IN THE MATTER OF AN APPLICATION FOR A HEARING AND REVIEW OF DECISIONS OF THE ONTARIO DISTRICT COUNCIL OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA PURSUANT TO SECTION 21.7 OF SECURITIES ACT, R.S.O. 1990, c. S.5, AS AMENDED

-AND-

IN THE MATTER OF DISCIPLINE PROCEEDINGS PURSUANT TO BY-LAW 20 OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA

B E T W E E N

STAFF OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA

-AND-

DIMITRIOS BOULIERIS

Hearing:	**November 24 & 28, 2003**		
Panel:	**Paul M. Moore, Q.C.**	**-**	**Commissioner (Chair of the Panel)**
	Suresh Thakrar	**-**	**Commissioner**
	Paul K. Bates	**-**	**Commissioner**
Counsel:	**Kate G. Wootton**	**-**	**For the Staff of the Ontario Securities Commission**
	Ricardo Codina **Elsa Renzella**	**-**	**For the Staff of the Investment Dealers Association, the Applicant**
	Darryl T. Mann	**-**	**For Dimitrios Boulieris, the Respondent**

DECISION AND REASONS

I. The Proceeding

[1] This is an application for a hearing and review of two decisions of the Ontario District Council (District Council) of the Investment Dealers Association of Canada (IDA) pursuant to section 21.7 of the Ontario *Securities Act* R.S.O., 1990, c. S.5 (the Act). The two decisions are dated September 30, 2002 (Decision on the Merits) and January 17, 2003 (Penalty Decision) and relate to a hearing (the Hearing) concerning discipline proceedings commenced against Dimitrios Boulieris (the Respondent) by the staff of the IDA (Association Staff) pursuant to by-law 20 of the Investment Dealers Association of Canada.

[2] Association Staff requests this hearing and review on the basis that:

1. In dismissing Count 1(a) of the notice of Hearing and particulars initiating the proceedings, District Council erred in principle in that they misapprehended what the allegations were in Count 1(a), and how they could be proven. Association Staff argues that District Council overlooked evidence that the Respondent had facilitated the business of First Union Kreditanstalt S.A. (First Union);

2. District Council erred by imposing a penalty that was unfit and inappropriate in light of the Respondent's participation in the market manipulation;

3. District Council erred by not ordering the disgorgement of commissions received by the Respondent; and

4. District Council fettered its discretion in not imposing a fine on the Respondent.

[3] Association Staff argued that District Council erred by imposing a penalty that undermines specific and general deterrence for similar misconduct in the capital markets, and that District Council took into account irrelevant factors when concluding that the Respondent was not part of the market manipulation.

[4] Association Staff also argued that District Council erred in concluding that it could not order the disgorgement of commissions received by the Respondent on the basis that no evidence was presented as to who received the benefit of the commissions earned by the trading of shares of First Florida Communications Inc. (First Florida) and that it fettered its discretion by not imposing a fine on the Respondent on the basis that no fine had been requested by Association Staff.

II. Complaint against the Respondent

[5] Association Staff initiated the discipline proceedings against the Respondent pursuant to the IDA by-law 20. In its notice of Hearing and particulars, Association Staff alleged that the Respondent engaged in conduct unbecoming by:

1. knowingly acting as an agent or facilitator for a company engaged in soliciting for the purpose of selling securities while not registered to do so with the Commission [Count 1(a)]; and

2. trading for a client who had advised the Respondent that he was attempting to manipulate the market price of a security [Count 1(b)].

III. Overview

[6] Between July 1998 and July 1999, the Respondent was a registered representative employed with First Delta Securities (First Delta), formerly a member firm of the IDA in Toronto.

[7] Harold Arviv (Arviv) was a client of the Respondent. He told the Respondent that he intended to manipulate the shares of First Florida. Subsequently, Arviv and entities related or associated with him referred persons to him. One of those entities, First Union, sent him confirmations of purchases by persons referred by First Union.

[8] First Florida was a telecommunications company incorporated in the state of Florida. Its shares were listed on the United States Over-the-Counter Bulletin Board (OTC BB) between May 27, 1998 and November 19, 1999.

[9] On March 24, 1999, the Royal Canadian Mounted Police and staff of the Commission executed a search warrant at the business premise of First Union located in Toronto. Various documents were seized including sales scripts that were used in the promotion of First Florida shares to offshore investors.

[10] First Union was not registered as a dealer pursuant to section 25 of the Act and therefore was not permitted to solicit clients for the sale of securities.

[11] It was alleged that the Respondent facilitated the business of First Union by accepting confirmations from First Union and then putting trades through that were on the same terms as those that First Union had negotiated with their clients.

[12] The essence of that allegation was that the Respondent was facilitating a non-registered entity doing something for which it was required to be registered in Ontario, namely soliciting clients for the purchase of securities.

[13] The second allegation was that the Respondent traded for Arviv, who was also connected to First Union. The Respondent traded for Arviv after being told by him that he was going to be manipulating the stock for First Florida. The Respondent subsequently traded on behalf of Arviv and traded for accounts that he knew to be associated with him.

IV. The Decision of District Council

[14] In the Decision on the Merits, District Council held that the Respondent engaged in conduct unbecoming by carrying out the trading of a client who told him that the client would attempt to manipulate the market price of a security. All other allegations were dismissed.

[15] In the Penalty Decision, District Council imposed the following sanctions on the Respondent:

1. successful rewriting of the examination based on the *Conduct and Practices Handbook for Securities Industry Professionals* (CPH) prior to being reapproved to work in the investment industry; and

2. strict supervision for a period of two years upon the Respondent's re-employment with any member of the IDA.

[16] The Respondent was also ordered to pay costs in the amount of $5000.

[17] With respect to Count 1(b), District Council found that the Respondent had indeed engaged in conduct unbecoming by trading for Arviv. However, they also found that he did not participate in the manipulation.

V. Submissions of Association Staff

[18] Association Staff argued that evidence illustrated that while the Respondent may not have had complete knowledge of what Arviv was doing, he certainly had sufficient knowledge to extract himself from the situation, and his failure to do so was an indication that he was a willing and consenting participant to what Arviv was doing. He did have enough knowledge to know that the manipulation was happening.

[19] Association Staff seeks from the panel an order setting aside the parts of the Decision on the Merits related to Count 1(a) of the notice of Hearing and particulars and either:

> a) making a finding that the Respondent had engaged in conduct unbecoming a registered representative by knowingly acting as an agent or facilitator for First Union; or
>
> b) in the alternative, remitting this matter back to District Council for a re-hearing; or
>
> c) in the further alternative, making an order setting aside the Penalty Decision and imposing a just and appropriate penalty in the circumstances; or
>
> d) making such other or further order as counsel may request and the Commission may deem just.

VI. Submissions of the Respondent

[20] The Respondent submitted that District Council specifically noted the absence of any evidence from the Respondent's clients who purchased First Florida shares and who had opened accounts with the Respondent at First Delta. The Respondents further argued that none of the non-resident clients, whose identities, accounts, and transactions are particularized in a schedule to the notice of Hearing, testified at the Hearing, nor was any evidence proffered by Association Staff as to any efforts to interview these clients or otherwise secure their evidence.

[21] The Respondent also submitted that District Council had particular regard to the evidence that the Respondent did not simply execute purchase orders in connection with First Florida but that he spoke with each client prior to opening any account. Moreover, the Respondent did not open an account for each referral but only for some of the referrals.

[22] The Respondent further argued that District Council acted reasonably, given the absence of any evidence from the clients as well as any evidence as to the manner in which the orders from these clients were solicited. District Council was unable to find that the Respondent had knowingly acted as an agent or a facilitator for a company engaged in soliciting for the purpose of selling securities while not registered to do so with the Commission, as alleged by Association Staff.

VII. Law

A. Statutory Provisions

[23] Section 21.7(1) of the Act reads as follows:

> s. 21.7 (1) The Executive Director or a person or company directly affected by, or by the administration of, a direction, decision, order or ruling made under a by-law, rule, regulation, policy, procedure, interpretation or practice of a recognized stock exchange, recognized self-regulatory organization, recognized quotation and trade reporting system or recognized clearing agency may apply to the Commission for a hearing and review of the direction, decision, order or ruling.
>
> s. 21.7 (2) Section 8 applies to the hearing and review of the direction, decision, order or ruling.

[24] Section 8(3) of the Act reads as follows:

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

[25] Section 20.10 of IDA by-law 20 provides:

20.10 The applicable District Council shall have power:

a) to impose upon a registered representative, investment representative, sales manager, branch manager, assistant or co-branch manager, partner, director or officer of a Member or any other person who may be subject to the jurisdiction of the Association any one or more of the following penalties:

(i) a reprimand;

(ii) a fine not exceeding the greater of:

(1) $1,000,000.00 per offence; and

(2) an amount equal to three times the pecuniary benefit which accrued to such person as a result of committing the violation;

(iii) suspension of approval of the person for such specified period and upon such terms as the District Council may determine;

(iv) revocation of approval of such person;

(v) prohibition of approval of the person in any capacity for any period of time;

(vi) such conditions of approval or continued approval as may be considered appropriate by the District Council;

if, in the opinion of the District Council, the person:

(1) has failed to comply with or carry out the provisions of any federal or provincial statute relating to trading or advising in respect of securities or commodities or of any regulation or policy made pursuant thereto;

(2) has failed to comply with the provisions of any By-law, Regulation, Ruling or Policy of the Association;

(3) has engaged in any business conduct or practice which such District Council in its discretion considers unbecoming or not in the public interest; or

(4) is otherwise not qualified whether by integrity, solvency, training or experience.

B. Relevant Cases

[26] Where the basis of the application is a decision of a recognized stock exchange, recognized self-regulatory organization or similar body pursuant to s. 21.7, the Commission will accord deference to factual determinations central to its specialized competence: *Re Shambleau* (2002), 25 O.S.C.B. 1850 at 1852; affirmed (2003), 26 O.S.C.B. 1629 (Ont. Div.Ct.).

[27] In *Hretchka v. British Columbia (Attorney General)*, [1972] S.C.R. 119, the Deputy Superintendent of the British Columbia Securities Commission (BCSC) issued an order prohibiting any trading in shares of a mining company by Hretchka, his wife and her investment company. The Deputy Superintendent had given notice of the hearing to consider the temporary cease trading order to Hretchka only, and had inaccurately stated the purpose of the hearing in the notice. A hearing was held before the Superintendent and subsequently the Deputy Superintendent, in effect, continued the order. The parties requested a review of this decision. The BCSC, at a full hearing with all parties represented, confirmed the order of the Deputy Superintendent, varying it in certain particulars. In considering the nature of a hearing and review under section 30(2) of the British Columbia Securities Act (BCSA) in 1972 (now section 165(4)), which is similar to section 8(3) of the Act, the British Columbia Court of Appeal ruled that the BCSC was not limited to determining whether the order of the Deputy Superintendent was valid, but could also make its own order. The Supreme Court of Canada refused to grant leave to appeal in this finding and quoted, with approval, part of the Court of Appeal judgment which pointed out that section 30 of the BCSA, in providing for a review as well as a hearing, and in permitting the BCSC to make such "other direction, decision, order or ruling as the Commission deems proper," went "far beyond appellate jurisdiction in the strict sense of deciding whether a lower decision be right or wrong."

[28] *Hretchka* involved the exercise of a power delegated to the Deputy Superintendent by the BCSC, but the reasoning also applies to powers conferred directly on the Executive Director by the Act. By reason of section 21.7(2) of the Act, the Commission exercises original jurisdiction (as opposed to a limited appellate jurisdiction) when exercising its powers of review under section 21.7(1) of the Act.

[29] The Commission may "confirm the decision under review or make such other decision as the Commission considers proper." The Commission is, therefore, free to substitute its judgment for that of the District Council. The hearing and review is treated much like a trial *de novo* where the panel may admit new evidence as well as review the earlier proceedings and the applicant does not have the onus of showing that the District Council was in error in making the decision that is the subject of the application. See *Security Trading Inc. and the Toronto Stock Exchange* (1994), 17 O.S.C.B. 6097 at 6105 and *Re Security Trading Inc.*, [1995] T.S.E.D.D. No.2; *Picard and Fleming - Brokers*, November (1953), O.S.C.B. 14; *BioCapital Biotechnology and Healthcare Fund and BioCapital Mutual Fund Management Inc.* (2001), 24 O.S.C.B. 2659 at 2662.

[30] In this regard, a hearing and review may be considered broader in scope than an appeal, which is usually limited to determining whether there has been an error in law or a rule of natural

justice has been contravened. See *Re C. Cole & Co Ltd., Coles Books Stores Ltd. and Cole's Sporting Goods Ltd.*, [1965] 1 O.R. 331; affirmed [1965] 2 O.R. 243 (C.A.).

[31] However, in practice the Commission takes a restrained approach. The Commission will interfere with a decision of a self-regulatory organization (SRO) if any of the following grounds are present:

1. the SRO has proceeded on an incorrect principle;
2. the SRO has erred in law;
3. the SRO has overlooked some material evidence;
4. new and compelling evidence is presented to the Commission that was not presented to the SRO; or
5. the SRO's perception of the public interest conflicts with that of the Commission's.

See *Re Canada Malting* (1986), 9 O.S.C.B. 3565 at 3587 and *Security Trading Inc. and the Toronto Stock Exchange* (1994), 17 O.S.C.B. 6097 at 6105.

[32] The Commission will not substitute its own view of the evidence for that taken by an SRO just because the Commission might have reached a different conclusion. See *Re Cavalier Energy Ltd.* (1991), 14 O.S.C.B. 1480 at 1482; *Re Lafferty, Harwood & Partners Ltd. and Board of Governors of the Toronto Stock Exchange* (1973), O.S.C.B. 26, confirmed (1975), 8 O.R. (2d) 604 at 607 (Ont. Div. Ct.); and *GHZ Resource Corporation v. Vancouver Stock Exchange* (1993), 1 B.C.J. No. 3106 at para. 7 (B.C. C.A).

C. Degree of Proof

[33] The degree of proof required in disciplinary proceedings involving a registrant is such that before a tribunal reaches a conclusion of fact, the tribunal must be reasonably satisfied that the fact occurred; and whether the tribunal is so satisfied depends on the totality of the circumstances including the nature and consequences of the facts to be proved, the seriousness of an allegation made, and the gravity of the consequences that will flow from a particular finding. See *Re Bernstein and College of Physicians and Surgeons of Ontario* (1977), 15 O.R. (2d) 447 at 470 (Ont. Div. Ct.); and *Re Coates et al. and Registrar of Motor Vehicle Dealers and Salesmen* (1988), 65 O.R. (2d) 526 at 536 (Ont. Div. Ct.).

[34] *Bernstein* stands for the proposition that grave charges against a person cannot be established to the reasonable satisfaction of a discipline committee by fragile or suspect testimony. The evidence to establish the charges have to be of such quality and quantity as to lead a discipline committee acting with care and caution to the fair and reasonable conclusion that the person is guilty of those charges. The degree of proof required must be nothing short of clear and convincing and based upon cogent evidence which is accepted by the tribunal. See

Bernstein at 485 and *Coates* at 536.

VIII. Analysis

[35] District Council found that there was market manipulation. This is not an issue that the Commission must decide.

[36] The issue before the District Council was not whether the Respondent participated in the market manipulation but whether the Respondent facilitated the process.

[37] There was clear and cogent evidence of the Respondent's direct role in the trading. He was a necessary party to permit the market manipulation. Granted, the Respondent did not act as a mere conduit. But the fact that the Respondent talked to the referred persons, or that they became his clients, does not change or sanitize the facts: the Respondent knew that Arviv intended to manipulate the stock, that Arviv or entities working with him, such as First Union, had solicited the referrals, and that the trades executed by the Respondent were in accordance with the solicitations. Confirmations that referrals instructed or permitted the Respondent to turn into orders after he talked with them would not have appeared without someone soliciting the referrals.

[38] First Union was not registered as a dealer and therefore was not permitted to solicit clients for the sale of securities. First Union also sought the Respondent's assistance to execute purchases to be made by the referrals it made. From January to March 1999, First Union faxed various trade confirmations to the Respondent relating to the purchase of First Florida shares by the referrals. These confirmations stated that the purchase order was referred by First Union through the courtesy of First Delta. The confirmations also set out information regarding each purchaser's name and address, the number of First Florida shares to be purchased, and the purchase price.

[39] The confirmations contained a First Delta account number that had been assigned to each referral prior to any account being opened at First Delta. The Respondent had sent unassigned First Delta account numbers to Arviv by fax and acknowledged that First Union probably obtained these unassigned First Delta account numbers from Arviv.

[40] The purchases for the clients were made by the Respondent on the same terms that were set out in the confirmations received by the Respondent.

[41] Although the Respondent maintained that the purchase price was not pre-determined by First Union (as set out in the confirmations) but was set by the market, on twenty-one separate occasions the referrals bought First Florida shares at prices that were not within the market range for the day of the purchase.

[42] The Respondent clearly facilitated the business of First Union evidenced by the confirmations sent, and the business referred to, the Respondent. The business was that of a financial intermediary for which registration is required in Ontario. It is not necessary in reaching this conclusion to understand how referred persons were solicited by First Union or

what the Respondent and the referred persons discussed.

[43] Of the 44 purchases executed for the referral accounts, 21 of the trades were crossed in-house with accounts related to Arviv and for which the Respondent was the registered representative.

[44] Clearly, the Respondent's role was directly related to the trading of First Florida shares and its manipulation. Evidence established that the First Florida shares were the subject of a "pump and dump" scheme.

[45] The Respondent was the registered representative for accounts at First Delta. Others connected with Arviv had accounts at BMO Nesbitt Burns, Yorkton Securities, Haywood Securities, and Merrill Lynch (U.S.). These accounts, along with the accounts at First Delta (collectively known control group accounts), carried out a large and significant portion of the trading in First Florida shares between January and June 1999, the period of the manipulation.

[46] The Respondent was the registered representative for two corporate accounts at First Delta. Arviv's wife had trading authority for one of the accounts. The Respondent knew that Arviv had influence over that account and that he was the beneficial owner of the other account.

[47] In January 1999, these two accounts at First Delta held 1,078,600 First Florida shares, which represented approximately 93.7% of First Florida's free trading shares and 97.02% of First Florida's shares deposited with the Depository Trust Company (DTC). The shares deposited with the DTC represent all First Florida shares deposited with securities dealers in Canada and the U.S.A.

[48] The Respondent derived monetary compensation as a result of his involvement. There was undisputed evidence at the penalty part of the Hearing, on consent of both parties, that the Respondent earned commissions from the trading of First Florida and as to the quantum. This evidence showed the total commissions for all trades in First Florida shares with respect to the accounts for which the Respondent was the Registered Representative. The commissions amounted to $85,669.70. That includes the portion belonging to First Delta. The Respondent's share was 50 percent or $42,834.85.

[49] The Respondent's actions were willful and egregious. They related to his fitness and honesty as a registrant and an individual employed by a member of the IDA.

[50] Where a registrant has willfully facilitated a market manipulation, he should face severe consequences, including removal from the marketplace for an appropriate period and disgorgement of moneys received as a consequence of his conduct. Otherwise, confidence in the capital markets will suffer and the market will be at risk of further disreputable conduct, and harm from the registrant.

[51] The District Council misapprehended the public interest in having strong sanctions in view of the Respondent's willful conduct.

[52] Discipline proceedings were also brought against First Delta and four of its directors and officers. The allegations were, in essence, that they failed to supervise the Respondent and that they did not have adequate policies and procedures in place. A settlement agreement was entered into with First Delta and three of the directors and officers. It was considered by District Council and approved. Proceedings against the fourth director and officer were dropped.

[53] During the 12 months the Respondent was employed at First Delta, he generated $665,412.34 in commissions. First Delta retained one-half of that amount. In the settlement agreement, First Delta agreed to pay a fine of $600,000 and its membership in the IDA was terminated. One of the directors and officers was fined $50,000 and suspended for a period of 6 months. The two other directors and officers were each fined $30,000 and suspended for 30 days.

IX. The Decision

[54] In dismissing Count 1(a), District Council misapprehended the essential business and operational elements necessary to prove that count.

[55] District Council erred by imposing a penalty that was completely unfit and inappropriate in light of the Respondent's facilitation of the market manipulation.

[56] District Council should have ordered the disgorgement of commissions received by the Respondent. There was undisputed evidence of the amount of the commissions. We agree with Association Staff that District Council could have imposed a fine on the Respondent and that its reason for not doing so – namely that this had not been explicitly asked for – was not a valid reason. The notice of Hearing gave notice that the District Council had the power to impose a fine not exceeding the greater of $1,000,000 and three times the pecuniary benefit.

[57] It is not desirable in this case to send the matter back to District Council. No further evidence or argument is necessary in order for us to make the orders that we are making.

[58] In deciding the appropriate fine, we are taking into account the fact that the Respondent was young and with little experience. In addition, he was operating in an environment that lacked adequate supervision and the proper guidance required to foster appropriate behaviour. As admitted by First Delta in the settlement agreement, “First Delta has violated Association Regulation 1300.1(a) by failing to exercise due diligence in learning the essential facts relative to several of its clients, their accounts and the trade orders made for those accounts.” Three directors and officers “violated Association Regulation 1300.2 by permitting new client accounts to be opened without approval and by failing to adequately supervise accounts for which Boulieris was the registered representative” and one director and officer “violated Association Regulation 1300.2 at the material time by failing to maintain effective account supervision procedures for First Delta.” Nevertheless, as we have previously stated the Respondent’s conduct was willful and egregious.

[59] The Respondent applied for a transfer of his registration approximately a year prior to the

Penalty Decision. With the blocking of the transfer, the Respondent has effectively been suspended since October 2001.

[60] We are making an order:

a) setting aside the parts of the Decision on the Merits related to Count 1(a) of the notice of Hearing and particulars;

b) imposing a fine of $128,504.55 on the Respondent, payable to the IDA, equal to the sum of, (i) $42,834.85, being the portion of the commissions earned by the Respondent for the purchase of First Florida shares during the applicable period, and (ii) $85,669.70 being two times the pecuniary benefit which accrued to the Respondent from trading in shares of First Florida during the applicable period; and

c) suspending the approval of the Respondent until October 1, 2008 (being equivalent to a period of seven years, commencing October 1, 2001).

[61] We confirm District Council's order:

a) as to costs;

b) as to the successful rewriting by the Respondent of the examination based on the *Conduct and Practices Handbook for Securities Industry Professionals*; and

c) as to strict supervision for two years upon the Respondent's re-employment with any member of the IDA.

DATED at Toronto this 28th day of January, 2004.

"Paul M. Moore" "Paul K. Bates"

Paul M. Moore, Q.C. Paul K. Bates

"Suresh Thakrar"

Suresh Thakrar