, less often by Poulstrup that increased the closing price for TIC, was evident on every day in May except May 25th.

¶ 164 The average spread between CQBOs and ask prices for TIC in May was $0.020. This was a much narrower spread than was typical of the TIC market during the rest of the trading day. The average bid-ask spread for TIC in all other post-opening quotes published in May excluding the closing quotes, was 3 ½ times greater at $0.071 per share.

May CQBOs TIC Summary

Trading days:	21
CQBOs posted:	Nemy 17
	Poulstrup 4
	Total is every trading day in May)
Size:	Nemy - 12 single board lots
	Poulstrup - 3 single board lots
Time:	19 in last 30 minutes
	15 in last 10 minutes
	8 in last minute
Price increase:	$0.01 to $0.08 per share
	Every bid except one equal to or slightly below last trade price
Improvement :	18 raised own previous bid
Average spread:	$0.02
Other average spread:	$0.071 (3½ times greater)

June 2005 [86]

¶ 165 Of the 22 CQBOs Nemy was responsible for 16, Poulstrup was responsible for three and Sadeghi one. Twenty of the CQBOs were entered in the last half hour of the trading day and all but one were entered by

[86] Holley Report paragraphs 43-50.

Nemy, Poulstrup or Sadeghi. Seventeen of their CQBOs were entered in the last ten minutes of trading. Nine were entered in the last minute.

¶ 166 Seventeen of the CQBOs in June were orders for 100 shares. All of these board lot orders were entered by Nemy, Poulstrup and Sadeghi.

¶ 167 On seventeen days in June, the foregoing CQBOs improved the closing bid price for TIC by amounts ranging from $0.01 per share to $0.04 per share. On each of these occasions the bid that was raised was one that had been posted by themselves. The CQBOs entered in June brought the closing bid to within $0.02 or less of the last trade price of the day. (In one case the closing bid was $0.02 above the last trade price.)

¶ 168 The average bid-ask spread for TIC's closing quotations in June was $0.019. The average bid-ask spread for all other June post-opening TIC quotations was three times larger at $0.059.

June CQBOs TIC Summary

Trading days:	22
CQBOs posted:	Nemy 16
	Poulstrup 3
	Sadeghi 1
Size :	17 single board lots
Time:	20 in the last 30 minutes
	7 in the last 10 minutes
	9 in the last minute
Price increase:	$0.01 to $0.04 per share
	Every bid except one within $0.02 of last trade price
Improvement:	17 raised own previous bid
Average spread:	$0.019
Other average spread:	$0.059 (3 times greater)

July 2005 [87]

¶ 169 The foregoing pattern of trading activity continued in July in a generally similar fashion to that seen in May and June. The most significant difference in July was that Nemy was on vacation from July 4th to July 22nd and Poulstrup played a much more active role during that period. Sadeghi's activity was limited to the purchase of 1,200 shares in the first two trading days, and an entry of a handful of orders on July 4th, 5th, 15th 19th and 20th.

¶ 170 There were 20 trading days in July. Poulstrup entered the CQBOs for TIC on 14 of those days, while Nemy entered the CQBOs on the last five days of the month. Every CQBO entered by Poulstrup and Nemy in July improved the closing bid price by amounts ranging from $0.01 to $0.05. On 15 days the CQBO entered by Nemy, Poulstrup and Sadeghi raised one of their own bids.

[87] Holley Report paragraphs 51-58.

¶ 171 Fifteen of the CQBOs in July were entered in the last half hour of trading, all by Poulstrup or Nemy. Eleven of those were entered in the last ten minutes of the trading day and six were entered in the final minute of trading.

¶ 172 Eleven of the CQBOs were board lot orders. All were entered by Poulstrup. All five of the CQBOs entered by Nemy on the last five days of the month were for 20 or more board lots. All were entered in the last five seconds of the trading day and none resulted in the purchase of any TIC shares. (Holley: "not surprisingly").

¶ 173 On eleven days in July the Respondent's CQBO brought the closing bid for TIC to within $0.01 of the last sale price.

¶ 174 The average spread between the closing bid and ask price for TIC in July was $0.024 compared to an average bid-ask spread for all other post-opening quotes of $0.07.

July CQBOs TIC Summary

Nemy on vacation from July 4th to July 22nd

Trading days:	20
CQBOs posted:	Nemy - 5 on the last five days of July
	Poulstrup - 14
	Sadeghi - 1
Size:	Poulstrup - 11 single board lot orders
	Nemy - 5 for 20 or more board lots
Time:	15 in the last half hour
	11 in the last 10 minutes
	6 in the last minute
	Nemy's 5 large orders all in the last 5 seconds
	(None resulted in the purchase of any shares)
Price increase:	$0.01 to $0.05 per share
Improvement:	15 days raised own previous bid
Average spread:	$0.024
Other average spread:	$0.07 (more than 2 times greater)

August 2005 [88]

¶ 175 Holley says the Nemy's activity in TIC was relatively subdued for parts of August and on several days he played a limited role in the TIC market or in the closing quotations for TIC. On other days, however, the pattern was quite consistent with the activity seen in May, June and July. (Nemy was on holidays from July 4 to July 22.)

[88] Holley Report paragraphs 59-69.

¶ 176 Holley says TIC released three news releases during August, all relating to capital raising activity. “I do not have sufficient information to express a view whether or not these releases were relevant to the Respondents’ trading activity.”[89] Nemy testified that in August he decided to “lighten up a bit” at a lower price.[90]

¶ 177 Of the 22 trading days in August, Nemy was responsible for the CQBO on six occasions, Poulstrup on six occasions and Sadeghi on one occasion. On the other nine trading days the CQBO was posted by other dealers, in most cases for client orders. All the CQBOs entered by the Respondents led to an increase in the closing bid price of TIC in amounts ranging from $0.01 to $0.04. Eight of the thirteen Respondents’ CQBOs improved a previous bid that had been entered by one of the Respondents.

¶ 178 There were only four CQBOs in August that were for single board lots of TIC - two by Nemy, and one by each of Poulstrup and Sadeghi. Nemy entered four CQBOs that were for significant volumes (from 2,000 to 150,000 shares). All four of these orders were entered in the last 15 seconds of the trading day. Only one resulted in the purchase of any shares.

¶ 179 Of the 22 CQBOs 20 were entered in the last half hour of trading. Twelve of those were entered in the last half hour. by the Respondents. Of the nine CQBOs entered in the last ten minutes of trading, seven were entered by the Respondents.. They were also responsible for four of the five CQBOs entered in the last minute of trading.

¶ 180 The average closing bid-ask spread that resulted from the Respondents’ CQBOs was $0.025 which was slightly lower than the $0.032 average bid-ask spread when other dealers posted the CQBO. The average bid-ask spread for all of the published post-opening quotations in August was $0.046.

August CQBOs TIC Summary

Holley says activity relatively subdue in parts of August

Nemy did not trade in his Proprietary account from August 4 to August 24

Trading days:	22
CQBOs posted:	Nemy - 6
	Poulstrup - 6
	Sadeghi - 1
	Other dealers – 9 mostly for client orders
Price increase:	$0.01 to $0.04 per share
Size:	for single board lots (2 by Nemy, 1 by Poulstrup & Sadeghi)
	4 significant size by Nemy (from 2,000 to 150,000 shares)
Time:	4 significant size bids entered in the last 15 seconds
	(Only one resulted in the purchase of any shares)
	12 of the 20 entered in the last half hour
	7 of the 9 entered in the last 10 minutes
	4 of the 5 entered in the last minute

[89] Holley Report paragraph 63.
[90] Transcript page 1419.

Price increase:	$0.01 to $0.04
Improvement:	8 improved own previous bid
Average spread:	$0.025
Other average spread:	$0.046 (slightly less than 2 times greater)

September 2005 [91]

¶ 181 In September Nemy was responsible for the CQBO on 18 of the 21 trading days. Fifteen of Nemy's CQBOs led to an immediate increase of $0.01 to $0.03 in the posted bid for TIC. On 14 occasions the bid that Nemy was improving was his own.

¶ 182 Thirteen of the 21 CQBOs were entered in the last half hour of the session, 11 of those by Nemy. He was also responsible for seven of the nine CQBOs entered in the last ten minutes and all three of the CQBOs entered in the last minute of trading.

¶ 183 Unlike in previous months, none of the CQBOs entered in September were for a single board lot. Even so, only three of Nemy's 18 CQBOs led to any shares being purchased.

¶ 184 The average closing bid-ask spread was $0.30 which was essentially the same as the average bid-ask spread for all other published post-opening quotations in September.

September CQBOs TIC Summary

Trading days:	21
CQBOs posted:	Nemy – 18
Size:	No single board lot but only three CQBOs led to a purchase
Time:	11 by Nemy of 13 in the last half hour
	7 by Nemy of 9 in the last 10 minutes
	All 3 CQBO in the last minute by Nemy
Price increase:	$0.01 to $0.03 per share
Improvement:	14 raised own previous bid
Average spread:	$0.030
Other average spread:	Essentially the same

October 2005 [92]

¶ 185 In October there was 20 trading days and 20 CQBOs, 18 of which were entered by Nemy. He was responsible for 14 of the 15 CQBOs entered in the last half hour and for all seven entered in the last ten minutes and the three CQBOs entered in the final minute. Fifteen of Nemy's CQBOs led to an immediate increase in the posted bid for price. On each of these occasions the bid that Nemy was improving was his own.

[91] Holley Report paragraphs 70-75.
[92] Holley Report paragraphs 76-82.

¶ 186 Twelve of the CQBOs in October were for just 100 shares of TIC, all entered by Nemy. Only two of Nemy's 18 CQBOs led to even a partial fill. On ten days in October Nemy entered more than one buy order in the last half hour of the day that improved the bid. The net effect of those orders was to improve the closing bid price by up to $0.05.

¶ 187 The average closing bid-ask spread for TIC in October was $0.023. The average bid-ask spread of all other post-opening quotes in October was $0.042.

October CQBOs TIC Summary

Trading days:	20
CQBOs posted:	Nemy -18 (Only two led to a partial fill)
Size:	12 for 100 shares
Time:	14 of 15 in the last half hour
	7 in the last 10 minutes
	All 3 by Nemy in the last minute
	On 10 days Nemy entered more than one buy order in the last half hour that improved the bid
Price increase:	Up to $0.05 per share
Improvement:	15 raised own previous bid
Average spread:	$0.030
Other average spread:	Essentially the same

¶ 188 Holley noted that Nemy was active in the TIC market buying 1.25 million and selling 1.17 million of the approximately ten million shares that traded over the Relevant Period. (12.5% and 11.7% of the volume, respectively). His involvement was more pronounced in terms of order entry, particularly on the buy side where he entered 38% of all the buy orders that were booked for TIC and appeared as the best bid 47% of the time that quotes were published. He was even more a factor late in the trading day entering 49% of the buy orders entered in the last half hour of trading and being the bidder on the closing quote on 80 ((64 %) of the 126 trading days of the Relevant Period.

¶ 189 Following are the relevant Summary and Conclusions of the Holley Report:[93]

> 88. Over the 126 trading days in the Relevant Period there were 126 buy orders that set the bid price in TIC in the closing quotation. Collectively, the Respondents (Nemy, Poulstrup and Sadeghi) were responsible for 109 of those CQBOs (Nemy 80, Poulstrup 27 and Sadeghi 2).
>
> 89. One hundred and one (101) of the 126 CQBOs were entered in the last half hour of trading. Eighty nine of those (88%) were entered by the Respondents (Nemy 66, Poulstrup 21, Sadeghi 2). The Respondents entered 63 (Nemy 51, Poulstrup 11, Sadeghi 1) of the 68 CQBOs in the last ten minutes of trading and 31 (Nemy 30, Poulstrup 1) of the 34 CQBOs

[93] Holley Report, pages 26-28.

entered in the final minute of the trading day.

96. In my opinion, the pattern of late-in-the-day order entry in TIC by the Respondents [meaning Nemy, Poulstrup and Sadeghi] during the Relevant Period reflected a strategy, led by Nemy and supported by Poulstrup and occasionally by Sadeghi of increasing the closing bid price of TIC through the entry of very small or very short lived buy orders that were not intended to be executed. The Respondents' conduct narrowed the closing bid ask spreads and increased the posted bid price close to, and in a few cases higher than, the last trade price.

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. My conclusions relate instead to the validity of the closing bids prices set by orders entered by the Respondents.

98. The general pattern was for the Respondents to enter one or more orders late in the trading day to establish bids for TIC that were higher than the previous bid even when the previous bid was their own and, and to close TIC with a bid that was very near the last sale price. In my opinion the Respondents would have known that the size and/or timing of these closing bids made it very unlikely that they would be filled. Indeed, the orders would not have served their purpose if they had been filled.

99. One effect of these orders was to increase the value attributed to the TIC shares that were held by the Respondents and by others in the Burlington sub-branch. Every one cent improvement in the closing bid of TIC would have increased the value of the TIC inventory position by several thousand dollars.

101. In my opinion, the size of the inventory position in TIC held by the Burlington sub-branch would have provided ample motivation to focus on the day-to-day valuation that applied to TIC, notwithstanding the fact that the Respondents were paid their share of inventory account profits only quarterly. In my experience, dealers pay fairly close attention to the performance of their inventory traders and to the potential capital exposure that arises from inventory holdings. In this case, the Respondents' profit and loss reports were subject to supervisory review on a daily basis. The impact of TIC on the Burlington sub-branch's trading performance was raised in a number of IM's by Nemy (see May 10th, May 11th, May 17th, May 24th, August 25th, and August 31st). The IM exchanged between Nemy and Dingwall on August 31st highlighted, in my view, not only the importance to Nemy of the closing prices for TIC but also his willingness to affect the closing quote for inventory evaluation purposes.

Conclusion re evidence presented by IIROC Staff

¶ 190 On the basis of the circumstantial evidence of motive and trading patterns the Panel concludes that IIROC Staff has made out a *prima facie* case, on a balance of probabilities, that the Individual Respondents engaged in the improper practice of entering the alleged Artificial Closing Bids in the Five Securities. Direct evidence of instant messages and telephone calls between the Individual Respondents and the Holley Report buttress this finding.

¶ 191 A final decision with respect to each Individual Respondent can only be made on the whole of the evidence. The evidence and submissions presented by each Individual Respondent is discussed below in PART VII (Nott), PART VIII (Sadeghi), PART IX (Nemy), PART X (Poulstrup) and PART XI (Kaplan).

PART V

INSTANT MESSAGES ON AUGUST 31, 2005 BETWEEN NEMY AND DINGWALL

¶ 192 There is a series of instant messages between Nemy and Dingwall on August 31, 2005 regarding TIC. The messages show that Nemy was concerned about his monthly ranking and the value of the adjusted cost base in a month other than a pay period month end. The following discussion of the August 31 messages casts doubt on Nemy's credibility and shows that Nemy was willing to manipulate the market for personal reasons.

¶ 193 To facilitate reading of the messages the Nemy instant messages are in *italics* and the Dingwall messages are in **bold**:

> 3:13:48 -- *Nemy to Dingwall: approx what is top # this month*
>
> 3:15:54 – **Dingwall to Nemy: you got it by a good margin**
>
> 3:16:23 – *Nemy to Dingwall: might sell some TIC so we get a good start to next month*
>
> 3::17:57 –*Nemy to Dingwall: mark down ... not up*
>
> 3:20:01 – **Dingwall to Nemy: I understand, but doesn't really help in long run does it. I wouldn't bother**
>
> 3:20:37 – *Nemy to Dingwall: its easier to trade with a lead*
>
> 3:20:53 – *Nemy to Dingwall: psychologically*
>
> 3:22:34 – **Dingwall to Nemy: Yeah but doesn't do any favours to the stock to knock it down. Rather you keep someone from running it up, maybe move it down small with some time to go than move it too much down close to close**
>
> 3:23:24 – *Nemy to Dingwall: have faith*
>
> 3:24:03 – *Nemy to Dingwall: its going north way too fast*[94]
>
> 3:24:11 – **Dingwall to Nemy: y**
>
> 4:02:41 – *Nemy to Dingwall: damn ... someone marked it up*
>
> 4:03:14 – **Dingwall to Nemy: you can still close it 2.20 offer**
>
> 4:03:42 – *Nemy to Dingwall: how*
>
> 4:03:51 – *Nemy to Dingwall: its CDX*
>
> 4:03:56 – **Dingwall to Nemy: dohhhh**
>
> 4:04:03 – *Nemy to Dingwall: dohhhhhhhhhhhhhhhhhhhhhhhhhhhhh*

¶ 194 Nemy testified that the beginning of the exchange was an inquiry as to who was the top guy in the office for the month of August. The reply from Dingwall indicated Nemy was way ahead. Nemy said that when he said "might sell some TIC so we get a good start next month" he was "pulling his [Dingwall's] chain" meaning, as I interpret "pulling his chain", that he was joking and not suggesting that the price of TIC be manipulated in order to set a lower adjusted cost base for September. Nemy said that Dingwall's responses regarding "I wouldn't bother" and "doesn't do any favour to the stock" indicated to Nemy that Dingwall was taking him seriously so he wrote "have faith" meaning "I'm just kidding you."[95] In cross examination Nemy said this meant "I'm not going to do anything." [96]

¶ 195 At the time of the first instant message the bid for TIC was $ 2.22. After the "have faith" message (at 3:23:24) Nemy cancelled a bid for 200 shares at $2.22 at 3:35:23. Then at 3:35:26 he cancelled a bid for 500 shares at $2.20 and a little later he cancelled a bid for 1000 shares at $2.19. This meant the bid price was $2.18 – down four cents from $2.22. The market would have closed with this bid price but for the fact that an

[94] Nemy said he was in the habit of tracking hurricanes because of the effect on oil investments and this was a reference to a hurricane.
[95] Transcript page 1376.
[96] Transcript page 1507.

independent came in 28 seconds before the market closed with a bid of $2.22. Nemy's reaction to this is set out in his instant message at 4.02.41: "damn ... someone marked it up."[97]

¶ 196 Nemy testified that he withdrew the bids on telephone instructions from Dingwall:

> ... you know, actually after that instant message or conversation about marking it up and marking it down, you know, Rob Dingwall picks up the phone and phones me and says "You know, actually I have now taken a look at the Titanium Corp book and you have some bids below the market and if that bid gets hit it's month end and you're going to be the bid so kill all those" and so that's what I do. I kill all the bids. And then this guy comes in and he bids 2.22 and so I'm saying "Oh damn. Someone marked it up. It's just a conjecture.[98]

¶ 197 Dingwall says he does not remember calling Nemy and telling him to pull all his bids in the marketplace that he had outstanding at August 31. Dingwall said: "I might have called him. I don't -- I don't honestly recall."[99]

¶ 198 The August 31 messages have been belaboured for several reasons.

¶ 199 The instant messages show that Nemy was concerned about his monthly ranking and the value of the adjusted cost base in a month other than a pay period. This is contrary to Boddie's opinion that the day to day and non-payout month end values were irrelevant.

¶ 200 Nemy's conduct in withdrawing the four bids shows he was willing manipulate the market in order to set a lower adjusted cost base for September. Nemy's says he was just kidding and not going to do anything but his failure to say so when Dingwall phoned and his actions in cancelling four buy orders contradict this testimony and undermine his credibility.

¶ 201 Nemy's credibility is further weakened by contradictory evidence he gave regarding his reason for withdrawing his TIC bids. In June 2007 Nemy was questioned by Stewart and Meanchoff on behalf of IIROC regarding the withdrawal of the bids. Nemy does not say anything about a phone call from Dingwall during the interview. This is what he said:[100]

> Q. – So isn't this sort of tying into the fact you want to lower the close, the fact you are pulling your bids?
>
> A. – It actually works out that way but it's month end and I actually, at this point, I figure it's probably not wise to have the bids in there at month end. It's just not a thing you should generally do at month end, so in this particular case I cancelled the bids.

¶ 202 Nemy's explanation is inconsistent with his actions at the end of every other month during the Relevant Period. In cross-examination Nemy acknowledged that Dingwall did not phone him at the end of any of the other months and instruct him to withdraw his closing bid. The fact is that in each of the other months Nemy did not withdraw his closing bid that was the last bid of the day.[101] In short, Nemy's explanation to Stewart and Meanchcoff for withdrawing the bids is not credible.

¶ 203 Nemy told the Panel he did not remember the phone call[102] at the time he was questioned in June 2007 by the IIROC investigators. Two and a half years later, not only does Nemy remember there was a call, but also he remembers the *details* of Dingwall's instructions.

¶ 204 Forgetting such an important phone call at a date much closer to the time of the call is suspicious. Nemy

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[97] When Dingwall suggested the price could be raised to $2.20 he mistakenly thought there was after-market trading.
[98] Transcript page 1378.
[99] Transcript page 2450.
[100] Transcript page 1510.

[101] Transcript pages 1518 - 1522.
[102] Transcript page 1511.

would know that if he told the investigators about the phone call this would make trouble for Dingwall. The explanation Nemy gave avoided this problem.

¶ 205 There is another explanation for not mentioning the phone call to the investigators, namely, the phone call never took place.

¶ 206 In the final analysis, whether or not there was a phone call is irrelevant to the issue of liability for improper market place activity because instructions from Dingwall could not and do not exonerate Nemy's attempt to improperly affect the month end closing price of TIC .

¶ 207 The fact is that after his message to Dingwall at 3.17.54 Nemy proceeded to mark down the bid by cancelling the four buy orders. But for the unexpected intervention of a third party this would have resulted in lowering the closing bid price of TIC by four pennies. Clearly Nemy showed his willingness to tamper with the market for personal reasons i.e. lowering the September inventory valuation of TIC in order to get a good start that month.

¶ 208 There is an element of irony to the foregoing discussion. The withdrawal of the four bids by Nemy on August 31 is not included as an Artificial Closing Bid in the IIROC Statement of Allegations. However, the conclusions regarding the conduct and credibility of Nemy are extremely relevant.

PART VI

EVALUATION OF THE BODDIE REPORT

¶ 209 In his Report Boddie says that TDSI devised a series of tests "specifically designed to assist in determination of artificiality in the trading that is the subject of the Allegations."[103] Boddie says he reviewed these tests and recommended some minor changes that resulted in certain tests he applied to each of the Five Stocks[104] in coming to the conclusions set out in the following Summary:[105]

> In my opinion, the empirical data demonstrates that the manner in which the Traders entered orders was generally within the market norms as they existed at the time for the Securities. That is, the vast majority of their bid prices were within daily market trading ranges and for this and other reasons, set forth in detail later in this report, the closing bid prices were not artificial. I do not believe that there was systematic ACB entry by the Traders but rather, at most, isolated incidents of this activity.
>
> I do not believe Nemy or Poulstrup entered any ACBs and that Kaplan entered only one, …[106]
>
> Therefore, I do not believe that the Allegations as set out by RS [i.e. IIROC] have any merit, ... with respect to … ACBs …

¶ 210 Boddie says the tests on which his conclusions are based "were designed to specifically relate to the guidelines that are outlined in UMIR Policy."[107] However, Boddie basically confined his interpretation of UMIR Rule 2.2 and UMIR Policy 2.2 to empirical trading data within the context of the market. This is contrary to the purposive approach (discussed above) that should be adopted in the analysis of artificial trades and disregards the UMIR Policy statements that the explicitly enumerated categories of manipulation are not finite or closed.

¶ 211 The opinions and conclusions set out in the Summary of the Boddie Report are founded on an erroneous interpretation of the guidelines outlined in UMIR Policy 2.2. Boddie discusses and analyses bidding in the context of the market (apples). The broader purposive approach by the Panel analyses bidding patterns

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[103] Boddie Report page 40.
[104] Bodie Report page 40.
[105] Bodie Report page 11.
[106] At page 68 of his Report Boddie states: There were only 2 Artificial Closing Bids that Kaplan was responsible for that I detected.
[107] Bodie Report page 40.

(oranges). Thus, the Boddie Report is not helpful with respect to Artificial Closing Bids found by the Panel.

¶ 212 The aphorism “You can’t see the forest for the trees” encapsulates the shortcoming of analysing UMIR Policy 2.2 by focusing on empirical trading data within the context of the market. The data describes the individual trees in the forest but does not detect the patterns created by the trees. In *An Illustrated Short History of Progress*: Ronald Wright makes a statement that pin points the inadequacy of the Boddie Report. He says: “... the parochialism of the present – the way our eyes follow the ball and not the game – is dangerous.” [108]

¶ 213 The sworn testimony of Nott reveals the applicability of this statement to Boddie’s market based analysis of the allegations against Nott.

¶ 214 IIROC alleges 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. Boddie concludes that Nott entered two Artificial Closing Bids for CAN, seven for CDF.A, three for PEC and none for ACU. Nott openly stated that the alleged Artificial Closing Bids 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: [109]

> So when I would phone Jake [Poulstrup] I would say, you know, "Take care of the TIC", and he would put a bid in maintaining the bid. You know, I don't think Jake or myself ever considered that high closing. It was just maintaining it. You know, the room would cheer. "Hey," you know, "great," you know, "They did it". **I mean, I did that with my own**
>
> **stocks but not to high close them or not anything else but just to maintain them.** (emphasis added)[110]

¶ 215 Boddie did not have this information when he prepared his Report. However, the validity of his analysis based on data in the context of the market and the accuracy of his findings crumble in the face of Nott’s testimony.

¶ 216 The Boddie Report has other shortcomings:

(i) Failure to give adequate consideration to the instant messages and telephone calls.

(ii) Disregarding size of the closing bids as a relevant consideration.

(iii) Restricting consideration of motive to trading on a particular day.

(i) Failure to give adequate consideration to the instant messages and telephone calls

¶ 217 In cross-examination Boddie acknowledged that he did not place the instant messages and telephone calls in time sequence with the trading.[111]

¶ 218 The Boddie Report states the following regarding instant messages:

> In most cases on a plain reading I found these communications unclear, and I found them to concern matters so removed from trading or expressed in so flippant and unprofessional a manner that I could not easily decide what weight, if any, should be given to them.[112]

¶ 219 The Panel does not concur with the Boddie Report approach to and evaluation of the instant messages. Several relevant instant messages are discussed in these reasons. The August 31 instant messages between Nemy and Dingwall disproves Boddie’s blanket devaluation of all instant messages. His failure to consider these messages casts a shadow on the objectivity of his analysis.

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[108] Harper Collins Canada Ltd, 2008, Fifth Printing, page 152.
[109] Transcript page 3655, lines 1-7.
[110] This matter is discussed below in much greater detail commencing in PART X.
[111] Transcript page 3217.
[112] A footnote at this juncture cites three examples, one on March 2, one on March 5 and another on June 6.

¶ 220 The written submissions of TDSI evaluate the Boddie Report as follows:[113]

> The primary focus of Boddie's analysis was on empirical trading data and whether a subject bid was within the context of the market. Where appropriate, he went beyond trading data, and he considered some instant messages and the content of some telephone calls to provide further context for some trading anomalies. Although Boddie did not isolate telephone calls, instant messages and trading data in the manner depicted on the AMRs, he did review the bulk of the IMs in the form they were originally produced in exhibits 9 and 10. There is no evidence that Boddie's trading analysis was affected by a particular IM or telephone call except in a very few instances.

¶ 221 One of these "very few instances" displays a lack of impartiality. In a message on August 24, 2005[114] Kaplan tells Nott to "kill the CAN." Boddie uses this conversation to ascertain Nott's motivation for entering a closing bid. [115] However, Boddie took the trouble to interview Kaplan. Boddie says: "While his [Kaplan] motivation for making this statement was unclear to me upon a plain reading, Kaplan subsequently explained that he wanted to see what the market would do without their participation.[116] Boddie accepted this unsworn, self serving statement in exonerating Kaplan.[117]

(ii) Disregarding size of the closing bids as a relevant consideration

¶ 222 In arriving at his conclusions Boddie did not take bid size lots into account. He testified that this is not one of the factors outlined in UMIR Policy 2.2 regarding artificiality.[118] In his Report Boddie says:[119]

> While I agree that the entry time of a bid, though not determinative of artificiality, is an important consideration, I do not share their [IIROC] focus on the "size" of an order. In my opinion, there is nothing inherently wrong with small orders. There are normal and proper market reasons for placing small bids that I will discuss in more detail in Section Seven below. Also, I am not aware of **any negative connotations addressed in the Policy or UMIR with respect to small bids.**" (emphasis original)

¶ 223 However, UMIR Rules and UMIR Policy do not *exclude* consideration of evidence with respect to small bids. In effect this is what Boddie does. In applying "context of the market" the frequency of small bids is not a consideration. In doing so he is out of step with the evidence of Cooper who said if somebody holds a large position in a stock, then bidding for a single board lot at the end of the day is suggestive of something other than a legitimate purpose and further that if the objective of the bid is not to buy a stock you would bid small. Cooper said that if a trader does something three or more times this can look like a deliberate pattern[120].

¶ 224 There is also the evidence of Holley[121] who said that small orders in low-priced stocks have a low probability of execution because they are unattractive to sellers who face minimum commission charges on partial fills.

¶ 225 The evidence indicates that small bids raise suspicion and should not be disregarded.

(iii) Restricting consideration of motive to trading on a particular day

¶ 226 In his Report Boddie says:[122]

> In my experience, I have found that a discernable motivation typically exists (usually

[113] Paragraph 154.
[114] Conversation ID 1769512, BLG 2122688)
[115] Boddie Report Page 6.
[116] Boddie Report Page 6 Footnote 6.
[117] The Panel found that Kaplan was not a credible witness. See discussion in PART XI.
[118] Transcript pp 3042-43.
[119] Boddie Report page 48.
[120] Transcript pages 2901-2907.
[121] Holley Report paragraph 95 a)
[122] Boddie Report page 7.

> financial gain) for most acts of deliberate misconduct that occur on a marketplace. That is, one can expect to find an ascertainable motive for misconduct such as entering of Artificial Closing Bids. In this report I have therefore examined the market data to try and identify trading activity that might suggest the existence of a motive on a particular day. In doing so I failed to find reasonable motivation to support the entering of Artificial Closing Bids, except in a few isolated instances.

¶ 227 This conclusion does not stand up in the face of the evidence outlined above regarding the large holdings of TIC by Nemy in his personal account and inventory account, the huge losses sustained by Nemy during the Relevant Period as a result of the declining value of TIC and the concerns expressed by Nemy regarding TIC in his instant messages.

PART VII

THE ALLEGATIONS AGAINST NOTT

¶ 228 IIROC alleges 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. Details of the Artificial Closing Bids for each of the stocks are set out in Tables 1, 2, 3 and 4 of Schedule "B" to the Statement of Allegations.

¶ 229 Nott became registered to work in the securities industry in 1995. 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.

¶ 230 Nott did not file a defence to the Statement of Allegations. He represented himself. He testified and openly stated that the closing bids listed on the Tables to the Statement of Allegations were not motivated by an intention to establish a price justified by real demand or supply. He said his intention was to maintain the price of the security:[123]

> I think basically what this all -- this whole argument comes down to -- I think comes down to what's the definition of high trading. My management team, Rob Dingwall, Tucker, Rob Nemy, obviously had the same definition of high closing that I did, which meant not to go higher but you could maintain the bid. I mean, you know, this is -- I'm just saying that this is proven by their actions with the -- with the stock TIC …

And further:[124]

> So when I would phone Jake [Poulstrup] I would say, you know, "Take care of the TIC", and he would put a bid in maintaining the bid. You know, I don't think Jake or myself ever considered that high closing. It was just maintaining it. You know, the room would cheer. "Hey," you know, "great," you know, "They did it". I mean, I did that with my own stocks but not to high close them or not anything else but just to maintain them. That's where I asked the panel and I think one of the major decisions you're going to have to make is to define high closing because my management and myself did not consider that high closing.

¶ 231 The Panel has ruled that bidding within the context of the market for the purpose of maintaining a closing bid price constitutes an Artificial Closing Bid. On the basis of the admissions by Nott the Panel finds that the Artificial Closing Bids set out in the Statement of Allegations have been proved.

PART VIII

THE ALLEGATIONS AGAINST SADEGHI

¶ 232 IROC alleges Sadeghi entered 50 Artificial Closing Bids for ACU (Table 1), two Artificial Closing Bids

[123] Transcript page 3653, lines 17-25.
[124] Transcript page 3655, lines 1-7.

for TIC (Table 5), one Artificial Closing Bid for PEC (Table 4) and four Artificial Closing Bids for CDF.A (Table 3).

Summary of findings

¶ 233 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 are dismissed**.**

¶ 234 The circumstances relating to the alleged Artificial Closing Bids for TIC on June 1 and August 18 do not support the inference that Sadeghi knew he might be entering Artificial Closing Bids. Both allegations are dismissed.

¶ 235 The Panel finds that Sadeghi entered a single Artificial Closing Bid in PEC on July 15 and two Artificial Closing Bids in CDF.A, one on October 14 and one on October 21. None of these bids were part of a pattern of entering Artificial Closing Bids. The allegations of entering Artificial Closing Bids in CDF.A on October 17 and 26 are dismissed.

Background information

¶ 236 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 Canaccord 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 Canaccord. Sadeghi says he became the most profitable Trader for Canaccord from 2003 to 2005. On May 9, 2005, after numerous contacts by Nemy and Tucker, he resigned from Canaccord and along with Kaplan joined TDSI at the Burlington Office under the supervision of Nemy.

¶ 237 In August 2005 Sadeghi was assigned as Market Maker on ACU, a newly listed stock on the TSX. ACU was a very thinly traded stock, a characteristic of many small capitalization companies when they are first listed on the TSX.

¶ 238 Sadeghi filed the 2006 TSX Market Maker Manual[125] detailing the Role of Market Makers. As an assigned Market Maker Sadeghi had a responsibility to maintain an orderly market for the shares of ACU. In the absence of independent orders he was required to ensure that there were bids or offers for the shares within an assigned price spread stipulated by the TSX.

The initial price spread for ACU was 5 cents. This was changed in late October to 21 cents. Market Makers are monitored by the TSX and marked on their performance. Lack of performance can result in loss of the assignment.

¶ 239 Sadeghi was the only one of the Individual Respondents with Market Maker responsibilities relating to any of the Five Stocks. Thus, his Market Maker trading activities in ACU were subject to the provisions of UMIR Rule 2.2 which read as follows:

> 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 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:

[125] Exhibit 51.

(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 Market Place Rules and the order or trade was required to fulfill applicable Market Maker Obligations.** (emphasis added)

¶ 240 Sadeghi began his testimony by saying "Although I am without legal representation, I feel very confident in presenting my side of the story and defending my cause, simply because I'm here to speak the truth".[126] In coming to its conclusions the Panel notes that Sadeghi's testimony and presentation were consistent with this statement. He was very well prepared, competent and credible.

ACU Closing Bid Orders

¶ 241 On August 6 Sadeghi noticed an increase in the volume of trading and price level of ACU. He said that what was very irregular for him at the time as a Market Maker was that usually you do not see the sort of spike that occurred from a $1.40 level to almost the $2.60 level.[127] Sadeghi discovered there was a large short position in the marketplace on ACU. Upon further research he became aware of the hard to borrow nature of this stock.

¶ 242 Based on background knowledge of the Panel Members[128] the significance of this statement can be explained as follows. A short seller sells stock he does not own with the hope of repurchasing the stock at a lower price. When a stock is sold short the seller normally would seek to borrow shares through the organized Loan Post of the TSX to satisfy delivery obligation to the purchaser. If a stock is difficult to borrow the Loan Post may not have any access to borrowable shares, so the short seller is exposed to having his short covered by a Buy-In executed on the TSX which would close out the short sale. Notice of a proposed Buy-In would be posted by the TSX by 3.00 p.m. for execution at 3.15 p.m. at a price premium of 15 per cent above the regular market price.

¶ 243 Sadeghi observed that a series of Buy-Ins were being executed against an unidentified broker. The shorting activities of this broker caused Sadeghi concern as to how to handle the market for ACU and he paid less attention to his price spread requirements of the TSX.

¶ 244 Sadeghi testified that in mid-August he set out to acquire a position in ACU partially so he would be in a position to satisfy the Buy-Ins being executed. He managed to accumulate 38,383 shares by the end of August. During the month he was approached by Nemy on more than a few occasions about maintaining the spread between bids and asks at a required limit or lower in order to increase his score as a Market Maker of ACU.[129]

¶ 245 Sadeghi testified: "After consulting a few of my more experienced colleagues, it seems that there were more than a few individuals involved in the downward manipulation of African Copper. There had to have been a large short position held in the firm under 01 or anonymous. In addition, there would have to be a smaller long account. This explains the late in the day downward pressure on ACU by the anonymous seller. Once the last independent trade is established, their short account that was on a margin call and was being bought in will do so at 15 per cent higher than the last independent trade"[130].

¶ 246 Sadeghi was never able to participate in Buy-Ins because the Buy-In would be withdrawn whenever he appeared with an offer.[131] Sadeghi testified: [132]

[126] Transcript page 3444 lines 3-5
[127] Transcript pages 3448-3449.
[128] The experience of the Panel members in the investment industry and with the TSE totals more than one hundred years.
[129] Transcript page 3453.
[130] Transcript page 3469.
[131] Transcript pages 3586- 587.
[132] Transcript page 3472.

> On numerous occasions I spoke with my immediate supervisor, Mr. Robert Nemy. I explained the situation and provided my research on the stock to Mr. Nemy. In early September, I asked Mr. Nemy if I could contact IIROC, RS back then, and have them monitor the suspicious trading on ACU. Mr. Nemy asked me to wait longer until a pattern of trading is further established. I repeatedly complained and showed my frustration on the matter to Mr. Nemy, to no avail.

¶ 247 John Newell who was also a Trader in the Burlington Office confirmed that Sadeghi had such discussions with Nemy. Newell testified:[133]

> Yeah. Mr. Nemy said, 'Don't call RS. He told Aidin: Don't buy any more stock, and just to wait for a pattern to develop on the stock and have more evidence' ".

¶ 248 Ordinarily, a Market Maker would report suspicious activity to the Market Regulator. With Nemy asking him to do his job and not contact the Regulator, Sadeghi said he felt he was in an impossible position having been told by Nemy not to trade shares or report to the Regulator yet being required to perform his Market Maker duties.

¶ 249 Sadeghi received notice that his performance as the responsible designated trader on ACU was below minimum acceptable standards for September 2005. Sadeghi kept within the required spread limit for the month of October.

ACU Closing Bid Orders

¶ 250 The Panel Members believe, and the Chair concurs, that there is an essential disconnect between a Market Maker's responsibility to maintain an orderly market on a stock and viewing these activities in the perspective of artificial bids. The Market Maker has a responsibility to perform and is judged on that performance by the TSX. He is required to use judgment based on the market conditions faced at any given time. He can approach the market from three points of view - neutral, bullish, or bearish. If he is bullish or positive, he will be prepared to make a market and buy on a declining scale because he expects the stock to rally and give a chance to sell out at a profit. If he is bearish he might try to get short so he can cover by buying on a scale down. If he is neutral, he will buy and sell but tend to try to be relatively flat over time.

¶ 251 The fact is that the Market Maker has to be there. It is conceivable that he could be the closing bid and offer every day of the year because he is keeping a market close to the last sale in the absence of independent bids or offers. None of those bids or offers represents "real" demand or supply. If the independent offer is 10 cents below the last sale and his minimum spread is 5 cents, a bid 5 cents below the last sale is better than an offer 5 cents below just to make the spread with an independent. None of his bids or offers represents real demand or supply, the criteria being used to describe an Artificial Closing Bid. He is using his best judgment in light of the market at any given time.

¶ 252 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.

¶ 253 None of these critics had the benefit of the credible testimony of Sadeghi.

¶ 254 There is criticism of how efficiently Sadeghi carried out his Market Maker responsibilities (e.g. narrowing the price spread to one cent on a number of occasions) but that is not the issue before this Panel. The issue is whether Sadeghi was performing a function mandated and supervised by the TSX in accordance with UMIR Rule 2.2 (3).

¶ 255 The Panel finds 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 are dismissed.

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[133] Transcript page 3518.

TIC Closing Bid Orders

¶ 256 Sadeghi entered two orders that became the closing bid (June 1 and August 18). Both were entered at the request of Nemy. Sadeghi said he thinks Nemy called in on both occasions and the orders were entered at the price Nemy stated. Sadeghi testified: "I didn't question the reasoning of it. I did what my manager told me." [134]

¶ 257 It was not unusual that occasional orders were entered at the request of other traders in the office if they were busy or absent from the office. In such instances, the trader would not necessarily be aware that the order might be part of a pattern of bidding. There is no evidence that Sadeghi was aware of the existence of such pattern when he entered the TIC bids.

¶ 258 The first order was on June 1 for 100 shares at $2.81 at 15:51:45:39 Sadeghi owned no shares at the time and the order had no financial significance to him with regard to any unrealized inventory loss. The stock opened that day at $2.84, had a high of $2.85, a low of $2.75 and last of $2.83, a volume of 16,400 during the day. The market closed $2.81 bid - $2.83 ask. The order price was 2 cents below the last sale.

¶ 259 The second order on TIC entered at the request of Nemy on August 18 was for 100 shares at $2.12 at 15:42:53:96. Sadeghi owned 100 shares at the close of the day. The order had minimal financial significance to him with regard to any unrealized loss. The stock opened that day at $2.20, had a high of $2.20, a low of $2.01 and last of $2.06, a volume of 103,000 during the day. The market closed $2.12 bid - $2.15 ask.

¶ 260 The circumstances relating to the alleged Artificial Closing Bids for TIC on June 1 and August 18 do not support the inference that Sadeghi knew he might be entering Artificial Closing Bids. Both allegations are dismissed.

PEC Closing Bid Order

¶ 261 Sadeghi entered only one bid that became a closing bid. On July 15, following a telephone call between Sadeghi and Nott, Sadeghi entered a bid for 2,000 shares and was filled. He then entered a second order for 500 shares at 15:06:43:32. He ended the day holding the 2,000 shares. The stock opened that day and had a high of $0.155, a low and last of $0.15, a volume of 25,000. The market closed $0.15 bid - $0.16 ask and opened the next day at $0.15. At 10:44:49 on July 16 Sadeghi sold the 2,000 PEC shares at $0.15 cents, the same price he had paid for these shares.

¶ 262 Sadeghi said the following regarding this one time closing bid:

> Mr. Nott did not materially gain by that transaction. The stock had previously traded at that price during the day, that was a one-time occurrence on this stock and I never traded PEC again. … In my opinion, that's an example of artificial bidding. I accept that, Your Honour. And the only thing I have to say about that are two things. As I said, Mr. Nott did not materially gain by it. By selling the shares the next day, I show that I did not want to have anything to do with it. I question my judgment at the time. And my bid was consistent with the last trade on the same day".[135]

¶ 263 This was a single one time closing bid, not part of a pattern of bidding. The bid was not entered in the closing minutes of the day. This was not a single lot bid. Sadeghi did not own PEC shares prior to the date of the bid. He sold the shares the next day at the same price he had paid for the shares. The circumstantial evidence relating to this bid falls outside the pattern of identifiable characteristics relied upon by IIROC staff in proof of Artificial Closing Bids.

¶ 264 Were it not for the admission by Sadeghi that this single, isolated closing bid order in PEC bid is "an example of artificial bidding" the Panel would dismiss the allegation. The admission cannot be disregarded. However, the Panel is constrained to state that although Sadeghi's admission constitutes proof that this single

[134] Transcript page 3703.
[135] Transcript page 3707.

closing bid order in PEC was an Artificial Closing Bid, the Bid was innocuous and without any negative effect on the market place.

CDF.A closing bid orders

¶ 265 IIROC Staff alleges that Sadeghi entered Artificial Closing Bids on October 14, 17, 21 and 26. Sadeghi candidly acknowledged that the bids on October 14 and October 21 were Artificial Closing Bids. He disputes the allegation re the bids on October 17 and October 26.

October 14

¶ 266 On October 14 Sadeghi received an instant message from Nott asking Sadeghi to bid for CDF.A. At 15:56:03:63 Sadeghi entered an order for 500 shares at $0.65 that became the closing bid. In cross examination Sadeghi agreed that the only purpose for entering the bid was to fulfill Nott's request. Sadeghi said: [136]

> I put the order in at his request. It's – this clearly an example of Artificial Closing Bid. I don't deny that. The conversations are there and I'm not going to insult your intelligence or the intelligence of the Panel. That's an example of Artificial Closing Bid.

October 17

¶ 267 IIROC Staff alleges that an order by Sadeghi on October 17 at 15:46:23:88 for 2,500 shares at $0.66 was an Artificial Closing Bid in response to a telephone request by Nott at 15.32.30. Sadeghi says he was bidding in order to acquire CDF.A for his inventory and he refers to a series of bids he made earlier in the day at lower prices. The Panel accepts Sadeghi's evidence and dismisses the allegation that he entered an Artificial Closing Bid on October 17.

October 21

¶ 268 In response to a request by Nott on October 21 to "Do me a favour". Sadeghi entered an order for 1,500 shares of CDF.A at $0.64 at 15.30.10.53. Sadeghi admitted that the sole purpose of this order was to enter the closing bid that day. Sadeghi noted that the stock had previously traded at that price and higher during the day.

October 26

¶ 269 Sadeghi testified that on October 26 he was contacted by Mr. Nott and asked to bid for the CDF.A.[137] In response to this request Sadeghi placed a Buy Order for 1,500 shares at $0.61 at 14:43:12:18. Then he placed a Buy Order for 1,500 shares at $0.63 at 14:43:18:54 followed by another Buy Order for 1,500 shares at $0.64 at 14:43:27:92. Sadeghi explained the rationale behind this ladder bidding as follows:[138]

> Well, what I did was I basically added depth to the market. In case there were sellers at 64, 63 and 61, I – naturally one of the things I would naturally do, I'm not sure if I did it in this case, but as I said to you I felt comfortable owning stocks at certain levels. And with this one I might have looked at the chart and said "Well, the support level could be 60. It could get knocked down to 60 cents. …. Nott told me to do this and when I put the other orders in it was that if I did get filled at 64 cents then if – I would have the 63 and 64 cents there just in case. I would basically average down on my order.

¶ 270 At 14:44:33:57 Nott sold 1,000 shares into Sadeghi's $0.64 Buy Order. Nott testified that he accidently hit the bid.[139] Sadeghi testified he did not know that Nott would sell into his order and was surprised:[140]

> And my response is, "Did you sell?"[141]That's a surprise response that you cannot possibly see by reading an IM message. But it shows my surprise. It's 2.45 in the afternoon. I put a

[136] Transcript page 3755.
[137] Transcript page 3709.
[138] Transcript page 3711.
[139] Transcript page 3656.
[140] Transcript pages 3714-3714.
[141] This was an Instant Message Sadeghi immediately sent to Nott.

> bid in there and in a matter of a minute I get a fill on it. And I look up and I see number 07 sold it to me so my natural – I wouldn't see – because it's previous trade, I wouldn't see who is the actual seller unless I asked Mr. Nott "Was that you? Did you just sell it to me?" And I was surprised and his response on line 7411 is "Small, Sorry. Talk later" I say, "Okay."

¶ 271 Sadeghi realized this was a wash trade[142] but was not concerned. He said the aggressive side of the trade is responsible for calling IIROC and he assumed Nott would do this.

¶ 272 In cross examination Sadeghi affirmed and reinforced the fact he was surprised by the wash trade and expected Nott would take corrective action:[143]

> Q. Mr. Nott had only asked you to bid 61 small but you have raised the bid to 64, which is the reason the wash trade occurred; is that correct?
>
> A. No, that's not the reason the wash trade occurred. You should ask Mr. Nott why the wash trade occurred. I bid -- I bid 61. I bid 63. I also bid 59. I bid 64 which ended up being the last bid on the day. The wash trade, as I said, it's evident from my response that I was -- I was the -- you know, I was shocked that number 7 sold it to me so I had to double check with Mr. Nott that -- if he was the seller.
>
> Q. And in your instant messages here at lines 7411 and 7412 you're not disturbed that Mr. Nott and you have just engaged in a wash trade?
>
> A. I was not disturbed and I'll tell you why I was not disturbed at the time. Because I was under the impression when Mr. Nott was the aggressive side of the trade he would be the one responsible for calling in and cancelling a trade that was literally a wash trade. Wash trades -- Mr. Corlett, wash trades happen on a daily basis in this stock. If you trade stock that is very active the same numbers trade against one another all the time. We're talking about intent. We're talking about predetermination here and I totally understand where you're getting at. But in this case, in this scenario, my response signifies the fact that even though I bid for the stock according to Mr. Nott's instructions, I was the first one to be surprised when I got a fill on it from Mr. Nott's order.

¶ 273 Sadeghi denied that the purpose of the bids he made in response to Nott's request was to increase the closing bid:[144]

> Q. But the sole reason you're entering orders in this stock is at the request of Mr. Nott as a favour to increase the closing bid?
>
> A. Not necessarily increase the closing bid. What I was doing was to put bids in the market, not necessarily the closing bid, at the prices that the stock traded or around the prices that the stock traded by filling the order book by putting bids from, let's say, 57 all the way to 64. In case there's a buyer, then you bid at 64 plus you'll bid at 63 and 61 and 59. It will give you a better average price that you would if you bought the whole thing at 64.
>
> Q. But you had no interest in being an owner of this security; isn't that correct?
>
> A. I had -- I had some interest because any order that I put in on any stock that I was told it would be based on my technical analysis perspective on the stock.

¶ 274 *Conclusion*: The CDF.A bid by Sadeghi on October 26 was not an Artificial Closing Bid. The wash trade was precipitated by Nott without the prior knowledge or concurrence of Sadeghi. Sadeghi expected Nott

[142] A wash trade is a trade resulting in no change in beneficial ownership.
[143] Transcript page pages 3751-3752.
[144] Transcript page 3753.

would call in and cancel the wash trade in accordance with the responsibility of the aggressive trader. In the circumstances, this expectation was reasonable.

Summary of decision re Sadeghi

¶ 275 The Panel finds that Sadeghi entered a single Artificial Closing Bid in PEC on July 15 and two Artificial Closing Bids in CDF.A, one on October 14 and one on October 21. This finding is based on the admissions by Sadeghi cited above. None of these bids were part of a pattern of entering Artificial Closing Bids. All other allegations of entering Artificial Closing Bids are dismissed.

PART IX

THE ALLEGATIONS AGAINST NEMY

¶ 276 IIROC alleges that Nemy entered 79 Artificial Closing Bids for TIC (Table 5).

Decision

¶ 277 The Panel finds that Nemy entered 39 Artificial Closing Bids with the improper intention of maintaining the value of TIC on the following dates specified in Table 5:

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

October 7, 18, 27. (total 3)

Background information

¶ 278 Nemy joined TDSI as a Registered Trader and Proprietary Trader on December 11, 2003. Prior to joining TDSI, Nemy had been a Proprietary Trader for 16 years and had experience supervising other traders at various other firms. Nemy worked out of TDSI's Toronto head office for about four months from December 2003 until March 2004 and then moved to the Burlington Office. Nemy worked at TDSI for about five years until September 2008 when the Burlington Office closed for business reasons unconnected to this proceeding.

¶ 279 Nemy was the most active, experienced and successful Trader in the Burlington Office and regarded as the supervisor by the other Traders even though he did not officially hold this position. He generally traded between 28 and 63 stocks in any one month. He had between five million and twenty million dollars of the Burlington Office capital at stake which was usually set at forty million dollars.[145]

¶ 280 Nemy invested in TIC while at Canaccord and brought over a large TIC position as a long-term investment when he joined TDSI. TDSI agreed that Nemy and the other Traders transferring from Canaccord who held TIC in their proprietary trading inventories could transfer their positions to TDSI. Dingwall, Tucker and other traders at the TDSI office in Toronto also had personal holdings in TIC.

¶ 281 During the Relevant Period Nemy acted as the primary TDSI Trader of TIC except for 15 days in July when he was on vacation and between August 9 and August 24. During this latter period he traded TIC in his personal account, with permission, in order to take advantage of a stock offering with warrants that had been announced on or about July 19.[146]

¶ 282 Nemy said he regarded TIC as a somewhat liquid volatile stock.[147] He said that during the Relevant

[145] Nemy transcript pages 1272-1273.
[146] Dingwall transcript page 2204.
[147] Nemy transcript pages 1291-1292.

Period it traded approximately ten million shares.[148] He was responsible for approximately twenty five per cent of that volume.[149]

¶ 283 Nemy said he tried to keep the value of his inventory holding at around the million dollar level.[150] TIC lost about one third of its value during the Relevant Period falling from about $3.60 to about $2.05.[151] Nemy said that in order to maintain the million dollar level he was a net buyer except for the month of August.[152]

¶ 284 Nemy said TIC was a long-term position. He said that by aggressively day trading TIC he could (and did – see paragraph [294] below) average down the unit cost of the declining value of TIC. [153]

Nemy's testimony re averaging down

¶ 285 Following is Nemy's evidence describing his averaging down strategy.[154]

> Well, it's basically aggressively daily trading the stock so that I'm selling at a higher price than I'm buying, which brings my daily cost on the stock down and in turn my monthly inventory cost and in turn my quarterly and my yearly, *et cetera* to the point where I brought the cost down and down through trading and eventually, when big days hit or good news comes out and it has that jump, I – you know, then I start to get the big P&L move. That's generally what we do as traders is slowly bring the cost of positions down.

¶ 286 To do this Nemy said he engaged in "price discovery" -- making best bids inside the market that narrowed the spread between the best bid and offer in the context of the market. He explains "price discovery" as follows:[155]

> Q. Now, you've used this phrase "price discovery." What do you mean by that?
>
> A. Price discovery generally -- examples are sometimes the best thing to use and I'll use the same -- the same example. If the stock is trading at $3.10, the last trade is $3.10, and that's basically where the last commercial transaction has taken place, that's -- at that moment in time, that is the genuine value of what the stock is worth. So if I see it trading at $3.10 and I bid $3.02, $3.05 and $3.07, that is essentially buying below the level of genuine demand. It's basically value. It's genuine value. An example would be if a woman was selling apples on the corner at $10.00 and she has sold a whole bunch of apples at $10.00 and I come in and I manage to get apples at $9.50, I've got -- I've got value.

¶ 287 Nemy's averaging down strategy involved constant monitoring of a program known as the Belzberg System ("**Belzberg**"). This program assisted him to watch between 28 and 63 stocks he was trading in any month during the Relevant Period.[156] Belzberg alerted Nemy to bids and trades in TIC (and his other stocks) and enabled Nemy to keep track of his Volume Weighted Average Price ("**VWAP**") for the stocks he was trading. Nemy explained (in chief) how the VWAP information was the cornerstone to his averaging down strategy:[157]

> Q. And what does it [VWAP] mean?
>
> A. It would mean -- it's hard to explain, but it would mean -- maybe I should give an example because it's really hard to describe the definition. If I bought 10,000 shares during

[148] The Holley Report summarizes the monthly trades. During the Relevant Period 9,564,306 shares traded.
[149] Nemy transcript pages 1291 -1292.
[150] Transcript page 1280.
[151] Nemy transcript pages 1419-1420.
[152] Nemy transcript page 1420-1421.
[153] Transcript page 1280.
[154] Transcript page 1280.
[155] Transcript pages 1285-1286.
[156] Transcript page 1270.
[157] Transcript pages 1281-1282.

the day at $2.00 -- between $1.95 and $2.05 the VWAP might be the average of the middle, $2.00, depending on how I was on either side of the market.

Q. Were you able to keep track of your VWAP?

A. Yeah. One of the advantages of the Belzberg system was it constantly monitored my daily -- my daily VWAP on the stock and my sheets would basically monitored [*sic*] my monthly VWAP on the stock. So I was constantly paying attention, actually, to the daily cost of where I bought the stock and the daily cost of where I sold the stock.

Q. And why are you paying attention to that?

A. Because that's how I -- this is how I make money. I try to buy below my sell VWAP and I try to sell above my buy VWAP.

Q. And would those figures both be available to you on your Belzberg system?

A. Yes, they would. That's the thing we constantly monitored.

THE CHAIR: You try to sell – say that again.

THE WITNESS: Okay. Sure. I would – if my sales, the average price of my sales, was higher, then I would try to buy below the average price of those sales and I would make money doing it because I sold higher than I bought.

THE CHAIR: And that brings your average price down?

THE WITNESS: That is correct. And of course the opposite, selling above my cost.

¶ 288 Paragraph 36 d) of the Holley Report states that in May there were 1091 inside quotes published for TIC after the opening: "Of those Nemy was the bidder, generally by himself, but sometimes with other market participants, 65 per cent of the time." This is how Nemy explains why he was so frequently showing an inside bid for TIC:[158]

> A. Generally speaking, I mentioned about being an RT [Registered Trader], that we participated on the bid and ask. You could be a little bit lazier doing that because you're getting half the volume. Once you -- this was -- Titanium Corp. was a CDNX [TSX-V] stock and as you have to be more aggressive. In other words, you have to be, you know, inside the bid and the ask if you want to participate. You can't be lazy and just sit on it. You want to promote volume. You want to engage in price discovery and so you generally want to be inside those bid and asks or you're not going to get the trades or you're going to get very few of the trades. So as you can see, I guess, by this table 1,091 inside quotes indicates I'm trying to be the best bid or best offer at any one point in time or 65 per cent of the time.

Q. And just to be clear, I'm sure members of the panel know this but I've got to get it on the record, what do you mean by best bid?

A. The best bid would be if the marketplace -- I'll give an example because it's an easier way to visualize it. If the market was $3.00 to $3.10 and I came in and I bid $3.05 then I would become the best bid. I would better the $3.00 bid.

Q. And why do you want to do that?

A. You want to do that because it – number one, you want to trade the stock because that's how I make my living and you basically want to promote -- it's called engaging in price discovery. You want to, you know, get things moving, attract volume into the stock. Otherwise, if it's a wide spread the public or the other pro traders are just not interested in

[158] Transcript pages 1284-1285.

trading it. You have to engage in an aggressive price discovery if you want to trade and make money in it.

¶ 289 Nemy explained the meaning and importance of spread tightening in the price discovery process:[159]

> Q. Now, we've also heard in this hearing about spread tightening or spread narrowing. Are you familiar with those phrases?
>
> A. Yes.
>
> Q. And what do they mean to you?
>
> A. Basically the marketplace -- you know, not just on Titanium Corp. but this is the way the marketplace works. It engages in a series of transactions -- not necessarily transactions but a series of quote changes, you know, by pros, by public, that engage in finding where the next trade is going to take place. So generally the spreads tend to get narrower and narrower until we find a level where we can start trading again.
>
> THE CHAIR: You engage in a series of?
>
> THE WITNESS: It's engaging in a series of changing the bid and the ask until it gets to a point where the next trade would be -- people would be willing to engage in transactions again. It's finding a level where the stock wants to trade.
>
> THE CHAIR: Negotiating?
>
> THE WITNESS: It's basically trading – and that's a very good way of expressing it. Trading is electronic negotiation.

¶ 290 Nemy explained his reasons for the small board lot size of his bidding:[160]

> A. Yeah. They were generally -- most of my bids would range between 100 shares and 500 shares.
>
> Q. And why was that?
>
> A. You know, primarily because, as you saw, 80 per cent of the time I'm engaging in electronic negotiation, price discovery. I'm also trading up to other stocks at any one time. Generally I'm not going to expose myself by bidding for 5,000 shares unless the market is extremely active and I know I can get off it. So if I bid underneath the market for 5,000 shares and 25,000 shares comes and hits me and goes offers -- and went offered then that would mean that the chances of me making money on that 5,000 shares would be extremely remote. I would probably have to get off it at a lower price. Now, by bidding for only 100 shares to 500 shares it's almost like an overt or a trigger for me to say it comes up on -- if it trades, it comes up on my trading machine and I can see it. I can go and look in the square and I can say, "You know what? That offering is too big. I don't want the rest," or, "You know what? There's only another 600 there. It's a good value. I'll take it." And then I jump. It's like being a pike in the weeds. Basically you sit there and you throw little bids out there and then when a good trade comes along you jump and hopefully you jump before the next guy. That's why we use alerts. Busy traders do this.

¶ 291 Nemy said that generally the highest volume of trading in TIC occurred during the first 15 minutes or so and the last 15 minutes.[161] He called this the "Liquidity Smile" and described it as "Basically high volume at the beginning of the day, around lunch time it tapers off and then in the last five, ten, fifteen minutes it just picks up

[159] Transcript page 1287.
[160] Transcript pages 1289- 1290.
[161] Transcript page 1332.

again."[162]

¶ 292 In cross examination Nemy said trading is "dynamic ... Your trading decision is any one minute."[163]. He said "Every day is a new day."[164] For example on July 28, Nemy entered the closing bid at 15.59.59.89 for 3,000 shares at $2.42. The next day – July 29 – at the opening he could have bought 2,000 shares at that price but instead entered a sell order for 2,000 shares at $2.42 seconds before the opening, which was executed at the opening. Nemy's explanation for why he sold instead of purchased was that it was "a new day": [165]

> Q. That's your opening position after closing as a buyer at 3,000 shares at $2.42 you're opening as seller of 2,000 shares at $2.42; is that fair?
>
> A. That's … it's a new day, that's the context of the market we're trading in. Yes, that's what I am doing.

Discussion

¶ 293 Nemy's defence to the allegations of Artificial Closing Bids is this: Frequent small bids throughout the day and during the busy last fifteen minutes of trading (the Liquidity Smile) were part of his strategy to average down the cost of the declining value of TIC. Best bids inside the market narrow the spread between the best bid and offer in the context of the market and increase liquidity. All his bids were entered with the intention that they be accepted.

¶ 294 The following calculations[166] from the trading records confirm Nemy's success at lowering the average cost of TIC during the Relevant Period. As a result of his trading in May, Nemy's average cost per share dropped from $3.997 on May 2 to $3.1699 on May 31. His opening position on August 1 was 273,850 shares at an average cost of $2.64. By August 9 he had increased his holding to 399,250 shares at an average cost of $2.5844. At month-end his position was down to 312,450 shares with an average cost of $2.496. By the end of October, Nemy had traded his cost base down to $2.2501.

¶ 295 IIROC Staff says that in addition to Nemy's successful averaging down bids there are 79 Artificial Closing Bids that were not entered for the purpose of price discovery and averaging down but for the purpose of establishing a high closing price to improve the daily profit and loss position of TIC held by Nemy and the Burlington Office traders.

¶ 296 The Panel recognizes that averaging down is a legitimate trading strategy involving frequent small bids that increase the best bid price and narrow the price spread. However, Artificial Closing Bids can be concealed under a cloak of similar patterns of bidding.

¶ 297 The intention of the trader entering the bid price is the key to resolving the conundrum of whether a bid is for the *legitimate purpose of averaging down* the cost base of a stock or for the *improper purpose of maintaining its value*.

¶ 298 The Panel must decide whether, on the whole of the evidence, IIROC has proved on a balance of probabilities that Nemy entered 79 Closing Bids with the intention of maintaining the value of TIC.

¶ 299 As stated early in these Reasons it is not necessary that IIROC prove each and every one of the alleged Artificial Closing Bids. The number of proven breaches of UMIR Rule 2.2(2)(b) goes to the issue of sanction, not to the issue of liability. However, the IIROC Statement of Allegations, written submissions and oral argument allege a *pattern* of Artificial Closing Bids with respect to TIC.

¶ 300 The alleged pattern of Artificial Closing Bids is the issue the Panel will address.

¶ 301 Nemy said he held TIC as a long term investment. He said that in order to maintain a million dollar level

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[162] Transcript page 1332.
[163] Transcript page 1463.
[164] Transcript page 1480.
[165] Transcript page 1482.
[166] By Panel member Donald Lawson.

he was a net buyer except for the month of August. Having regard to the matters discussed below the Panel has concluded the lot size and late time of the entry the following Bids entered by Nemy during the Relevant Period are inconsistent with this policy.

¶ 302 In May, Nemy set the Closing Quote Bid Order ("**CQBO"**) on 17 of 21 trading days. Sixteen of the 17 bids were for small board lots (12 for single board lots, two for two board lots and two for five board lots). Seven of the small board lot bids were entered less than one minute before closing**.** (May 4, 12, 16, 19, 20, 26 and 27) and one with less than two minutes before closing (May 6) and one with less than three minutes before closing (May 13).

¶ 303 Nemy also entered one CQBO on May 24 for 3,000 shares with less than four seconds before closing (15:59:56:63). If Nemy intended to acquire this larger number of shares why would he wait until the time of the bid made it extremely unlikely for the bid to be filled?

¶ 304 In June, Nemy set the closing bid with single board lots on one day with less than 35 seconds before closing (June 15), six days with less than 20 seconds remaining (June 20, 23, 27, 28, 29, 30) and three days with less than two minutes before closing (June 21, 22, 24). On June 9 he entered one Closing Bid for 4,500 shares at 15:59:55:18 and on June 16 he offered 10,000 shares at 15:59:57:43. Again, if Nemy really wanted to acquire the larger number of shares why would he wait until the last split second to place the bids?

¶ 305 July is at the multi-board lot end of the size scale. Nemy was on vacation from July 4 to July 22. On his return he entered the CQBO on each of the last five days of July for 20 or more board lots (July 25, 26, 27, 28, 29). All were entered in the last five seconds of the trading day and none resulted in the purchase of any TIC shares. (Holley says: "not surprisingly"[167]). Every one of the bids improved the closing bid price by amounts ranging from $0.01 to $0.05.

¶ 306 In the first five days of August Nemy entered one CQBOs with less than fifteen seconds remaining (August 2 for 2,000 shares) and three CQBOs with less than five seconds remaining (August 3 for 21,600 shares; August 4 for 8,700 shares; August 5 for 150,000 shares). On August 25, the day he returned to proprietary trading after trading his personal TIC account Nemy entered a single lot CQBO at 15:58:44:25.

¶ 307 In September Nemy posted the CQBO on 18 of 21 trading days. There was no single board lot bid. Only three of the 18 bids led to a purchase.[168] Table 5 lists 17 bids as Artificial Closing Bids: six for 1,000 shares, one for 500 shares, eight for 200 shares and two for 100 shares. Based on the size and late bids entered in the previous months the Panel concludes on a balance of probabilities that four of these bids were Artificial Closing Bids, namely:

- A bid for 200 shares on September 2 entered at 15:58:19:05.
- A bid for 1000 shares on September 6 entered at 15:59:26:70.
- A bid for 200 shares on September 27 entered at 15:59:23:2.
- A bid for 200 shares on September 30 entered at 15:58:29:63.

¶ 308 In October out of 20 trading days IIROC alleges Nemy posted 18 CQBO's: two for 1,000 shares, one for 500 shares, two for 200 shares and 13 for 100 shares. The Panel infers that two bids for 100 shares posted less one second before closing were Artificial Closing Bids: (October 7 at 15:59:59:95, October 18 at 15:59:28:70).

¶ 309 The total of the foregoing Artificial Closing Bids during the Relevant Period is 39.

¶ 310 If Nemy was intent on acquiring shares he would have stopped entering unsuccessful orders so close to the end of the trading day, particularly for large board lot orders. In any event, even if the small board lot orders had been filled they would not have had any impact on his stated strategy of averaging down his position.

¶ 311 The Panel accepts Holley's opinion that small board lot bids at the end of the day are not an effective

[167] Holley Report paragraph 55.
[168] Holley Report paragraphs 76-82.

means of price discovery and that they have a low probability of execution.[169]Cooper agreed that if a trader did not want to purchase stock he would bid small.[170]

Thus, it is reasonable to conclude that the foregoing pattern of posting bids so late in the day is inconsistent with an intention to acquire the shares.

¶ 312 Invariably the Closing Bids increased Nemy's own previous bid and narrowed the spread much more than was typical of the TIC market during the rest of the trading day.

¶ 313 Nemy had a financial incentive (i.e. motive) to maintain or sustain a closing bid price for TIC in order to minimize the financial impact of the declining value of TIC on compensation. This is substantiated by the evidence of the TIC shareholdings of Nemy personally and in his proprietary inventory, the shareholding of the Burlington Office and details of the monthly realized and unrealized loss in the value of TIC discussed earlier.

Decision re Nemy

¶ 314 The relative illiquidity of TIC and the pattern of 39 of the 79 alleged Artificial Closing Bids by Nemy detailed below in paragraph [316] (small board lots entered in the closing seconds of trading or large board lots entered in the last five seconds of trading: detailed below in paragraphs [302]-[309]) all increasing the best bid price, resulted in a low probability of execution.These patterns coupled with Nemy's indisputable motive for maintaining the share value of TIC and the other considerations mentioned above negate the plausibility of Nemy's explanation that this bidding was minute by minute and day by day with the intention that they be accepted for the purpose of price discovery and averaging down his unit cost of TIC. The Panel does not accept this explanation.

¶ 315 The doubt cast on Nemy's credibility by the foregoing analysis of the instant messages on August 31 and Nemy's contradictory evidence regarding his reason for withdrawing the four bids add weight to his lack of credibility.

¶ 316 The Panel finds that Nemy entered 39 Artificial Closing Bids with the improper intention of maintaining the value of TIC on the following dates specified in Table 5:

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)

Uncovered bids and Early Bids

¶ 317 Nemy's strategy of price discovery and averaging down the unit cost of TIC required him to monitor TIC throughout the day. Consequently, Nemy would quickly see any of his bids that were uncovered. (Nine of the alleged Artificial Closing Bids are uncovered bids.) Counsel for IIROC says allowing these bids to stand was part of the scheme of setting the closing bids because if the uncovered price was satisfactory there would be no need to enter the market.

¶ 318 Counsel says bids entered any time earlier than the time of the bids found to be artificial do not fall outside the IIROC theory of setting the closing bid because if the price of the earlier bid remained satisfactory throughout the day there would be no need to come back into the market to enter a bid or withdraw the bid.

¶ 319 This expansive IIROC theory of setting the Closing Bid is not without logical merit. However, these earlier bids are exposed to the forces of the market. Without additional evidence the Panel is not prepared to

[169] Holley transcript pages 1028-1029.
[170] Cooper transcript page 2882.

infer that the uncovered bids and bids entered earlier than the Artificial Closing Bids constitute Artificial Closing Bids.

PART X

THE ALLEGATIONS AGAINST POULSTRUP

¶ 320 IIROC alleges that during the Relevant Period Poulstrup entered 27 Artificial Closing Bids in TIC and two in CAN.

Decision

¶ 321 The Panel concludes that Poulstrup entered 14 Artificial Closing Bids in TIC on July 4, 5, 6, 7, 8, 11, 12, 14, 15, 18, 19, 20, 21 and August 9.

¶ 322 Notwithstanding the submissions of Counsel for IIROC Staff and the evidence, the Panel does not conclude that the two Bids for CAN were Artificial Closing Bids.

Background information

¶ 323 Poulstrup began working 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 with Nemy. Prior to that he had been a Registered Trader and Proprietary Trader with the Burlington sub branch of Canaccord for approximately one and a half years. Poulstrup worked out of the TDSI Toronto head office for about four months from December 2003 until March 2004 and then moved to the Burlington Office where he worked as a Proprietary Trader and a Registered Trader with stocks of responsibility for approximately five years until September 2008, when the Burlington sub-branch closed. Poulstrup was a successful trader during the Relevant Period. For the twelve months ended October 2005 he earned $473,642 in gross profits.

¶ 324 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. Poulstrup said he would defer to Nemy because Nemy "liked to be the only pro, or one of the only pros trading it. So in order not to sort of crowd his space, I would trade less."[171]

¶ 325 The traders in the Burlington Office with positions in TIC, for reasons that are not clear, seemed to have accepted a pricing arrangement whereby shares were allocated at the end of the day at an average price regardless of whether they had placed the order at a specific price during the day. Poulstrup's evidence was unclear on when an order could be identified as being for another trader's account or for his own, though he suggested that orders resulting in trades that ended up in his account were his orders; he also accepted that all orders entered under his trader i.d. were entered by him.

TIC Closing Bid Orders

¶ 326 Nemy was on holidays the 15 trading days from July 4 to July 22. During this period Poulstrup acted as Nemy's surrogate for trading in TIC. Nemy and Poulstrup exchanged e-mail messages about TIC on July 13, 18, 19 and 20.[172] During Nemy's absence Poulstrup set the Closing Bid on 14 days with 13 single board lot bids and one bid on July 22 for 1,200 shares.

¶ 327 With respect to the July 22nd bid the Annotated Market Reports for TIC show that Poulstrup was bidding and buying at the market price level on that day. The Panel concludes this bid in less than 51 seconds before closing was not an Artificial Closing Bid.

¶ 328 Having regard to the frequency with which Poulstrup set the Closing Bid in July with single board lot bids (13 out of 15 days) it is apparent this was intentional. Given his modest TIC holdings, these bids had a negligible impact on Poulstrup's daily unrealized profit or loss.

¶ 329 Poulstrup says that all these bids were intended to advertise his or others' continuing interest in TIC and

171 Transcript page 1691.
172 Exhibit 3: Tabs 39, 40, 41, 42, 43 and 45.

with the intention they be accepted.

¶ 330 In analyzing Nemy's Artificial Closing Bids the Panel focused on the size and the very late time 39 of his bids were entered and concluded there was a low probability of execution. In Poulstrup's case all but one of his bids (July 22 at 15.59.08.67) were single board lots entered several minutes before closing (varying from as early as 15.09.59.40 to 15.57.39.60). Thus, the time pattern element is missing that would allow the Panel to draw the inference the 13 bids were entered for the improper purpose of maintaining the value of TIC.

¶ 331 However, the testimony of Nott clearly establishes that maintaining the price of TIC was the precise purpose of the bidding by Poulstrup when Nemy was absent from the office. This is what Nott said: [173]

> Often, like I was saying earlier, I was the liaison between the Toronto office and the Burlington office for no other reason than just that I was considered one of the Burlington office guys. So often, you know, Rob Dingwall or Mr. Tucker – when Rob Nemy was absent from the office they would always tell me, "Oh, make sure Jake's taking care of the TIC," you know, and I was really busy, like I said. And I would be like, "Why don't you guys just call him," right? And then, you know, I would call him and say, "Jake," and he would say, "Yeah, yeah, yeah. Don't worry. You know, I'm watching it." He would put in the bid, maintain the bid like what was indicated and, you know, there was a lot of people in that office that were long with TIC, not just Rob Dingwall, not just Tucker. There was numerous people. They had an inventory there that was long a bunch. They all -- everyone in the room watched that stock like a hawk.

And further: [174]

> So when I would phone Jake [Poulstrup] I would say, you know, "Take care of the TIC", and he would put a bid in maintaining the bid. You know, I don't think Jake or myself ever considered that high closing. It was just maintaining it. You know, the room would cheer. "Hey," you know, "great," you know, "They did it."

¶ 332 Nott was not cross-examined by anyone. No evidence was called to contradict him. His testimony is not tainted by any self-serving purpose. The Panel accepts Nott's testimony as credible.

¶ 333 Nott's assertion that bidding within the context of the market for the purpose of maintaining the price of the stock was accepted practice and not regarded as high closing is consistent with other evidence.[175]

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

¶ 335 The approach to bidding set out in these reasons closes the book on the practice of bidding within the context of the market in order to maintain the value of a stock and opens a new book of bidding in accordance with true market supply and demand.

¶ 336 Poulstrup entered single lot bids on June 10 at 15:51:15:60, June 13 at 15:35:31:29,

June 14 at 15:44:41:17 and August 26 at 15:45:59:65 and August 29 at 15:43:33:12 for 200 shares. The Annotated Market Reports show that Nemy engaged in trading on those dates. Having regard to the time these bids were entered and the fact that Nemy was not absent from the market the Panel is not prepared to infer these were Artificial Closing Bids.

[173] Transcript page 3654 lines 1-19.
[174] Transcript page 3654 lines 20-25.
[175] For example see THE OCTOBER 2005 ANALYSIS: Paragraphs [458]-[464].

¶ 337 Poulstrup entered Closing Bids in TIC on the following days during the period in August that Nemy was trading his personal account in TIC: August 15 at 15:46:35:08 (100 shares), August 19 at 15:50:07:97 (300 shares) and August 24 at 15:02:48:03 (300 shares). Although Nemy was not engaged in proprietary trading in TIC on these dates he was present in Burlington Office trading his TIC personal account. Having regard to the time of entry (several minutes before closing) and the market activity in TIC around the time of the entry of these bids the Panel does not infer that these are Artificial Closing Bids.

¶ 338 The Panel finds that the bid entered on August 9 by Poulstrup at 15:58:57:86 (500 shares) is an Artificial Closing Bid.

¶ 339 IIROC Staff alleges that Poulstrup entered Artificial Closing Bids on May 10 (15:35 :53:67), May 17 (15:56:26:00), May 18 (15:57:17:42), May, 25(14:40:12:81), June 10 (15:51:15:60), June 13 (15:35:31:29) and June 14 (15:44:41:17). The Panel does not infer that these bids are Artificial Closing Bids.

Decision re TIC

¶ 340 Poulstrup entered 14 Closing Bids with the improper intention of maintaining the value of TIC on July 4, 5, 6, 7, 8, 11, 12, 14, 15, 18, 19, 20, 21 and August 9 as specified in Table 5 of the Statement of Allegations.

CAN Closing Bid Orders

¶ 341 Poulstrup entered two Closing Bids in CAN for Kaplan when he was not available to bid for himself, the first on July 20 and the second on July 29. The evidence and submissions of IIROC Staff do not persuade the Panel these were Artificial Closing Bids.

PART XI

THE ALLEGATIONS AGAINST KAPLAN

¶ 342 Table 2 of the Statement of Allegations sets out 57 Artificial Closing Bids in CAN. It is also alleged that Kaplan entered four Artificial Closing Bids in CDF.A and one in PEC.

Decision

¶ 343 The Panel finds that Kaplan entered 19 Artificial Closing Bids on the following dates set out in Table 2 of the Statement of Allegations namely, eight bids with less than two minutes remaining on May 12, 17, 31, July 13, August 29, 30, 31, October 13 plus 11 bids with less than one minute remaining on June 14, 16, 17, 20, 28, July 8, 11, 12, 14, 21, September 6 and 14 ("**Late CAN Bids**").

¶ 344 In addition, Kaplan entered 18 Artificial Closing Bids earlier in the trading day on the following dates set out in Table 2 of the Statement of Allegations: May 13, 20, 26, June 1, 2, 3, 6, 8, 22, 23, July 22, August 9, 11, 24, September 1, 13, October 11, 25 (**"Early CAN Bids"**).

¶ 345 The evidence and the IIROC submissions that the four bids in CDF.A and the single bid in PEC were entered to assist Nott in setting the Closing Bid do not persuade the Panel these were Artificial Closing Bids.

Background information

¶ 346 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. He worked at the Burlington Office until September 2008 when that office closed. He was unable to find work until November 2009 when he joined another Ontario firm as a Proprietary Trader.

¶ 347 Kaplan was a profitable trader in the Burlington Office actively trading 15 – 25 stocks in any one month. For the seven months ended December 31, 2005 he earned $276,396.00 in gross profits.

¶ 348 CAN was a junior gold exploration issuer with Canadian-based exploration properties. CAN.H traded on the NEX Marketplace until May 27. 2005 when it migrated to the TSX-V and its symbol changed to CAN. The symbol CAN will be used in this discussion. The standard trading unit for CAN was 500 shares.

Kaplan's testimony re CAN

¶ 349 Shortly after arriving at TDSI in May 2005, Kaplan pursued an interest in accumulating an inventory position in CAN. Kaplan said Nott also shared an interest in CAN and in accumulating it with him. Nott was located at TDSI's Toronto office and had to execute agency orders throughout the day so he could not always watch the market for CAN. A reason for cooperating with Nott was that Kaplan could more easily watch the stock than Nott. Accordingly, Kaplan and Nott communicated by instant message and telephone about CAN on a regular basis. Kaplan said their communications covered multiple stocks not just CAN.

¶ 350 Kaplan said that he and Nott each intended to accumulate roughly equal amounts of CAN and neither wanted to use disproportionate amounts of capital relative to the other when accumulating CAN.[176] His plan was to accumulate up to 250,000 shares.[177] He said Nott had a similar accumulation objective. Therefore, on any particular day, when Kaplan thought he had committed enough capital he would urge Nott by instant message to put in proportionate bids.[178] Kaplan said that from time to time they would not agree on purchasing CAN.[179]

¶ 351 The following inventory of holdings at the end of each month from May to October shows the extent to which the Kaplan and Nott accumulated CAN shares:

	Kaplan	Nott
May	73,500	85,000
June	131,500	114,000
July	157,500	127,000
August	163,500	131,500
September	166,000	147,000
October	204,000	166,000

¶ 352 To avoid wash trading or violating UMIR client priority rules, Kaplan said they would let each other know when they were trading CAN or when Nott was representing client orders. Each of them took turns bidding and trading CAN. When one was out of the office, the other would act as a back-up trader.[180]

¶ 353 Kaplan said he perceived that CAN generated greater market interest towards the end of the day than at the beginning and accordingly he would often enter bids near the end of the day. He said you could say this was a "liquidity smirk" – a variation of the "liquidity smile" terminology.[181] He said his bids were for small amounts of stock to test selling interest and he entered bids at various prices to discover the cheapest price point for accumulating shares.[182] He said that to accumulate stock you had to use price discovery. You had to be the best bid in the context of the market[183] and move it in orderly increments to a level where someone would actually sell stock.[184]

¶ 354 Kaplan had anticipated that as CAN emerged from the preliminary stage of its development, acquired property and generally implemented its business plan, the stock price would go up. He would then be able to sell his CAN inventory into the buying interest he anticipated would develop for the more mature CAN.[185] However, the expected buying interest never materialized. By October 2005 Kaplan was very frustrated by

[176] Transcript page 1740.
[177] Transcript page 1729.
[178] Transcript page 1763.
[179] Transcript page 1852.
[180] Acting as a back-up is an accepted function for a Proprietary Trader: Holley transcript at page 996.
[181] Transcript page 1732.
[182] Transcript page 1743.
[183] Transcript page 1735.
[184] Transcript page 1733.
[185] Transcript pages 1717-1718.

CAN's failure to develop any buying interest even after it had begun to implement its business plan.[186]

Discussion

¶ 355 Kaplan's defence to the allegation of Artificial Closing Bids is this: He and Nott each intended to accumulate approximately 250,000 shares of CAN. They would let each other know by instant messages and telephone calls when they were trading CAN or when Nott was representing client orders. Each of them took turns bidding and trading CAN. Kaplan consistently engaged in price discovery for the primary purpose of accumulating shares. His bids were for small amounts of stock to test selling interest. 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".[187]

¶ 356 Kaplan's defence is essentially the same as the defence put forth by Nemy except that Nemy's price discovery bidding was for a different purpose (averaging down the unit cost of TIC). With respect to Nemy the Panel concluded that the extremely late time of entry of bids and the size of those bids was a cornerstone consideration in drawing the inference that 39 of Nemy's bids were Artificial. The Panel was not prepared to draw the same inference with respect to bids entered earlier in the day.

Late CAN Bids by Kaplan

¶ 357 Kaplan entered eight Late CAN Bid orders with less than two minutes remaining on May 12, 17*, 31*, July 13, August 29, 30, 31, October 13 and 11 bids with less than one minute remaining on June 14, 16, 17*, 20, 28, July 8, 11, 12*, 14, 21, September 14 for a total of 19 Late CAN Bids all of which became the Closing Bid Order. (On the four dates marked * the bid was for 1,000 shares. The remaining 13 bids were for 500 shares.)

¶ 358 Small board lot bids at the end of the day are not an effective means of price discovery and have a low probability of execution.[188] Having regard to the illiquidity of CAN (see below), the likelihood of a response to these Late Bids was practically zero. Furthermore, bidding single and double board lots is inconsistent with accumulating a large amount of shares.

¶ 359 Each of the 19 Late CAN Bids resulted in an increase of the closing quote. Because of the small size of the Late CAN Bids the cost to Kaplan would have been less than $40.00 per transaction. On the other hand, each one cent decrease in the closing bid reduced the value of CAN more than a thousand dollars depending on the number of shares owned at the time.

¶ 360 Kaplan's motive to maintain the price of CAN is shown by his complaints about the loss he was experiencing as the price of CAN kept falling. For example, Kaplan lamented a two cent drop from 33 cents to 31 cents in the last second of trading on October 14 because this cost him $5,000.00.[189]

¶ 361 On the basis of the foregoing considerations the Panel does not accept Kaplan's testimony that the 19 Late CAN Bid Orders were an integral part of price discovery and his plan to accumulate volume. The Panel concludes that the 19 Late CAN Bids were entered for the purpose of maintaining the price of CAN. The testimony of Nott (see below) confirms this conclusion.

Early CAN Bids

¶ 362 Kaplan entered 38 Early CAN Bids at times ranging from 14.19.10.29 to 15.56.25.86 that became the Closing Bid. One of these bids was for 1,000 shares (June 21). The remaining 37 bids were single board lots.

¶ 363 The Panel must decide, on the whole of the evidence, whether, at the time Kaplan entered these Early CAN Bids his purpose was to maintain the price of CAN.

¶ 364 IIROC Staff alleges that Nemy entered 79 Artificial Closing Bids. The Panel concluded that 39 of these bids were Artificial. The Panel said that without additional evidence it was not prepared to infer that the 40 bids

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[186] Transcript page 1733.
[187] Transcript page 2019.
[188] Holley transcript pages 1028-1029.
[189] Kaplan transcript page 2027.

Nemy entered earlier than the 39 Artificial Closing Bids were also Artificial Closing Bids.

¶ 365 There are additional matters and evidence to be considered regarding CAN and Kaplan: *(i)* the illiquidity of CAN, *(ii)* the pattern of the Early CAN Bids and *(iii)* the credibility of Kaplan.

(i) *Illiquidity of CAN*

¶ 366 Kaplan testified that CAN was thinly traded.[190] He said that on July 25 CAN had not traded in five days.[191] Kaplan said no buying interest materialised.[192] Dingwall said the market on CAN was illiquid.[193] He agreed that an illiquid stock is called illiquid because it rarely trades.[194]

¶ 367 Dingwall said that illiquid stocks have a higher potential for manipulation[195] because generally there are less bids and offers in the book.[196]

(ii) Pattern of the Early CAN Bids

¶ 368 Between them, Kaplan and Nott entered 81 Early CAN Bids that became the Closing Bid.[197] (Kaplan entered 38 Early CAN Bids; Nott entered 43.) The frequency of the Early CAN Bids indicates that the purpose or intention of these Bids was to establish the Closing Bid.

¶ 369 CAN was an illiquid stock -- as Dingwall said, a stock that rarely trades. IIROC Staff says this illiquidity set the stage for establishing the Closing Bid because Kaplan and Nott knew there was a good likelihood an Early CAN Bid could end up as the Closing Bid price but if there was an intervening transaction, a subsequent remedial bid could be entered. Several instances are cited in the IIROC Staff Written Submissions where, after a bid was hit passively, Kaplan or Nott entered a bid that established the closing bid price. [198]

(iii) C*redibility of Kaplan*

¶ 370 Nott's testimony about bids being entered to maintain the value of TIC encompassed the 43 Early Bids he entered in CAN:[199]

> I mean, I did that with my own stocks but not to high close them or not anything else but just to maintain them.

¶ 371 This raises a credibility issue regarding the testimony of Kaplan who steadfastly maintained that all his bidding was for the purpose price discovery and purchase of CAN shares. He denied that any bids were entered for the purpose of maintaining the price of CAN.

¶ 372 It is important to note that the relationship between Kaplan and Nott was long standing and extremely close. Kaplan started working with Nott as the senior liability traders on the institutional desk at Canaccord Capital in 2000. Kaplan said the close relationship that existed there continued at TDSI:[200]

> Q. And where did Mr. Nott sit in relation to you in the Canaccord institutional desk?
>
> A. Mr. Nott sat right beside me.
>
> Q. How did you interact with Mr. Nott at that time?
>
> A. We interacted all day long on stocks we were trading, what our sentiments were on the

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[190] This is confirmed by Exhibit 40, CAN Stock Chart for May-October 2005.
[191] Transcript page 1981.
[192] Transcript page 1734.
[193] Transcript page 2013,
[194] Transcript page 2328.
[195] Transcript page 2324.
[196] Transcript page 2323.
[197] Nott entered 43 Early Bids between 08.14.36.55 and 15.57.44.65. One bid was for 1,500 shares, twelve were for 1,000 shares and thirty for 500 shares.
[198] Paragraph 111.
[199] Transcript page 3655 lines 1-3.
[200] Transcript pages 1726-1727.

market, what positions we actually had, what stocks look good, what stocks look bad, if there's a particular buying interest in any relevant stocks that we were long or short. We basically conveyed our trading strategies throughout the day, all day long.

Q. And when you moved to TDSI did you continue to communicate with Mr. Nott?

A. Yes, I did.

Q. And how did you do that?

A. Through instant messaging and the telephone. Instant messaging allowed us to have the same sort of atmosphere that Mr. Nott and I had at Canaccord Capital, it was as if he was sitting right beside me. It conveyed our thoughts to the second and we used that as a tool with our trading strategies throughout the day.

Q. Mr. Nott being on the trading desk at TDSI downtown while you were out in Burlington?

A. Yes.

MR. NORRIS: Now, is this when you were both at TD or when you were at Canaccord and he was at TDSI?

THE WITNESS: When we were both at TD.

Kaplan's testimony

¶ 373 Kaplan was painstakingly cross examined on virtually every instant message and telephone conversation and many transactions. At times his evidence was illogical or did not hang together. There were contradictions and inconsistencies. A complete explanation on which these statements are based would be unduly lengthy and needless. A few examples will suffice.

¶ 374 On May 18 there is an interchange of messages in which Kaplan writes to Nott "Your turn on the CAN" followed by "CAN, your bid". The transcript then reads:[201]

Q. And of course, Mr Kaplan, looking at these instant messages after you say. "Your turn on the CAN" you say, "CAN, your bid," but you don't use the expression, "Your turn to buy CAN;" is that correct?

A. Sure. You can use them interchangeably. "Bid" and "buy" are basically the same thing, from my standpoint.

¶ 375 The words "bid" and "buy" have specific meanings and are not used interchangeably. Kaplan's contradictory explanation that "from his standpoint" the words are basically the same thing is an attempt to negate the inference he is telling Nott it is Nott's turn to set the bid price.

¶ 376 Along similar questionable "bid – buy" lines are the comments of Kaplan concerning a recorded conversation between Nott and Poulstrup on July 29 during which Poulstrup says "I know Chris [Kaplan] wants it [CAN] to be 43 bid." On cross-examination Kaplan said the following about this statement:[202]

A. I left instructions with Mr. Poulstrup to buy me stock at 43 cents.

Q. So did both Mr. Poulstrup and Mr. Nott get your instructions wrong in this conversation?

A. No. Mr. Poulstrup had my instructions. I'm not sure where Mr. Nott ---

Q. But as it's reflected in the conversation, he got your instructions wrong; is that correct?

[201] Transcript page 1911.
[202] Transcript page 1986.

A. No. He knew that I wanted to purchase stock at 43 cents.

Q. And why do you say that?

A. Because I gave him instructions to purchase me stock at 43 cents.

Q. But based on the conversation, you just said, "I know Chris wants it to be 43 bid," not, "Chris wants to purchase 10,000 at 43 cents."

A. That's correct, I wanted to purchase stock at 43 cents.

Q. But that's not what Poulstrup says; is that correct?

A. I can understand your interpretation of that, but my meaning is that I asked Jake to buy me stock at 43 cents.

¶ 377 On October 24 there was a telephone conversation between Nott and Kaplan in which Nott tells Kaplan he is leaving because his dad is having an operation and then asks Kaplan to "watch some stuff for me." Kaplan responds "What do you need to watch?" Following is an example of unsatisfactory and illogical testimony by Kaplan:[203]

Q. So Mr. Nott asks you to watch some stuff for him, but he does not provide you with any information about the bid price you should put in, the volume you should put in, the cost of his inventory position, or anything of that nature; is that correct?

A. In this particular phone call.

Q. He merely says, "Please watch them for me." Is that correct?

A. Yes.

Q And he just provides you with the stock symbol and that's it?

A. He gave me some latitude, yes.

Q. And how would you have any latitude on CDF.A if you didn't know what his cost price was or what price he wanted to trade at?

A. I'm assuming he probably would have made purchases within a particular price level. I'm just speculating at this point. He's asking me to watch his stock, so I'm his back-up.

Q. But you have no indication from him as to what price he wants to purchase at or what volume he wants to purchase?

A. No. But obviously he'd want a couple of thousand shares, I'm assuming.

Q. And this didn't cause you any concern given the fact that you had already purchased 500 shares for him which he didn't want to take?

A. I'm just Mr. Nott's back-up. I don't know what his thoughts were.

Q. Still, as his back-up, you would need certain instructions what to -- to make sensible purchases for him; isn't that correct?

A. He was just giving me some latitude on this particular day with the stocks.

Q. But what kind of latitude can he give you if he didn't give you any parameters on which to trade? He's merely saying, "Watch it."

A. Yes.

[203] Transcript pages 2060-2062.

Q. The reason he's saying, "Watch it," is to watch the closing bid price; isn't that correct?

A. Watch his stocks. Watch what happens throughout the day.

Q. And how would you be able to react to watching it if you have no information as to the bids, the volume or the price?

A. Obviously he's interested in this particular price range. I would buy him a couple of thousand shares.

Q. Just because you know that's how things are done?

A. Just with respect to CDF and CAN. He has a direct interest in them, yes.

Q. But how would you know that on CDF.A, which is the stock you've said you didn't know anything about?

A. We just -- I just assumed. He said, "Watch it," so obviously that means he wants to purchase stock within this particular price range.

¶ 378 At times Kaplan gave evidence that verged on the bizarre. For example, in the above discourse there is mention of a purchase of 500 shares by Kaplan for Nott that Nott did not want to take. Kaplan says he was frustrated by Nott because he refused to journal the shares. Kaplan says he then "lied" to Nott to induce Nott to comply.[204] Shortly thereafter Nott asked Kaplan to buy another 500 shares. Despite the foregoing Kaplan complied. Kaplan's explanation for doing this: "I was giving him one last chance."[205]

¶ 379 On June 17 Kaplan entered a buy order for 1,000 shares of PEC at 14.48.33 that became the best bid and closed at 25 cents. He gave the following testimony about this order:[206]

Q. Now, could you explain what the purpose of entering this order in PEC was?

A. I was Mr. Nott's back-up. Mr. Nott asked me to buy him some stock at 25 cents. I entered the order.

Q. And how did Mr. Nott give you these instructions to enter this order?

A. Over the phone.

Q. Presumably not from his office line; is that correct?

A. He was on vacation.

¶ 380 Kaplan acknowledged this was not the explanation he gave on June 4, 2007 when questioned by RS about this transaction. He testified he gave that explanation to RS because:[207]

> At the time of the interview, I was given a small portion of the broad TOQ reports. I hadn't seen a TOQ report prior to that, so they were rather confusing. I was given a couple of telephone calls, some IM's. I answered those questions as best I could at the time.

¶ 381 Kaplan explained the reason for his answer on this hearing as follows:

> Now, going over all this information, the AMRs, the TOQ reports, the IM's, I don't want to discredit anything I said in the interview, but I can answer it more confidently now that this was for Mr. Nott, yes.

¶ 382 In the course of the RS interview Kaplan said that at the time he placed the PEC order he did not know

[204] Transcript page 2069.
[205] Transcript page 2070.
[206] Transcript pages 2079-2080.
[207] Transcript pages 2081-2082.

Nott traded in PEC ("He never mentioned it." "I'm unaware of it."[208]). He said he did not know whether he entered this order for Nott.[209] He said "Probably I meant to put in PCA ..."[210] Later he said: "I probably hit PEC as opposed to PCA."[211] When asked why he thought this may have been a mistake he said:[212]

> I don't know the stock [PEC], so in my opinion it's a mistake. Normally I know when I'm putting buy orders in here, and this I have no idea. I didn't even know what the acronym was, PEC.

¶ 383 When asked: "But you were certain Mr. Nott didn't ask you to put this order in?" Kaplan gave the perplexing reply: "I have no idea." [213]

¶ 384 Kaplan's statement that he may have made a mistake by hitting PEC as opposed to PCA when he entered the buy order for 1,000 shares of PEC at 14.48.33 at is not believable. PEC traded in pennies. PCA (Petro Canada) is a senior stock that traded in dollars. Furthermore, as back-up for Nott it is not plausible that Kaplan did not know Nott was trading in PEC. This is especially so having regard to the constant communication between them.

¶ 385 Other inconsistencies and contradictions in the foregoing testimony regarding PEC and PAC are obvious and do not require comment.

¶ 386 Evading responsibility for bidding problems relating to PEC pervade the statements by Kaplan during his RS interview. His testimony on this hearing bears the same characterization with respect to CAN.

¶ 387 The improper intention of Kaplan and Nott to set the bid price is illustrated by instant messages exchanged on May 30, 2005 at 14:12. Kaplan sent an instant message to Nott telling Nott that he was leaving early so Nott was "going to have to bid". (Kaplan does not indicate to Nott that Nott should be buying.[214]) Nott agreed, and at 15:59:55 entered a closing bid for 1,000 shares at $0.37, increasing the bid price by $0.02.

¶ 388 Nott was the last witness to testify (February 10, 2010). He was not cross examined by any of the parties. No application was made to recall Kaplan or any of the earlier witnesses to respond to Nott's testimony. Apart from Kaplan, Nott's evidence stands unchallenged. The self-incriminating aspect of Nott's testimony adds weight to his credibility.

¶ 389 Having regard to the close working relationship between Kaplan it is inconceivable that Nott entered 43 Early CAN Bids for the purpose of maintaining the value of CAN while Kaplan, working hand in hand with Nott, entered 38 Early CAN Bids for sole purpose of price discovery. The testimony of Kaplan to the contrary is not credible.

Decision re Early CAN Bids

¶ 390 The Panel Members have carefully reviewed all the CAN trading data in Volume 1 of the Annotated Market Reports.[215] Having regard to the matters discussed above (time and size of the bid, illiquidity etc.) and the living mechanism of the market the Panel Members conclude, on a balance of probabilities, that the Early CAN Bids (18 in all) entered by Kaplan on May 13, 20, 26, June 1, 2, 3, 6, 8, 22, 23, July 22, August 9, 11, 24, September 1, 13, October 11 and 25 are Artificial Closing Bids.

¶ 391 Although there may be reason to suspect one or more of the other 20 Early CAN Bids, the Panel cannot conclude, on a balance of probabilities, that these Bids were entered for an improper purpose.

CDF.A and PEC Closing Bid Orders

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[208] Transcript page 2085.
[209] Transcript page 2085.
[210] Transcript page 2082 line 25 and page 2083 line 1.
[211] Transcript page 2084 lines 13-5.
[212] Transcript pages2086 lines 23-25 and page 2087 lines 1-2.
[213] Transcript page 2087 lines 8-11.
[214] Kaplan Transcript page 1922.
[215] Exhibit 18

¶ 392 Kaplan entered the Closing Bid in CDF.A on June 16, June 17, August 11 and August 16 and one in PEC on June 17. Kaplan's explanation for these bids is that Nott asked him to purchase the shares for him. Notwithstanding the credibility comments regarding Kaplan, the IIROC submissions that these bids were entered to assist Nott in setting the Closing Bid do not persuade the Panel, on a balance of probabilities, that these were Artificial Closing Bids.

PART XII

THE ALLEGATIONS AGAINST TDSI

¶ 393 IIROC Staff says that UMIR 7.1 and Policy 7.1 are focussed on a Participant developing and implementing supervision and compliance procedures and policies that are "appropriate for the Participant's size, lines of business in which it is engaged and whether the Participant carries on business in more than one location or jurisdiction".[216] In other words, a Participant must make an effective assessment of the risks associated with the types of trading in which it engages and adopt and implement policies and procedures that are adequate.

¶ 394 IIROC Staff alleges that TDSI failed to comply with its trading supervision obligations contrary to UMIR Rule 7.1 and UMIR Policy 7.1 by reason of:

> (i) failure to adopt trading supervision policies and procedures that were adequate, taking into account its business affairs and the risks associated therewith;
>
> (ii) failure to adequately address the risks associated with the Burlington Office;
>
> (iii) failure of supervisory practices and procedures; and
>
> (iv) failure to adequately review and monitor order entry activity.

¶ 395 The extremely detailed and lengthy (30 pages) Policy provisions of UMIR 7.1 on which these allegations are based need not be set out in these reasons. [217] There is no issue as to whether the foregoing trade supervision obligations are imposed under UMIR Rule 7.1 and UMIR Policy 7. The issue is whether, on the whole of the evidence, IIROC Staff has proved one or more of the alleged failures on a balance of probabilities.

¶ 396 Earlier in these Reasons the Panel dealt with two preliminary defences raised by TDSI. First, there were

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[216] UMIR Policy 7.1.

[217] In its Written Submissions IIROC sets out the following:

UMIR 7.1 provides as follows:

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

(2) Prior to the entry of an order on a marketplace by a Participant, the Participant shall comply with:
- (a) applicable regulatory standards with respect to the review, acceptance and approval of orders;
- (b) the policies and procedures adopted in accordance with subsection (1); and
- (c) all requirements of these Rules and each Policy.

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

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

UMIR Policy 7.1 states:

The obligation to supervise applies whether the order is entered on a marketplace:
- by a trader employed by the Participant;
- by an employee of the Participant through an order routing system;
- directly by a client and routed to a marketplace through the trading system of the Participant, or
- by any other means.

In performing the trading supervision obligations, the Participant will act as a "gatekeeper" to help prevent and detect violations of applicable Requirements.

no Artificial Closing Bids by Nemy or Poulstrup[218] and one by Kaplan[219]. Boddie was called and the Boddie Report was filed in support of this position. Second, Nemy, Poulstrup and Kaplan described their actions and intentions in denial of the allegations of Artificial Closing Bids. The reasons for the unsuccessful outcome of these defences need not be repeated**.**

Summary of Decision

¶ 397 Re (i): The alleged failure to adopt adequate trading supervision policies and procedures: This allegation is dismissed.

¶ 398 Re (ii): The Panel is not satisfied that TDSI failed to adequately address the risks associated with the Burlington Office. This allegation is dismissed.

¶ 399 Re (iii): alleged failure of supervisory practices and procedures. The recurring theme of this allegation is that there was no systematic process or procedure for reviewing late bids. IIROC Staff criticizes the random review approach used by Dingwall and Tucker.

¶ 400 The Panel examines the evidence relating to the TDSI real time Trade Desk Supervision. The supervisory practices and procedures and trade room scenario are described. There was no software program available that was designed to detect late bids. There was no flag or signal on the monitor screens in the trade room that specifically alerted late bids. Having regard to these facts and the trade room scenario relating to detecting and investigating late bids (fully described in the Reasons below) the Panel finds that the random approach review employed by Dingwall and Tucker was realistic and reasonable. This allegation is dismissed.

¶ 401 Re (iv): The alleged failure to adequately review and monitor order entry activity: This allegation is dismissed.

¶ 402 Following are the reasons for dismissal of each of the four allegations.

(i) ALLEGED FAILURE TO ADOPT ADEQUATE TRADING SUPERVISION POLICIES AND PROCEDURES

Discussion

¶ 403 During the Relevant Period, TDSI had a two-tier monitoring structure comprised of (1) Trade Desk Supervision and (2) the Compliance Department post trade review headed by Mathew Cooper, Acting Chief Compliance Officer (**"Cooper"**). The first tier was divided into (i) real time Trade Desk Supervision of the Proprietary Traders and (ii) post trade Supervisory Group.

¶ 404 Cooper said his Compliance Department is "sort of another level of review of trading activity" that fits over the top of the first tier to provide independent testing and oversight to make sure that the supervision is effective. This was after the fact testing, sometimes several weeks after the fact.

¶ 405 Cooper indicated that compliance was a matter of discussion and concern at the highest corporate level. He said he attended meetings every two weeks or thereabouts with the senior vice-president and vice-chair of TDSI to discuss matters relating to compliance such as testing results, significant regulatory investigations and new technologies.[220]

¶ 406 The Post Trade Supervisory Group concentrated on trades and did not concern itself with bids. Real time Trade Desk supervision will be discussed in detail below.

¶ 407 During the Relevant Period TDSI implemented written policies and procedures that covered its entire business to ensure compliance with UMIR Rules and UMIR Policy including the Rules and Policy governing market manipulation.[221]

[218] Boddie Report page 69.
[219] Boddie Report page 68. The Totals column show 1 instead of the 2 shown in the CAN column.
[220] Transcript page s 2622-2623.
[221] Exhibit 33, Tab 1, 2005 Trade Desk Review at page 4.

¶ 408 Cooper said that the TDSI system of supervision and compliance was consistent with industry standards and practice elsewhere on the street.[222] The Panel members are in accord with this statement.

¶ 409 The procedures were reviewed by IIROC in trade desk reviews and were found to be satisfactory. In its Written Reply Submissions IIROC says that a Trade Desk Review is not ratification of a firm's supervision system, nor can it act as a shield to enforcement action for supervision failures.[223]

¶ 410 The Panel does not base its conclusion regarding the adequacy of the TDSI system of supervision and compliance on the results of the IIROC trade desk reviews. The Panel simply notes that its conclusion is consistent with these trade desk review findings.

Decision

¶ 411 The alleged failure to adopt adequate trading supervision policies and procedures is dismissed.

(ii) ALLEGED FAILURE TO ADEQUATELY ADDRESS THE RISKS ASSOCIATED WITH THE BURLINGTON OFFICE

IIROC Staff submissions

¶ 412 The overall capital limit for both day trading positions and overnight positions doubled from $20 million to $40 million shortly after six new traders (including Nemy and Poulstrup) joined the TEG in December, 2003. After about four months in Toronto, these traders worked in the Burlington Office. Having regard to the large increase in the number of traders and capital IIROC says TDSI should have done more than it did to screen, instruct and monitor the Burlington Office traders.

Discussion

¶ 413 Tucker was in charge of Trade Supervision. He and Dingwall supervised the Burlington Office from Toronto despite the fact that in the business proposal for the opening of the Burlington Office Tucker budgeted for hiring a branch manager. Thus, there was no one in the Burlington Office to perform the supervisory function of observing the traders at work in the trading room to see and hear what was going on and listen to what they were saying to each other. During the Relevant Period Tucker visited the Burlington Office every couple of months. He supplemented the walking around with instant messages or e-mail to chat with the traders. Tucker said he had the same supervisory tools at his fingertips for the Toronto Office and the Burlington Office.

¶ 414 Tucker knew the traders came to TDSI from a firm that did not have, in his estimation, the same rigorous regulatory standards as TDSI. Tucker acknowledged he realized there was a greater risk associated with these traders than there would have been if they had grown up in the TDSI world. Tucker said no specific training in relation to avoiding manipulative and deceptive trading practices was provided to any of the new traders when they joined TDSI.

¶ 415 However, prior to hiring the new traders Tucker personally interviewed them. As part of the hiring process they were required to meet with a senior individual in the Human Resources department who spent a lot of time chatting with each of them and then gave feedback as to the character and type of person that was interviewed. Tucker had the opportunity to observe them and talk with them every day at the Toronto office for four months before they went to the Burlington Office. Tucker said he found them to be experienced traders with a good view in the market. They were hired on a three month probationary period which enabled TDSI to do background checks. Nothing was turned up in these checks from a regulatory perspective.

¶ 416 With respect to compliance matters Tucker said that prior to hiring the new traders a great deal of time was spent with each of them talking about the TDSI trading philosophy. He said that after his discussions with each of them regarding the internal framework of TDSI he was comfortable with them. When they were hired

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[222] Transcript pages 2673-2674.

[223] The following November 2003 Market Integrity Notice makes this clear:

> The [trade desk] review of the policies and procedures does not constitute an approval of the policies and procedures by RS as RS will not have undertaken a comprehensive analysis of the business of the Participant.

they were given a copy of the UMIR Rules and Policy. They participated in the TDSI semi-annual compliance reviews. They were on the distribution list for any UMIR market integrity notices. They were required to follow prescribed education credits. They each signed an attestation that they understood UMIR Rules and Policy in detail and would follow TDSI policies and rules.

¶ 417 Tucker emphasized that the new traders had all been licensed by the TSX as registered traders and would therefore be well versed in UMIR Rules and Policy.

¶ 418 Cooper acknowledged that there were no formal training sessions when the Individual Respondents were hired. However, he said, TDSI hired experienced licensed Registered Traders for the TSEX who had to pass a test at the TSEX to get the license. After talking to these traders Cooper said TDSI was comfortable with their knowledge of UMIR Rules and Policy.[224]

¶ 419 Cooper was responsible for making people aware any new notice, UMIR Rule or Policy change or interpretative bulletin and provided his commentary if there was a significant one. He ran one or two sessions a year with the traders in a board room setting to discuss a theme of the day, what a UMIR Rule meant in terms of how traders do their day to day job, and give the traders some feedback on how Compliance thought they were doing their job.[225]

¶ 420 Nemy and Poulstrup began working at TDSI in December, 2003 -- seventeen months prior to the commencement of the Relevant Period. This was more than enough time to evaluate their performance.

¶ 421 Before opening the Burlington Office, TDSI submitted the proposal to the Investment Dealers Association and obtained approval. IIROC was aware of the opening of the Burlington Office and did not raise any objection.

Decision

¶ 422 The Panel is not satisfied that TDSI failed to adequately address the risks associated with the Burlington Office. This allegation is dismissed.

(iii) ALLEGED FAILURE OF SUPERVISORY PRACTICES AND PROCEDURES

¶ 423 IIROC Staff says the Trade Desk supervisors focused primarily on the profit and loss positions of the traders. However, the crux of the allegation against TDSI is this: There was no procedure systematically employed by the Trade Desk Supervisors (Tucker and Dingwall) for reviewing bids placed late in the day except on a random basis.

Discussion

Real Time Trade Desk Supervision of the Proprietary Traders

¶ 424 There was a total of 19 traders in the Toronto and Burlington Offices. Dingwall sat at the Trading Desk in the midst of the Toronto traders and communicated with the Burlington Office traders by phone and instant messages. Tucker's office was adjacent to the traders.

¶ 425 At the end of the day the accounting department provided information outlining the estimated capital usage by each trader, what their profit and loss was and their capital. If something unexpected popped up, Dingwall would investigate the cause. Dingwall transferred this information to a spreadsheet so he could review the information more quickly. This enabled him to see what a trader had done the previous day and readily calculate the profit and loss of each trader. Every morning (starting at 6.00 a.m.) the inventory report for each trader was reviewed to determine individual trader exposure and TEG overall sector exposure. Based on this daily review, positions inconsistent with usual trading patterns could be detected.

¶ 426 At 9.00 a.m. preliminary Profit and Loss reports received from Accounting were reviewed. Any significant discrepancies between this actual Profit and Loss and the prior night's trader estimates were

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[224] Cooper transcript page 2542-2543.
[225] Transcript pages 2621-2622.

investigated. Any gains or losses out of the ordinary range for an individual trader were investigated. This usually involved analysis such as a review of trade data or a chronological reconstruction of trading activity and face-to-face interaction with the trader. Unusual gains or losses did not occur frequently.

¶ 427 During the day, Tucker and Dingwall each had as many as six monitors in front of them to display "tools" that could be selected to assist in monitoring and supervising the traders including:

- Ripple, (an in house inventory management system), monitored TDSI profit and loss capital usage, each trader's position and daily profit and loss all in real time or at any selected time. It could also bring up a summary page of all of the different inventories.[226]
- Belzberg Inventory Manager, fundamentally the same as Ripple.[227]
- Firm Book shows orders within TDSI and the identity of the trader placing the order. If it was a client hat had direct access (meaning they could put in their own orders), the order would be shown. The date the order went in and the price and quantity of the stock would be shown. Dingwall said the time of the order is not shown.[228]
- Fills Analysis Tool (also called Trade Analysis Tool) shows every single trade by anybody in the firm. This tool could pull up any information you wanted about any transaction that occurred on the TSEX for any one day or a number of days. Dingwall said he used this tool regularly. [229]
- Market by order shows every order of a stock on the TSEX and combines the orders at similar price levels. For example if there were ten people bidding at one price it would show ten orders at that price.[230]
- Market by price displays the quantity available at each price level. Tucker said he used the market by price and market by order tools most of the time, especially the market by order display because it would give him a real time view of the number of orders from TDSI at each various price level. [231]
- Market by broker displays the actual individual brokers (TDSI, RBC Dominion Securities *etc*.) bidding at the different price levels.[232]
- Reuters Screen gives a very good overview of the general market in terms of who was participating in a particular security. This could be used to look at the entire market, or TDSI trading activity. Tucker said he typically used this to view overall marketplace activity.[233]
- Stock Watch List ("**Watch List**") is list of stock symbols on a screen that identifies the bid price, the quantity bid, the offer price, the quantity for sale on the offering, the last sale and the volume for each of the stock symbols. A stock would remain on the Watch List unless it was deleted. Whenever anything happened in the stock the whole line of that stock would light up (flash) for a second or two and then disappear. If the text on the monitor was normally white with black background, it would reverse to be black font on a white background (go inverse[234]) showing the updated information resulting from what had happened. In short, this was a signal that *something* has happened in the stock.

¶ 428 The evidence does not clearly indicate which of the foregoing tools sets out the time of entry of a bid. For the purpose of this discussion it is assumed this information could be ascertained.

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[226] Tucker transcript page 2509 and Dingwall transcript pages 2153-2154.
[227] Tucker transcript page 2510.
[228] Transcript page 2152 line 18.
[229] Dingwall transcript page 2146-2147.
[230] Dingwall transcript page 2149.
[231] Tucker transcript pages 2511-2512.
[232] Dingwall transcript page 2151.
[233] Tucker transcript page 2514.
[234] Dingwall transcript page 2362.

¶ 429 Dingwall said the number of stocks on his Watch List on any given day occupied almost the capacity of the screen. He said the Watch List was not limited to stocks in the portfolio of the Proprietary Traders. TDSI has a huge number of client orders that come in every day. These stocks are added to the Watch List because from time to time a client will do something of concern that requires monitoring.

¶ 430 Dingwall said when he saw a stock on his Watch List flash he would generally pull up a Market by order to see whether the change in the stock was as a result of a TDSI trader and if it was, he would investigate further using Firm Book or Fills Analysis to identify what had happened.

¶ 431 Dingwall said the Watch List screen is updating all day. He said it would be physically impossible to investigate every signal. He said that if he tried to do this he would be sitting there just looking at TIC from 9.30 to 4.00 every single day because "as you can imagine from looking at the TOQs, each stock generates hundreds of pages of updates, every day, even on these illiquid stocks…"[235]

¶ 432 Dingwall recognized that manipulative activity is more likely to occur on or about the opening and at or near the close: "At 3.59 probably the entire screen would be going inverse because of the activity at that time of the day."[236]

¶ 433 Tucker had a Watch List similar to Dingwall but not identical. Tucker said the mere fact that a stock was on his Watch List did not mean that there was a review of every order that went in during the day or during the last ten minutes.

¶ 434 During the Relevant Period a record of executed trades was available that enabled the Trade Supervision Group and Cooper's second tier Compliance to carry out systematic procedures for post trade reviews. However, there was no tool available to TDSI to monitor real time orders (i.e. bids and offers). Consequently, there was no systematic procedure, manual or otherwise to review orders.[237] Tucker said:[238]

> Q. So that your review of orders was really more either random or *ad hoc*? In other words, it didn't follow an articulated procedure?
>
> A. Recall there was no -- there was no software available on the street to the participants to monitor real time orders so each participant, as part of their supervisory responsibilities, had their own methodology of reviewing orders. So I would say we reviewed orders, not on an *ad hoc* basis. It was done daily but it was certainly done in a manual type fashion until we had -- there was software commercially available to do it -- to help us supplement the process.
>
> Q. But it was in the nature of a more random review; isn't that fair?
>
> A. Okay. That would be fair.

¶ 435 Tucker said that during the Relevant Period RS (now IIROC) had (and continues to have) a real time software surveillance system called "Smarts" given to them by TSX which detects certain irregularities in the market[239] including the time and sequence of all bids and offers in the marketplace.[240] This tool was not provided to the dealers.[241] The dealers were provided with a number of reports (e.g. high month end closings) that did not include any information regarding bids and offers.

Decision re focussing on profit and loss position of the traders

¶ 436 The Panel does not accept the submission by IIROC Staff that the Trade Desk Supervisors focussed primarily on the profit and loss position of the traders. Time was spent on the profit and loss position but not an

[235] Dingwall transcript page 2367.
[236] Dingwall transcript page 2494.
[237] Tucker transcript page 2593.
[238] Transcript page 2594.
[239] Transcript page 2568.
[240] Transcript page 2571.
[241] Transcript page 2572.

undue amount of time. This was an essential part of their responsibility and understandably so, having regard to the substantial amount of capital at risk. This review had a monitoring side effect because positions inconsistent with usual trading patterns could be detected. By far the greatest amount of Dingwall's (and Cooper's) time was spent fulfilling their monitoring responsibilities. Profit and loss did not impinge on the performance of these responsibilities.

Discussion re no procedure for reviewing late bids and random review of late bids

¶ 437 The answer to this criticism is that there was no real time software surveillance system during the Relevant Period to detect the time and sequence of bids and offers in the marketplace. IIROC had the SMART software that could perform this function but it was not available to the dealers. Without this software, the only pragmatic alternative was random review.

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

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

¶ 440 In affirmation of the time that would be required to establish a pattern of bidding one need only look at the testimony of Cooper describing what he did in July 2006 to evaluate whether eight traders, including Sadeghi and Nott, engaged in improper trading during the month of October 2005. [242] Using a sophisticated software program called Compliance Explorer and applying his considerable skill, Cooper was able to compile sufficient information to re-create the October 2005 market data and do certain tests relating to late bids ("**October 2005 Analysis**") Cooper said this analysis took him "weeks"[243] to perform. The implication of this Analysis will be discussed below.

Decision re alleged failure of supervisory practices and procedures

¶ 441 Having regard to (i) the fact there was no software program available to detect the time and sequence of late bids and (ii) the trade room scenario (described above) relating to detecting and investigating late bids the Panel finds that the random review approach employed by Dingwall and Tucker was reasonable and realistic. This allegation is dismissed.

(iv) ALLEGED FAILURE TO ADEQUATELY REVIEW AND MONITOR ORDER ENTRY ACTIVITY

¶ 442 This allegation overlaps with the preceding allegation of alleged failure of supervisory practices and procedure. That discussion and decision apply to this allegation.

¶ 443 However, IIROC Staff amplifies the allegation by saying this failure is demonstrated by what happened in Nott and CDF.A and TIC where TDSI's trade desk supervision conducted the review of unfilled orders either very badly, not at all, or condoned the entry of late day closing bids and thereby failed to meet the standard set UMIR Policy 7.1. These criticisms will now be addressed.

Criticism re monitoring Nott and CDF.A

[242] Transcript pages 2700-2716.
[243] Transcript page 2716.

¶ 444 Nott voluntarily reported a large increase in his position in CDF.A to Dingwall on October 4, 2005. He told Dingwall he had accidentally "fat fingered" an order for CDF.A and wound up purchasing 154,000 shares in error.[244] This transaction brought his position in that stock to over 350,000 shares. The trade was large for Nott, representing roughly $100,000, and accordingly this accidental acquisition warranted on-going monitoring.

¶ 445 Dingwall took the precaution of placing CDF.A on his Watch List because of the position size. This was done from a risk-management perspective. Dingwall wanted to ensure that if the stock started to fall, the position could be liquidated.[245]

¶ 446 On October 19 Dingwall noticed some trading activity in CDF.A on his Watch List screen and determined that Nott had been responsible. Nott was given a verbal warning not to increase his position in CDF.A. On October 26, Dingwall noticed, again through his Watch List, a wash trade between Nott and Sadeghi in CDF.A. This led to follow up investigation and the Gatekeeper Report pursuant to UMIR 10.16.

¶ 447 TDSI deserves credit, not criticism, for the manner in which it monitored and detected the bidding improprieties in CDF.A and for the prompt filing of the Gatekeeper Report on November 16 (21 days after the discovery of the wash trade).

Criticism re monitoring TIC

¶ 448 IIROC Staff says that because of the heavy TDSI inventory position in TIC throughout the entire Relevant Period, there should have been a systematic review of closing bids.

¶ 449 The heavy TIC inventory was precisely the reason TIC was on the Watch List for the entire Relevant Period. None of the other Five Stocks were on the Watch List except CDF.A after the fat finger purchase by Nott on October 4.

¶ 450 Nemy said that during the Relevant Period TIC traded approximately ten million shares. He was responsible for approximately twenty five per cent of that volume.[246] Having regard to the monitoring challenges described earlier it would not have been possible to perform a systematic review of Nemy's late bids.

¶ 451 Nemy was a very experienced and competent trader and extremely successful. He was the senior trader at the Burlington Office and highly regarded by all the traders. He was entrusted to hold a long range position in TIC. The degree of confidence and trust in Nemy is verified by the fact he was allowed between five million and twenty million dollars of the total Burlington Office trading capital which was usually set at forty million dollars.[247] In November 2006 Nemy was promoted to a formal supervisory role and appointed a vice-president.[248]

¶ 452 Asked whether Nemy might bid for inventory purposes rather than price discovery Dingwall said:[249]

> I would think too in terms of, like the motive – you know he's quite comfortable in terms of the amount of P&L. You know, up a hundred [thousand dollars] down two hundred [thousand dollars]. He was a successful … You know, he made real money trading, P&L realized profits, not unrealized losses. So that's why I question that he would be doing it just to be marking his inventory.

¶ 453 Dingwall said he never had any trouble getting information from Nemy about his loss position ("He was very good."[250]). Dingwall said when Nemy called in his position at the end of the day he never understated or

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[244] Hearing Transcript, Dingwall, January 27 at p. 2216. (TDSI Evidence Brief, Tab S2)
[245] Hearing Transcript, Dingwall, January 27 at p. 2224. (TDSI Evidence Brief, Tab S2)
[246] Nemy transcript pages 1291-1292.
[247] Nemy transcript pages 1272-1273.
[248] Cooper transcript page 2741.
[249] Transcript page 2495.
[250] Transcript page 2496.

mislead Dingwall about how much he was losing in TIC ("He was very open and transparent."[251]).

¶ 454 The reason for not monitoring TIC is understandable.

Decision re failure to adequately review and monitor order entry activity

¶ 455 This allegation is dismissed.

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¶ 456 All four allegations having been dismissed, there is no proof that TDSI failed to comply with its UMIR Rule 7.1 and UMIR Policy 7.1 trading supervision obligations. Consequently this allegation is dismissed.

DISCUSSION OF THE OCTOBER 2005 ANALYSIS

¶ 457 The following discussion of the October 2005 Analysis delineates the fundamental flaw in the TDSI compliance monitoring system.

¶ 458 When Cooper looked at the market data that was compiled for the month of October 2005 (Cooper's October 2005 Analysis), he saw there were bids entering the market close to 4.00 p.m. He said that generally those bids appeared to be trading in the "context of the market" at that time.[252] The following statement by Cooper appears to be the genesis of the TDSI approach to the analysis of Artificial Closing Bids: [253]

> The bid would not be higher than the last sale or the high of the day. So it gave us the idea that yes, there were some late bids going into the market, but they might really not be that unusual or manipulative just because they were late. So we had to start thinking about some of the other aspects of UMIR 2.2. So UMIR 2.2 asks you to look at the time the order is entered, but it also asked you to look at the prices of preceding and succeeding trades, the change that you've affected on the bid or the last sale price, as the case may be, between an order and a trade. Those sorts of things. So we started thinking about those and the bids didn't really stick out except for the fact that they were late.

¶ 459 Cooper concluded that "other than the fact these bids are apparently late, there's nothing else to suggest that they are manipulative or that they are a price that the market has not seen yet already or that they're somehow inconsistent or misleading".[254]

¶ 460 Working with Compliance Explorer[255] Cooper specified certain alerts he wanted a compliance software program to monitor. The bid had to be very close to closing. It had to be small and at or above the last sale.[256] A bid that was below the last sale would not be alerted.[257] The following interchange provides an example:[258]

> Mr. Norris: So are you saying that if the last sale was 50 cents and a bid went in at 48 cents, then it wouldn't be picked up or it wouldn't be necessarily ---
>
> The Witness: It wouldn't flag it for us. But if you put in a bid at 51 cents or 50 cents, then it would point it out to us for review. But again, it's not indicative of an improper order, but it's just a suggestion that it's something that maybe needs to be looked at.
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> Mr. Norris: So to be clear, even with the new system allowing you to monitor other things

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[251] Transcript page 2496.
[252] Transcript page 2700.
[253] Transcript page 2700-2701.
[254] Transcript pages 2701-2702.
[255] In July 2006 Compliance Explorer was in the process of developing compliance and supervision technologies. TDSI worked with Compliance Explorer to develop alerts relating to late order placement and trading that might be potentially manipulative and to develop patterns of trading that might not otherwise be discernable. This feature was not available prior to this time.
[256] Transcript page 2704.
[257] Transcript page 2704.
[258] Transcript pages 2703-2704.

than the old system was, it wouldn't give you a bid that was below the last sale.

The Witness: That's just the way that we've configured it, yes.

¶ 461 Over the next period of time other alerts were added to the program. The alerts were designed to specifically relate to the guidelines that are outlined in the UMIR Policy. Boddie reviewed these tests and recommended some minor changes as described and explained in the Boddie Report.[259] But the "context of the market" principle was not altered.

¶ 462 This approach to bidding explains why Dingwall and Tucker would not be concerned when a late bid triggered the Watch List. All of Nemy's late bids in TIC were less than the price of the last trade (which they could easily see) and therefore in the context of the market.

¶ 463 Cooper did not develop a trading system. He analysed the existing system. His analysis confirms Nott's evidence that maintaining the price of a stock by bidding within the context of the market was the accepted standard at TDSI and not high closing.

¶ 464 Dingwall and Tucker did not detect the late bids IIROC Staff says should have been identified because they were using an alert system that was different than the alert system prescribed by IIROC. The reason for the different alert systems was an honest but erroneous interpretation of UMIR Policy.

¶ 465 The process of interpretation of the UMIR Rules and UMIR Policy is not something that happens overnight. The decision of this Panel is an important step in that process. The approach to bidding set out in these reasons closes the book on the practice of bidding within the context of the market in order to maintain the value of a stock and opens a new book of bidding in accordance with true market supply and demand.

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

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

Donald Lawson

Phillip Ted Norris

[259] Boddie Report page 40 in the paragraph titled TDSI Testing.