The Ontario Securities Commission

OSC Bulletin

August 9, 2012

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The Ontario Securities Commission administers the
Securities Act of Ontario (R.S.O. 1990, c. S.5) and the
Commodity Futures Act of Ontario (R.S.O. 1990, c. C.20)

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Toronto, Ontario
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Table of Contents

Chapter 1

Notices / News Releases

1.1 Notices

1.1.1 Current Proceedings Before The Ontario Securities Commission

August 9, 2012

CURRENT PROCEEDINGS

BEFORE

ONTARIO SECURITIES COMMISSION

- -

Unless otherwise indicated in the date column, all hearings will take place at the following location:

The Harry S. Bray Hearing Room
Ontario Securities Commission
Cadillac Fairview Tower
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Judith N. Robertson	—	JNR
Charles Wesley Moore (Wes) Scott	—	CWMS

SCHEDULED OSC HEARINGS

August 13, August 15-16 and August 21, 2012 10:00 a.m.	**Irwin Boock, Stanton Defreitas, Jason Wong, Saudia Allie, Alena Dubinsky, Alex Khodjaiants, Select American Transfer Co., Leasesmart, Inc., Advanced Growing Systems, Inc., International Energy Ltd., Nutrione Corporation, Pocketop Corporation, Asia Telecom Ltd., Pharm Control Ltd., Cambridge Resources Corporation, Compushare Transfer Corporation, Federated Purchaser, Inc., TCC Industries, Inc., First National Entertainment Corporation, WGI Holdings, Inc. and Enerbrite Technologies Group** s. 127 and 127.1 D. Campbell in attendance for Staff Panel: VK
August 13, 2012 10:00 a.m. August 15, 2012 10:30 a.m. September 18-19, 2012 10:00 a.m.	**Crown Hill Capital Corporation and Wayne Lawrence Pushka** s. 127 A. Perschy/A. Pelletier in attendance for Staff Panel: JEAT/CP/JNR
August 13, 2012 2:00 p.m.	**Shaun Gerard McErlean and Securus Capital Inc.** s. 127 M. Britton in attendance for Staff Panel: VK/JDC

August 13, 2012 2:30 p.m.	**Marlon Gary Hibbert, Ashanti orporate Services Inc., Dominion International Resource Management Inc., Kabash Resource Management, Power to Create Wealth Inc. and Power to Create Wealth Inc. (Panama)** s. 127 J. Lynch/S. Chandra in attendance for Staff Panel: JDC
August 15, 2012 10:00 a.m.	**Morgan Dragon Development Corp., John Cheong (aka Kim Meng Cheong), Herman Tse, Devon Ricketts and Mark Griffiths** s. 127 J. Feasby in attendance for Staff Panel: EPK
August 15 and 16, 2012 10:00 a.m.	**Goldpoint Resources Corporation, Pasqualino Novielli also known as Lee or Lino Novielli, Brian Patrick Moloney also known as Brian Caldwell, and Zaida Pimentel also known as Zaida Novielli** s. 127(1) and 127(5) C. Watson in attendance for Staff Panel: MGC
August 21, 2012 10:30 a.m.	**Energy Syndications Inc., Green Syndications Inc., Syndications Canada Inc., Land Syndications Inc. and Douglas Chaddock** s. 127 C. Johnson in attendance for Staff Panel: MGC
August 28, 2012 2:30 p.m.	**David Charles Phillips and John Russell Wilson** s. 127 Y. Chisholm in attendance for Staff Panel: JDC
September 4-10, September 12-14, September 19-24, and September 26 – October 5, 2012 10:00 a.m.	**Portus Alternative Asset Management Inc., Portus Asset Management Inc., Boaz Manor, Michael Mendelson, Michael Labanowich and John Ogg** s. 127 H Craig in attendance for Staff Panel: TBA
September 4, 2012 11:00 a.m.	**Juniper Fund Management Corporation, Juniper Income Fund, Juniper Equity Growth Fund and Roy Brown (a.k.a. Roy Brown-Rodrigues)** s. 127 and 127.1 D. Ferris in attendance for Staff Panel: VK/MCH
September 5, 2012 10:00 a.m.	**Vincent Ciccone and Cabo Catoche Corp. (a.k.a. Medra Corp. and Medra Corporation)** s. 127 M. Vaillancourt in attendance for Staff Panel: VK
September 5-10, September 12-14 and September 19-21, 2012 10:00 a.m.	**Vincent Ciccone and Medra Corp.** s. 127 M. Vaillancourt in attendance for Staff Panel: VK
September 11, 2012 3:00 p.m.	**Systematech Solutions Inc., April Vuong and Hao Quach** s. 127 J. Feasby in attendance for Staff Panel: EPK

September 12, 2012 9:00 a.m.	**Sage Investment Group, C.A.D.E Resources Group Inc., Greenstone Financial Group, Fidelity Financial Group, Antonio Carlos Neto David Oliveira, and Anne Marie Ridley** s. 127 C. Watson in attendance for Staff Panel: EPK
September 13, 2012 10:00 a.m.	**Paul Donald** s. 127 C. Price in attendance for Staff Panel: CP/PLK
September 18, 2012 10:00 a.m.	**Roger Carl Schoer** s. 21.7 C. Johnson in attendance for Staff Panel: JDC
September 21, 2012 10:00 a.m.	**Oversea Chinese Fund Limited Partnership, Weizhen Tang and Associates Inc., Weizhen Tang Corp., and Weizhen Tang** s. 127 and 127.1 H. Craig in attendance for Staff Panel: TBA
September 24, September 26 – October 5 and October 10-19, 2012 10:00 a.m.	**New Found Freedom Financial, Ron Deonarine Singh, Wayne Gerard Martinez, Pauline Levy, David Whidden, Paul Swaby and Zompas Consulting** s. 127 A. Heydon in attendance for Staff Panel: JDC
October 10, 2012 10:00 a.m.	**Sino-Forest Corporation, Allen Chan, Albert Ip, Alfred C.T. Hung, George Ho and Simon Yeung** s. 127 H. Craig in attendance for Staff Panel: MGC
October 10, 2012 10:00 a.m	**Sino-Forest Corporation, Allen Chan, Albert Ip, Alfred C.T. Hung, George Ho, Simon Yeung and David Horsley** s. 127 H. Craig in attendance for Staff Panel: MGC
October 11, 2012 9:00 a.m.	**New Solutions Capital Inc., New Solutions Financial Corporation, New Solutions Financial (II) Corporation, New Solutions Financial (III) Corporation, New Solutions Financial (VI) Corporation and Ron Ovenden** s. 127 S. Horgan in attendance for Staff Panel: TBA
October 19, 2012 10:00 a.m.	**Global Energy Group, Ltd., New Gold Limited Partnerships, Christina Harper, Howard Rash, Michael Schaumer, Elliot Feder, Vadim Tsatskin, Oded Pasternak, Alan Silverstein, Herbert Groberman, Allan Walker, Peter Robinson, Vyacheslav Brikman, Nikola Bajovski, Bruce Cohen and Andrew Shiff** s. 127 C. Watson in attendance for Staff Panel: PLK

October 22 and October 24 – November 5, 2012 10:00 a.m.	**MBS Group (Canada) Ltd., Balbir Ahluwalia and Mohinder Ahluwalia** s. 37, 127 and 127.1 C. Rossi in attendance for staff Panel: TBA
October 29-31, 2012 10:00 a.m.	**Shallow Oil & Gas Inc., Eric O'Brien, Abel Da Silva and Abraham Herbert Grossman aka Allen Grossman and Kevin Wash** s. 127 H. Craig/S. Schumacher in attendance for Staff Panel: JDC
October 31 – November 5, November 7-9, December 3, December 5-17 and December 19, 2012 10:00 a.m.	**Rezwealth Financial Services Inc., Pamela Ramoutar, Justin Ramoutar, Tiffin Financial Corporation, Daniel Tiffin, 2150129 Ontario Inc., Sylvan Blackett, 1778445 Ontario Inc. and Willoughby Smith** s. 127(1) and (5) A. Heydon in attendance for Staff Panel: TBA
November 5, 2012 10:00 a.m.	**Heir Home Equity Investment Rewards Inc.; FFI First Fruit Investments Inc.; Wealth Building Mortgages Inc.; Archibald Robertson; Eric Deschamps; Canyon Acquisitions, LLC; Canyon Acquisitions International, LLC; Brent Borland; Wayne D. Robbins; Marco Caruso; Placencia Estates Development, Ltd.; Copal Resort Development Group, LLC; Rendezvous Island, Ltd.; The Placencia Marina, Ltd.; and The Placencia Hotel and Residences Ltd.** s. 127 B. Shulman in attendance for Staff Panel: TBA
November 12-19 and November 21, 2012 10:00 a.m.	**Sandy Winick, Andrea Lee McCarthy, Kolt Curry, Laura Mateyak, Gregory J. Curry, American Heritage Stock Transfer Inc., American Heritage Stock Transfer, Inc., BFM Industries Inc., Liquid Gold International Inc., and Nanotech Industries Inc.** s. 127 J. Feasby in attendance for Staff Panel: TBA
November 21 – December 3 and December 5-December 14, 2012 10:00 a.m.	**Bernard Boily** s. 127 and 127.1 M. Vaillancourt/U. Sheikh in attendance for Staff Panel: TBA
November 27-28, 2012 10:00 a.m.	**Simply Wealth Financial Group Inc., Naida Allarde, Bernardo Giangrosso, K&S Global Wealth Creative Strategies Inc., Kevin Persaud, Maxine Lobban and Wayne Lobban** s. 127 and 127.1 C. Johnson in attendance for Staff Panel: JDC
December 4, 2012 3:30 p.m.	**Global Consulting and Financial Services, Crown Capital Management Corporation, Canadian Private Audit Service, Executive Asset Management, Michael Chomica, Peter Siklos (Also Known As Peter Kuti), Jan Chomica, and Lorne Banks** s. 127 H. Craig/C. Rossi in attendance for Staff Panel: CP

December 20, 2012 10:00 a.m.	**New Hudson Television Corporation, New Hudson Television L.L.C. & James Dmitry Salganov** s. 127 C. Watson in attendance for Staff Panel: TBA
January 7 – February 5, 2013 10:00 a.m.	**Jowdat Waheed and Bruce Walter** s. 127 J. Lynch in attendance for Staff Panel: TBA
January 21-28 and January 30 – February 1, 2013 10:00 a.m.	**Moncasa Capital Corporation and John Frederick Collins** s. 127 T. Center in attendance for Staff Panel: TBA
January 23-25 and January 30-31, 2013 10:00 a.m.	**Sage Investment Group, C.A.D.E Resources Group Inc., Greenstone Financial Group, Fidelity Financial Group, Antonio Carlos Neto David Oliveira, and Anne Marie Ridley** s. 127 C. Watson in attendance for Staff Panel: TBA
February 1, 2013 10:00 a.m.	**Ground Wealth Inc., Armadillo Energy Inc., Paul Schuett, Doug DeBoer, James Linde, Susan Lawson, Michelle Dunk, Adrion Smith, Bianca Soto and Terry Reichert** s. 127 S. Schumacher in attendance for Staff Panel: TBA
February 4-11 and February 13, 2013 10:00 a.m.	**Alexander Christ Doulis (aka Alexander Christos Doulis, aka Alexandros Christodoulidis) and Liberty Consulting Ltd.** s. 127 J. Feasby in attendance for Staff Panel: TBA
March 18-25, March 27-28, April 1-5 and April 24-25, 2013 10:00 a.m.	**Peter Sbaraglia** s. 127 J. Lynch in attendance for Staff Panel: CP
April 29 – May 6 and May 8-10, 2013 10:00 a.m.	**North American Financial Group Inc., North American Capital Inc., Alexander Flavio Arconti, and Luigino Arconti** s. 127 M. Vaillancourt in attendance for Staff Panel: TBA
TBA	**Yama Abdullah Yaqeen** s. 8(2) J. Superina in attendance for Staff Panel: TBA
TBA	**Microsourceonline Inc., Michael Peter Anzelmo, Vito Curalli, Jaime S. Lobo, Sumit Majumdar and Jeffrey David Mandell** s. 127 J. Waechter in attendance for Staff Panel: TBA
TBA	**Frank Dunn, Douglas Beatty, Michael Gollogly** s. 127 K. Daniels in attendance for Staff Panel: TBA

TBA

MRS Sciences Inc. (formerly Morningside Capital Corp.), Americo DeRosa, Ronald Sherman, Edward Emmons and Ivan Cavric

s. 127 and 127(1)

D. Ferris in attendance for Staff

Panel: TBA

TBA

Gold-Quest International, 1725587 Ontario Inc. carrying on business as Health and Harmoney, Harmoney Club Inc., Donald Iain Buchanan, Lisa Buchanan and Sandra Gale

s. 127

H. Craig in attendance for Staff

Panel: TBA

TBA

Gold-Quest International, Health and Harmoney, Iain Buchanan and Lisa Buchanan

s. 127

H. Craig in attendance for Staff

Panel: TBA

TBA

Brilliante Brasilcan Resources Corp., York Rio Resources Inc., Brian W. Aidelman, Jason Georgiadis, Richard Taylor and Victor York

s. 127

H. Craig in attendance for Staff

Panel: TBA

TBA

Paul Azeff, Korin Bobrow, Mitchell Finkelstein, Howard Jeffrey Miller and Man Kin Cheng (a.k.a. Francis Cheng)

s. 127

T. Center/D. Campbell in attendance for Staff

Panel: TBA

TBA

Uranium308 Resources Inc., Michael Friedman, George Schwartz, Peter Robinson, and Shafi Khan

s. 127

H. Craig/C.Rossi in attendance for Staff

Panel: TBA

TBA

Axcess Automation LLC, Axcess Fund Management, LLC, Axcess Fund, L.P., Gordon Alan Driver, David Rutledge, 6845941 Canada Inc. carrying on business as Anesis Investments, Steven M. Taylor, Berkshire Management Services Inc. carrying on business as International Communication Strategies, 1303066 Ontario Ltd. Carrying on business as ACG Graphic Communications, Montecassino Management Corporation, Reynold Mainse, World Class Communications Inc. and Ronald Mainse

s. 127

Y. Chisholm in attendance for Staff

Panel: TBA

TBA

FactorCorp Inc., FactorCorp Financial Inc. and Mark Twerdun

s. 127

C. Price in attendance for Staff

Panel: TBA

TBA

2196768 Ontario Ltd carrying on business as Rare Investments, Ramadhar Dookhie, Adil Sunderji and Evgueni Todorov

s. 127

D. Campbell in attendance for Staff

Panel: TBA

TBA

York Rio Resources Inc., Brilliante Brasilcan Resources Corp., Victor York, Robert Runic, George Schwartz, Peter Robinson, Adam Sherman, Ryan Demchuk, Matthew Oliver, Gordon Valde and Scott Bassingdale

s. 127

H. Craig/C. Watson in attendance for Staff

Panel: TBA

TBA

Innovative Gifting Inc., Terence Lushington, Z2A Corp., and Christine Hewitt

s. 127

M. Vaillancourt in attendance for Staff

Panel: TBA

TBA

Firestar Capital Management Corp., Kamposse Financial Corp., Firestar Investment Management Group, Michael Ciavarella and Michael Mitton

s. 127

H. Craig in attendance for Staff

Panel: TBA

TBA

David M. O'Brien

s. 37, 127 and 127.1

B. Shulman in attendance for Staff

Panel: TBA

TBA

Eda Marie Agueci, Dennis Wing, Santo Iacono, Josephine Raponi, Kimberley Stephany, Henry Fiorillo, Giuseppe (Joseph) Fiorini, John Serpa, Ian Telfer, Jacob Gornitzki and Pollen Services Limited

s. 127

J, Waechter/U. Sheikh in attendance for Staff

Panel: TBA

TBA

Empire Consulting Inc. and Desmond Chambers

s. 127

D. Ferris in attendance for Staff

Panel: TBA

TBA

American Heritage Stock Transfer Inc., American Heritage Stock Transfer, Inc., BFM Industries Inc., Denver Gardner Inc., Sandy Winick, Andrea Lee McCarthy, Kolt Curry and Laura Mateyak

s. 127

J. Feasby in attendance for Staff

Panel: TBA

TBA

Energy Syndications Inc. Green Syndications Inc. , Syndications Canada Inc., Daniel Strumos, Michael Baum and Douglas William Chaddock

s. 127

C. Johnson in attendance for Staff

Panel: TBA

TBA

Bunting & Waddington Inc., Arvind Sanmugam, Julie Winget and Jenifer Brekelmans

s. 127

S. Schumacher in attendance for Staff

Panel: TBA

TBA

Global Energy Group, Ltd., New Gold Limited Partnerships, Christina Harper, Vadim Tsatskin, Michael Schaumer, Elliot Feder, Oded Pasternak, Alan Silverstein, Herbert Groberman, Allan Walker, Peter Robinson, Vyacheslav Brikman, Nikola Bajovski, Bruce Cohen and Andrew Shiff

s. 37, 127 and 127.1

C. Watson in attendance for Staff

Panel: TBA

TBA

Colby Cooper Capital Inc. Colby Cooper Inc., Pac West Minerals Limited John Douglas Lee Mason

s. 127

B. Shulman in attendance for Staff

Panel: TBA

TBA

Normand Gauthier, Gentree Asset Management Inc., R.E.A.L. Group Fund III (Canada) LP, and CanPro Income Fund I, LP

s. 127

B. Shulman in attendance for Staff

Panel: TBA

TBA

Beryl Henderson

s. 127

S. Schumacher in attendance for Staff

Panel: TBA

TBA

Ciccone Group, Cabo Catoche Corp. (a.k.a Medra Corp. and Medra Corporation), 990509 Ontario Inc., Tadd Financial Inc., Cachet Wealth Management Inc., Vincent Ciccone (a.k.a. Vince Ciccone), Darryl Brubacher, Andrew J Martin, Steve Haney, Klaudiusz Malinowski and Ben Giangrosso

s. 127

M. Vaillancourt in attendance for Staff

Panel: TBA

TBA

International Strategic Investments, International Strategic Investments Inc., Somin Holdings Inc., Nazim Gillani and Ryan J. Driscoll

s. 127

C. Watson in attendance for Staff

Panel: TBA

TBA

Majestic Supply Co. Inc., Suncastle Developments Corporation, Herbert Adams, Steve Bishop, Mary Kricfalusi, Kevin Loman and CBK Enterprises Inc.

s. 37, 127 and 127.1

D. Ferris in attendance for Staff

Panel: TBA

TBA

David Charles Phillips

s. 127

Y. Chisholm in attendance for Staff

Panel: TBA

TBA **Nest Acquisitions and Mergers, IMG International Inc., Caroline Myriam Frayssignes, David Pelcowitz, Michael Smith, and Robert Patrick Zuk**

s. 37, 127 and 127.1

C. Price in attendance for Staff

Panel: TBA

TBA **Global RESP Corporation and Global Growth Assets Inc.**

s. 127

D. Ferris in attendance for Staff

Panel: TBA

ADJOURNED SINE DIE

Global Privacy Management Trust and Robert Cranston

Livent Inc., Garth H. Drabinsky, Myron I. Gottlieb, Gordon Eckstein, Robert Topol

LandBankers International MX, S.A. De C.V.; Sierra Madre Holdings MX, S.A. De C.V.; L&B LandBanking Trust S.A. De C.V.; Brian J. Wolf Zacarias; Roger Fernando Ayuso Loyo, Alan Hemingway, Kelly Friesen, Sonja A. McAdam, Ed Moore, Kim Moore, Jason Rogers and Dave Urrutia

Hollinger Inc., Conrad M. Black, F. David Radler, John A. Boultbee and Peter Y. Atkinson

1.1.2 Notice of Correction – Matco Financial Inc.

An incorrect date was published on February 17, 2012 for *Matco Financial Inc.* (2012), 35 OSCB 1703.

The date read “February 13, 2011” and should have read “February 13, 2012”.

1.1.3 Notice of Correction – Shaun Gerard McErlean and Securus Capital Inc.

NOTICE OF CORRECTION

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

AND

**IN THE MATTER OF
SHAUN GERARD MCERLEAN AND
SECURUS CAPITAL INC.**

(2012), 35 O.S.C.B. 6859. In the Reasons and Decision in this matter, published on July 26, 2012, Mr. Jack Bateman was incorrectly described as a witness for the respondent, Mr. McErlean. The relevant headings in the Reasons and Decision have been amended and now correctly identify Mr. Bateman as a witness called by Enforcement Staff of the Ontario Securities Commission.

1.2 Notices of Hearing

1.2.1 Global RESP Corporation and Global Growth Assets Inc.

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

AND

**IN THE MATTER OF
GLOBAL RESP CORPORATION AND
GLOBAL GROWTH ASSETS INC.**

NOTICE OF HEARING

WHEREAS on July 26, 2012, the Ontario Securities Commission (the "Commission") issued a temporary order (the "Temporary Order") pursuant to subsections 127(1) and 127(5) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act");

AND WHEREAS the Temporary Order ordered terms and conditions imposed on the registrations of Global RESP Corporation ("Global RESP") and Global Growth Assets Inc. ("GGAI");

TAKE NOTICE THAT the Commission will hold a hearing ("the Hearing") pursuant to section 127 of the Act at the offices of the Commission at 20 Queen Street West, 17th Floor Hearing Room on Friday, August 10, 2012 at 9:30 a.m., or as soon thereafter as the hearing can be held;

TO CONSIDER whether, in the opinion of the Commission, it is in the public interest, pursuant to subsections 127(7) and (8) of the Act, for the Commission to:

(a) extend the Temporary Order; and

(b) to make further orders as the Commission considers appropriate;

BY REASON OF such allegations and evidence as counsel may advise and the Commission may permit;

AND TAKE FURTHER NOTICE that any party to the proceedings may be represented by counsel at the hearing;

AND TAKE FURTHER NOTICE that upon failure of any party to attend at the time and place aforesaid, the hearing may proceed in the absence of that party and such party is not entitled to any further notice of the proceedings.

DATED at Toronto this 1st day of August, 2012.

"John Stevenson"
Secretary to the Commission

1.3 News Releases

1.3.1 OSC Panel Issues Sanctions Against Lyndz Pharmaceuticals Inc., James Marketing Ltd., Michael Eatch and Rickey McKenzie for Breaches of the Securities Act

FOR IMMEDIATE RELEASE
August 1, 2012

OSC PANEL ISSUES SANCTIONS AGAINST LYNDZ PHARMACEUTICALS INC., JAMES MARKETING LTD., MICHAEL EATCH AND RICKEY MCKENZIE FOR BREACHES OF THE SECURITIES ACT

TORONTO – A panel of the Ontario Securities Commission (OSC) today released its reasons and decision on sanctions and costs against Lyndz Pharmaceuticals Inc., James Marketing Ltd., Michael Eatch and Rickey McKenzie ("the Respondents").

In its earlier decision on the merits, the OSC panel found that the Respondents engaged in an illegal distribution and perpetrated a fraud on Lyndz investors. Between 1999 and 2008, approximately $2.1 million was raised from the sale of Lyndz securities to investors in Ontario, other Canadian provinces and the United Kingdom.

In their decision on sanctions and costs, the OSC panel found that the Respondents "cannot be safely trusted to participate in the capital markets in any way" and accordingly ordered permanent market prohibitions against all the Respondents. In addition, the OSC panel ordered that:

- Lyndz disgorge to the Commission the amount of $400,000;
- Lyndz and James Marketing disgorge to the Commission on a joint and several basis the amount of $345,000;
- Eatch, Lyndz and James Marketing disgorge to the Commission on a joint and several basis the amount of $655,000;
- McKenzie, Lyndz and James Marketing disgorge to the Commission on a joint and several basis the amount of $700,000;
- Eatch pay an administrative penalty in the amount of $500,000; and
- McKenzie pay an administrative penalty in the amount of $600,000.

A copy of the Reasons and Decision on Sanctions in this matter is available on the OSC website at www.osc.gov.on.ca.

The mandate of the OSC is to provide protection to investors from unfair, improper or fraudulent practices and to foster fair and efficient capital markets and confidence in capital markets. Investors are urged to check the registration of any person or company offering an investment opportunity and to review the OSC's investor materials available at www.osc.gov.on.ca.

For media inquiries:
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1.4 Notice from the Office of the Secretary

1.4.1 Lyndz Pharmaceuticals Inc. et al.

FOR IMMEDIATE RELEASE
August 1, 2012

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

AND

IN THE MATTER OF
LYNDZ PHARMACEUTICALS INC.,
JAMES MARKETING LTD.,
MICHAEL EATCH AND RICKEY MCKENZIE

TORONTO – The Commission issued its Reasons and Decision on Sanctions and Costs and an Order in the above named matter.

A copy of the Reasons and Decision on Sanctions and Costs and the Order dated July 31, 2012 are available at **www.osc.gov.on.ca**.

OFFICE OF THE SECRETARY
JOHN P. STEVENSON
SECRETARY

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1.4.2 IIROC v. Mark Allen Dennis

FOR IMMEDIATE RELEASE
August 1, 2012

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

AND

IN THE MATTER OF
AN APPLICATION FOR A HEARING AND REVIEW
OF A DECISION OF THE ONTARIO DISTRICT COUNCIL
OF THE INVESTMENT INDUSTRY REGULATORY
ORGANIZATION OF CANADA PURSUANT TO
SECTION 21.7 OF THE SECURITIES ACT,
R.S.O. c. S.5, AS AMENDED

AND

IN THE MATTER OF
DISCIPLINE PROCEEDINGS PURSUANT TO THE
BY-LAWS OF THE INVESTMENT DEALERS
ASSOCIATION OF CANADA AND THE DEALER
MEMBER RULES OF THE INVESTMENT INDUSTRY
REGULATORY ORGANIZATION OF CANADA

BETWEEN

STAFF OF THE INVESTMENT INDUSTRY
REGULATORY ORGANIZATION OF CANADA

AND

MARK ALLEN DENNIS

TORONTO – The Commission issued its Reasons For Decision and an Order in the above named matter.

A copy of the Reasons For Decision and the Order dated July 31, 2012 are available at **www.osc.gov.on.ca**.

OFFICE OF THE SECRETARY
JOHN P. STEVENSON
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1-877-785-1555 (Toll Free)

1.4.3 Paul Donald

FOR IMMEDIATE RELEASE
August 2, 2012

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

AND

IN THE MATTER OF
PAUL DONALD

TORONTO – Following the hearing on the merits in the above noted matter, the Commission issued its Reasons and Decision.

The Commission also issued an Order which provides that the hearing to determine sanctions and costs will be held at the offices of the Commission at 20 Queen Street West, Toronto, commencing on September 13, 2012 at 10:00 a.m.

A copy of the Reasons and Decision and the Order dated August 1, 2012 are available at **www.osc.gov.on.ca**.

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SECRETARY

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Manager, Public Affairs
416-593-2361

Dylan Rae
Media Relations Specialist
416-595-8934

For investor inquiries:

OSC Contact Centre
416-593-8314
1-877-785-1555 (Toll Free)

1.4.4 Sanjiv Sawh and Vlad Trkulja

FOR IMMEDIATE RELEASE
August 2, 2012

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

AND

IN THE MATTER OF
AN APPLICATION FOR A HEARING AND REVIEW OF THE DECISION OF DIRECTOR BRIDGE OF THE ONTARIO SECURITIES COMMISSION, PURSUANT TO SUBSECTION 8(2) OF THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
SANJIV SAWH AND VLAD TRKULJA

TORONTO – The Commission issued its Reasons For Decision in the above named matter.

A copy of the Reasons For Decision dated August 1, 2012 is available at **www.osc.gov.on.ca**.

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1.4.5 Marlon Gary Hibbert et al.

FOR IMMEDIATE RELEASE
August 2, 2012

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

AND

IN THE MATTER OF
MARLON GARY HIBBERT, ASHANTI CORPORATE SERVICES INC., DOMINION INTERNATIONAL RESOURCE MANAGEMENT INC., KABASH RESOURCE MANAGEMENT, POWER TO CREATE WEALTH INC. AND POWER TO CREATE WEALTH INC. (PANAMA)

TORONTO – The Commission issued an Order in the above named matter which provides that the sanctions hearing is adjourned to August 13, 2012 at 2:30 p.m. on a peremptory basis with respect to Hibbert.

A copy of the Order dated August 1, 2012 is available at **www.osc.gov.on.ca**.

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1.4.6 Ground Wealth Inc. et al.

FOR IMMEDIATE RELEASE
August 2, 2012

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

AND

IN THE MATTER OF
GROUND WEALTH INC., ARMADILLO ENERGY INC., PAUL SCHUETT, DOUG DEBOER, JAMES LINDE, SUSAN LAWSON, MICHELLE DUNK, ADRION SMITH, BIANCA SOTO AND TERRY REICHERT

TORONTO – The Commission issued a Temporary Order in the above named matter which provides that, pursuant to subsections 127(7) & 127(8) of the Act, (1) the February 2012 Temporary Order is extended to February 4, 2013, or until further order of the Commission; and (2) the matter shall return before the Commission on February 1, 2013 at 10:00 a.m. or on such other date as set by the Office of the Secretary and agreed to by the parties.

A copy of the Temporary Order dated August 2, 2012 is available at **www.osc.gov.on.ca**.

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1-877-785-1555 (Toll Free)

1.4.7 Global RESP Corporation and Global Growth Assets Inc.

FOR IMMEDIATE RELEASE
August 3, 2012

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

AND

IN THE MATTER OF
GLOBAL RESP CORPORATION AND
GLOBAL GROWTH ASSETS INC.

TORONTO – The Office of the Secretary issued a Notice of Hearing on August 1, 2012 setting the matter down to be heard on August 10, 2012 at 9:30 a.m. to consider whether it is in the public interest for the Commission:

(1) to extend the Temporary Order pursuant to subsections 127(7) and (8) of the Act

(2) to make such further orders as the Commission considers appropriate.

A copy of the Notice of Hearing dated August 1, 2012 and Temporary Order dated July 26, 2012 are available at **www.osc.gov.on.ca**.

OFFICE OF THE SECRETARY
JOHN P. STEVENSON
SECRETARY

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Chapter 2

Decisions, Orders and Rulings

2.1 Decisions

2.1.1 Silvermex Resources Inc. – s. 1(10)

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – Issuer deemed to no longer be a reporting issuer under securities legislation.

Applicable Legislative Provisions

Securities Act, R.S.O. 1990, c. S.5, as am., s. 1(10)(a)(ii).

August 1, 2012

Silvermex Resources Inc.
1805 - 925 West Georgia Street,
Vancouver, British Columbia
V6C 3L2

Dear Sirs:

Re: Silvermex Resources Inc. (the Applicant) – application for a decision under the securities legislation of Ontario and Alberta (the Jurisdictions) that the Applicant is not a Reporting Issuer

The Applicant has applied to the local securities regulatory authority or regulator (the Decision Maker) in each of the Jurisdictions for a decision under the securities legislation (the Legislation) of the Jurisdictions that the Applicant is not a reporting issuer.

In this decision, "securityholder" means, for a security, the beneficial owner of the security.

The Applicant has represented to the Decision Makers that:

(a) the outstanding securities of the Applicant, including debt securities, are beneficially owned, directly or indirectly, by fewer than 15 securityholders in each of the jurisdictions of Canada and fewer than 51 securityholders in total worldwide;

(b) no securities of the Applicant, including debt securities, are traded in Canada or another country on a marketplace as defined in National Instrument 21-101 *Marketplace Operation* or any other facility for bringing together buyers and sellers of securities where trading data is publicly reported;

(c) the Applicant is applying for a decision that it is not a reporting issuer in all of the jurisdictions of Canada in which it is currently a reporting issuer; and

(d) the Applicant is not in default of any of its obligations under the Legislation as a reporting issuer.

Each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the decision has been met and orders that the Applicant is not a reporting issuer.

"Jo-Anne Matear"
Manager, Corporate Finance
Ontario Securities Commission

2.1.2 BMO InvestorLine Inc.

Headnote

Multilateral Instrument 11-102 Passport System – the requirement (the Adviser Registration Requirement) in section 74 of the Securities Act (Ontario) that prohibits a person or company from being in the business of advising, unless the person or company is registered in the appropriate category of registration under the legislation, should not apply in respect of the offering of a full service brokerage service (adviceDirect) which includes suitability recommendations through an online platform with involvement by registered representatives – without the relief with respect to the Adviser Registration Requirement, BMO InvestorLine would be subject to adviser registration since it does not satisfy all the conditions of the adviser registration exemption in section 8.23 of NI 31-103 – the advice to an adviceDirect client is provided through a combination of online advice and individual dealing representatives and not solely through an individual dealing representatives as is worded in paragraph 8.23(b) of National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations – section 74 of the Securities Act (Ontario) and paragraph 8.23(b) of National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations.

Applicable Legislative Provisions

Securities Act, R.S.O. 1990, c. S.5, as am., s. 74(1).
Multilateral Instrument 11-102 Passport System, s. 4.7(1).
National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations, s. 8.23(b).

August 1, 2012

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO
(the Jurisdiction)

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
BMO INVESTORLINE INC.
(the Filer or BMO InvestorLine)

DECISION

Background

The principal regulator in the Jurisdiction has received an application (the **Application**) from the Filer for a decision under the securities legislation of the Jurisdiction of the principal regulator (the **Legislation**) that the requirement (the **Adviser Registration Requirement**) in the Legislation that prohibits a person or company from being in the business of advising, unless the person or company is registered in the appropriate category of registration under the Legislation, should not apply in respect of the offering of a full service brokerage service (**adviceDirect**) which includes suitability recommendations that are (a) in connection with trades in securities that the Filer and its registered representatives are permitted to make under the Filer's registration; (b) provided through an online security trading platform with involvement by registered representatives; and (c) not in respect of a managed account (the **Exemption Sought**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

(a) the Ontario Securities Commission (**OSC**) is the principal regulator for this decision, and

(b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 Passport System (**MI 11-102**) is intended to be relied upon in all jurisdictions of Canada other than Ontario (collectively, the Non-Principal Jurisdictions, and together with Ontario, the **Filing Jurisdictions**).

Representations

BMO InvestorLine

1. BMO InvestorLine:

   (a) is a corporation incorporated under the laws of Canada and has its head office in Toronto, Ontario;

   (b) is registered in each of the Filing Jurisdictions as an investment dealer and is a member of the Investment Industry Regulatory Organization of Canada (**IIROC**); and

   (c) operates as a discount broker and is exempt from suitability requirements under securities legislation and under IIROC's rules in respect of the discount brokerage service.

adviceDirect

2. adviceDirect is a fee-based full service brokerage service offering what IIROC refers to as "advisory accounts" which includes suitability recommendations through an online platform with involvement by registered representatives of BMO InvestorLine (**adviceDirect Registered Representatives**).

3. adviceDirect takes a long term, disciplined and classical approach to advising clients on their investments and therefore is not suitable for active traders, day traders and other excessive trading strategies. adviceDirect advises clients to diversify their portfolios over various asset classes as opposed to an individual stock picking approach.

4. adviceDirect will not permit clients to short sell securities or trade options or to trade in futures, commodities, or foreign exchange.

5. Four investor profiles are available under adviceDirect. These investor profiles are described to the potential client during the application process and each description includes a statement about time horizon and risk tolerance.

6. adviceDirect is based on an analysis engine that evaluates a client's portfolio holdings against his or her recommended investor profile and then provides recommendations (e.g. buy, hold or sell) directly to the client. A client's portfolio is analyzed on four elements – ratings, asset allocation, risk and diversification.

7. Each adviceDirect account is subject to continuous overall portfolio suitability review to determine whether the overall composition of the client's portfolio continues to be suitable for the client and the client will be alerted immediately of any discrepancies allowing appropriate corrective action to be taken.

8. A team of adviceDirect Registered Representatives will be assigned to each adviceDirect client.

9. adviceDirect is overseen by a committee, the adviceDirect Review Committee (**ARC**) that will be comprised of senior management and subject matter experts from BMO InvestorLine and/or BMO Financial Group. Each ARC member will be an IIROC approved person in either an executive, supervisor or registered representative approved category. The ARC members plus various subject matter experts will assist in guiding the future development of adviceDirect; as well as provide input on the operations and performance characteristics of adviceDirect.

10. adviceDirect meets IIROC's suitability assessment requirements subject to any relief from such requirements granted by IIROC to BMO InvestorLine in respect of adviceDirect.

Account opening, collection of know-your-client (KYC) information and recommendation of investor profile

11. The adviceDirect account opening process involves the following four stages (which are summarized in paragraph 13 below):

    Stage 1: Collection of personal information and client verification;

    Stage 2: Collection of investment related information;

    Stage 3: Discussion between adviceDirect Registered Representative and the applicant; and

    Stage 4: Review and approval/denial.

12. During the account opening process, the applicant has access to online help and definitions. Explanations about the account opening form are available to the applicant during the account opening process. There are clear and complete descriptions of terminology used in the account opening process and explanations of the reason for collecting the information available to the applicant. The applicant also has the option of contacting an adviceDirect Registered Representative during the account opening process to receive assistance. The adviceDirect account opening process also includes each applicant being called by an adviceDirect Registered Representative to discuss his or her application prior to the application being approved (as described under Stage 3 in paragraph 13 below).

13. The following is a summary of the components of the KYC information collected during each stage of the adviceDirect account opening process.

Stage 1

(a) *Personal information and client verification:* The initial stage of the adviceDirect account opening process collects information about the applicant including name, address, email address, citizenship, SIN number, type of account and where applicable, credit history. After this information is collected, adviceDirect conducts an authentication of the applicant using the services of Equifax Canada Inc.

(b) Once the authentication process has been completed, the applicant will be permitted to continue with the account opening process and will be required to provide further information including employment, income, net worth and sources of funds.

Stage 2

(c) *Investment objectives, investment needs and time horizon:* After providing the personal information described above, the applicant is asked to set out his or her investment objectives, investment needs and time horizon through a series of questions which will help identify the applicant as having either an income, balanced, growth or aggressive objective.

(d) *Investment knowledge and experience:* adviceDirect also collects information about the applicant's investment knowledge – the categories are Limited (little understanding of investing and limited experience with different types of investments), Average (understand investing basics and have some experience with different types of investments), Good (comfortable understanding of investing and a good deal of experience with different types of investments) and Expert (excellent understanding of investing and a great deal of experience with a variety of investments and strategies).

(e) An applicant is asked about investing experience with various investment products such as cash, fixed income securities and equities. In each of these categories there are questions about whether the applicant has obtained experience with specific products such as treasury-bills, bonds, income trusts or private placements.

(f) *Risk tolerance and account objectives:* An applicant is asked about his or her risk tolerance and account objectives in the application. In addition, the adviceDirect Registered Representative will discuss the applicant's risk tolerance and account objectives directly with the applicant during Stage 3 of the account opening process.

(g) *Investor profile:* There are four investor profiles available under adviceDirect – income, balanced, growth and aggressive growth. As part of the online application, an adviceDirect applicant is asked to identify (either independently or with the assistance of an online investor profile questionnaire that the applicant has the option of completing) which investor profile he or she believes best suits him or her however, it is the adviceDirect Registered Representative's responsibility to recommend a suitable investor profile for each applicant.

Stage 3

(h) *Discussion with adviceDirect Registered Representative:* Prior to the account application being approved, an adviceDirect Registered Representative will call the applicant after the application has been completed to discuss the application including the following:

(i) the nature of the adviceDirect service offering, including the fees associated with the account, the order types that are permitted under adviceDirect, the suitability notifications and how they work and funding of the account;

(ii) the applicant's risk tolerance, investment knowledge, investment objectives, investment needs, investment time horizon, account objectives and any other relevant information, so that the applicant has a clear and complete understanding of why the information was gathered, and how adviceDirect uses the information to ensure suitable recommendations are made for the individual;

(iii) the investor profile identified by the applicant (either independently or with the assistance of the online investor profile questionnaire) in the online application. The adviceDirect Registered Representative is responsible for making a recommendation about which investor profile is suitable for the applicant based on the KYC information collected online (including the answers to the online investor profile questionnaire if completed) and the discussion between the applicant and the adviceDirect Registered Representative. If none of the four investor profiles available under adviceDirect is suitable for the applicant, or if the adviceDirect Registered Representative has determined that an adviceDirect account is not suitable for the applicant, the adviceDirect Registered Representative will not recommend that the applicant open an adviceDirect account and that the application be denied.

(i) The KYC information collected through the online application process and during the discussion between an applicant and an adviceDirect Registered Representative will be documented.

(j) The Filer will maintain appropriate systems to ensure that accurate records of all communications and transactions that occur on the adviceDirect platform are kept to ensure that a compliance review can be conducted.

Stage 4

(k) *Final review and approval:* Each completed application is reviewed by the adviceDirect Supervisor in accordance with BMO adviceDirect written policies and procedures and then the approval or denial decision is made. If none of the four investor profiles available under adviceDirect is suitable for the applicant, or if an adviceDirect account is not suitable for the applicant, the application will not be approved. As well, an application will not be approved if the investor profile identified in the application form is not the same as the investor profile recommended for the applicant by the adviceDirect Registered Representative. If an applicant insists on an investor profile that is not suitable for him or her, based on the adviceDirect Registered Representative's assessment, an adviceDirect account will not be opened for the applicant.

Account supervision, suitability and the role of adviceDirect Registered Representatives

14. The ultimate designated person, chief compliance officer and other supervisory registrants of BMO InvestorLine will be accountable for adviceDirect and will be reporting to the BMO InvestorLine Board of Directors on a semi-annual basis.

15. Each client's adviceDirect account will be documented and approved in accordance with applicable IIROC rules, other relevant securities legislation and BMO InvestorLine's policies and procedures.

16. BMO InvestorLine has written policies and procedures with respect to adviceDirect which set out a level of account supervision that complies with IIROC's rules and is conducted through a combination of proprietary computer systems and dealing representative interaction.

17. Once an adviceDirect account has been opened for a client, the client will have his or her account supervised by BMO InvestorLine in the following way:

(a) continuous monitoring by adviceDirect to determine whether the overall composition of a client's portfolio continues to be suitable for the client;

(b) daily and monthly supervisory activities performed by the applicable adviceDirect Supervisor in accordance with IIROC's rules for two-tier reviews which includes monthly monitoring by adviceDirect Registered Representatives of the client's portfolio and trading activity including the occurrences of suitability alerts generated by adviceDirect;

(c) daily and monthly supervisory activities performed by BMO InvestorLine's Compliance Department in accordance with IIROC's rules for two-tier reviews; and

(d) at a minimum, an annual review by an adviceDirect Registered Representative.

18. Each adviceDirect account is subject to continuous overall portfolio suitability review to ensure the level of risk in the portfolio is suitable for the client and that the portfolio is aligned with the client's investor profile. The suitability assessment of a client's portfolio will be based on three parameters: asset allocation, risk and diversification. For each type of investor profile there are specific thresholds with respect to equities and fixed income which are set out in the investor profile descriptions. The suitability assessment will take into consideration the thresholds for the client's specific investor profile, and the specific holdings in the client's portfolio to determine the suitability of the portfolio in order to make the appropriate recommendations.

19. An adviceDirect client can transfer his or her existing securities holdings into the adviceDirect account in which case, these securities will be subject to a suitability assessment by adviceDirect (i.e., if the asset allocation/securities transferred are not suitable based on the recommended investor profile, the suitability escalation process will ensue and the client will be prompted to take remedial action).

20. If a client attempts to execute a transaction that is considered by adviceDirect to be unsuitable for the client, a message will be displayed warning the client of the unsuitability of the potential transaction. The client may decide to amend his or her order or continue with the original order after acknowledging having received the warning message.

21. A client's KYC information is kept updated through a process of electronic communications and discussions with an adviceDirect Registered Representative.

22. When a client experiences a material change in circumstances, he or she will fill out a material change form with the updated KYC information and provide the form to BMO InvestorLine. Material change forms are reviewed by the adviceDirect Supervisor or an adviceDirect Registered Representative as per the standards for opening a new account. adviceDirect clients will be prompted in various ways to provide updated KYC information. For example, a message to adviceDirect clients will appear at least twice a year on a client's account statement asking if the client's circumstances have changed and telling him or her how to update the information. As well, when a client is contacted directly by an adviceDirect Registered Representative regarding a suitability issue with his or her portfolio, the client will be asked to confirm if there are any changes to his or her KYC information. And, as part of the account supervision process, each client will be contacted directly by an adviceDirect Registered Representative on an annual basis at a minimum who will discuss, among other things, whether there have been any changes to the client's KYC information. Additional methods for clients to provide updated KYC information may be added to adviceDirect from time to time.

23. An adviceDirect Registered Representative's role in respect of adviceDirect clients includes:

    (a) account opening review as described above, including making recommendations as to the suitability of the account itself and the investor profile for each adviceDirect client;

    (b) ongoing account supervision;

    (c) conducting a suitability assessment for a client when requested by the client; and when required under the adviceDirect suitability alert process;

    (d) market commentary discussing economic and market updates relevant to a client's portfolio;

    (e) research; and

    (f) execution of trades.

24. The adviceDirect Registered Representatives will be determining the appropriateness of the adviceDirect service and the account types available under adviceDirect at all times including when marketing adviceDirect to prospective new clients.

adviceDirect client disclosure

25. In addition to the disclosure of information made during the account opening process as described above, information will also be disclosed to an adviceDirect client after his or her account is approved as follows:

    (a) when the client signs onto his or her adviceDirect account, the information provided to the client includes:

        - Client Agreement (contains disclosure items required by law)
        - 90-day trial period terms and conditions

- Protecting your privacy (disclosure about BMO's privacy code)
- Canadian Investor Protection Fund (description of how CIPF operates)
- adviceDirect fee schedule
- Investor's guide to making a complaint
- Opening your retail account (IIROC brochure)
- Conflicts Disclosure Document
- About adviceDirect (described in paragraph 26 below);

(b) each client may also receive a call once the account is funded; and

(c) educational material covering various aspects of adviceDirect will be available to adviceDirect clients.

26. Specific information about the availability of continuous suitability monitoring and about the recommendations that an adviceDirect Registered Representative can make under the adviceDirect service are contained in the Client Agreement and in a plain language document called About adviceDirect. Both documents are made available to the client when his or her account is opened and will be available to clients through the adviceDirect website.

adviceDirect investment recommendations

27. adviceDirect will generate recommendations about equity and mutual fund investments. An adviceDirect client will also be able to choose from a list of fixed income securities identified by BMO InvestorLine.

28. An adviceDirect client will have access to information about the securities that adviceDirect recommends. The client will be able to access information from MarketGrader (with respect to equities) and Lipper (with respect to mutual funds) that is specific to the security being recommended. In addition, there is a "Research" tab the client can access to obtain a variety of research information from third-party entities including research on a specific security (e.g. research from S&P Research), ratings on securities by various analysts, and general economic research.

29. adviceDirect Registered Representatives will be available from 8:00 a.m. to 8:00 p.m. (ET) to discuss recommendations generated by adviceDirect with clients.

Conflicts of interest

30. Recommendations provided by adviceDirect are not produced in such a way as to favour related-party securities over third-party securities or to result in increased sales of related party products. There is no bias towards related party securities in any of the investor profiles or asset class mixes. adviceDirect's recommendations may include a BMO Financial Group product in addition to third-party products.

31. Where securities offered by any BMO InvestorLine affiliated entity are recommended, adviceDirect will provide clear and accurate disclosure to clients specifically advising them of this fact. When an adviceDirect client enters an order for a related or connected issuer, there will be a notification directly on the order entry screen itself before the trade is executed, stating that the security is issued by a related or connected issuer of BMO InvestorLine. While no acknowledgement of the notification is required by the client, on the order entry screen, there will be a link to the conflicts of interest disclosure document which the client may access.

32. The compensation structure for adviceDirect Registered Representatives is non-commission based and there is no incentive within the compensation structure that encourages the sale of related party securities over the sale of non-related party securities.

33. BMO InvestorLine may receive trailer fees in respect of some mutual funds held by a client in an adviceDirect account and therefore, the value of those mutual fund units which pay the trailer fee to BMO InvestorLine will be excluded in calculating the fee payable by a client for his or her adviceDirect account. Since an adviceDirect account is a fee-based account, no commission will be paid to BMO InvestorLine in respect of a trade in mutual fund units by an adviceDirect client.

Exemption Sought

34. Under National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**), there is a general exemption (section 8.23 of NI 31-103) for dealers, and dealing representatives acting on behalf of the dealer, from the adviser registration requirement when giving non-discretionary advice (i.e., suitability recommendations) in the ordinary course of the dealer's business if the advice is

    (a) in connection with a trade in a security that the dealer and the representative are permitted to make under his, her or its registration;

    (b) provided by the representative; and

    (c) not in respect of a managed account.

35. Without the Exemption Sought with respect to the Adviser Registration Requirement, BMO InvestorLine would be subject to adviser registration since it does not satisfy all the conditions of the adviser registration exemption in section 8.23 of NI 31-103 because the advice to an adviceDirect client is provided through a combination of online advice and individual dealing representatives and not solely through an individual dealing representative as worded in paragraph 8.23(b) of NI 31-103.

Decision

The Decision Maker being satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the decision has been met.

The decision of the Decision Maker under the Legislation is that the Exemption Sought is granted provided that

    (a) the Filer is a member of IIROC;

    (b) adviceDirect offers only what IIROC refers to as "advisory accounts";

    (c) the Filer is in compliance with any relief granted by IIROC to the Filer in respect of adviceDirect;

    (d) proprietary websites relating to adviceDirect, adviceDirect brochures and any other documents describing the adviceDirect offering state the following: "An adviceDirect account is a non-discretionary fee based account which offers investment recommendations. adviceDirect does not provide portfolio management by a portfolio manager. The client makes their own investment decisions and manages their own investment portfolio. adviceDirect does not offer discretionary, managed accounts.";

    (e) the Filer provides the OSC with a report with respect to adviceDirect concerning the items set out in Appendix A hereto (i) six months after the launch date, (ii) one year after the launch date, and (iii) thereafter, as agreed to between the Filer and the OSC;

    (f) this Decision shall terminate in a Filing Jurisdiction upon the implementation in the Filing Jurisdiction of a rule, other instrument, or amendments, by the Filing Jurisdictions that governs the provision of the offering of a full service brokerage service including suitability recommendations through an online platform with involvement by registered representatives.

"Mary Condon"
Vice Chair
Ontario Securities Commission

"James E. A. Turner"
Vice Chair
Ontario Securities Commission

Appendix A

1. Any system integrity and compliance deficiency related issues identified and any steps taken to address those issues

2. Any other information requested by OSC staff including, but not limited to, details relating to:

   - all suitability alerts subject to the escalation process
   - product related suitability issues
   - order type related suitability issues
   - order control issues including market volatility control issues
   - unreasonable recommendations generated by the adviceDirect system
   - system failures
   - integrity of the information provided by the third party vendors
   - compliance deficiencies identified by internal and external auditors or adviceDirect's Advisory Review Committee
   - denials and related statistical data (e.g., how often does a registered representative conclude that the adviceDirect account is not suitable for an individual, how often does a registered representative disagree with an individual about the individual's self-selected investor profile, and accordingly, does not recommend that investor profile to the individual in question)

2.1.3 Lithium One Inc. – s. 1(10)

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – application for an order that the issuer is not a reporting issuer.

Ontario Statutes

Securities Act, R.S.O. 1990, c. S.5, as am., s. 1(10).

July 31, 2012

Lithium One Inc.
c/o Fasken Martineau DuMoulin LLP
Stock Exchange Tower
P.O. Box 242, Suite 3700
800 Square Victoria
Montreal, Québec H4Z 1E9

Attention: Monica Dingle

Dear Sirs/Mesdames:

Re: Lithium One Inc. (the "Applicant") – Application for a Decision under the Securities Legislation of Alberta, Ontario and Québec (the "Jurisdictions") Revoking the Applicant's Status as a Reporting Issuer

The Applicant has applied to the local securities regulatory authority or regulator (the Decision Maker) in each of the Jurisdictions for a decision under the securities legislation (the Legislation) of the Jurisdictions that the Applicant is not a reporting issuer.

In this decision, "securityholder" means, for a security, the beneficial owner of the security.

The Applicant has represented to the Decision Makers that:

(a) the outstanding securities of the Applicant, including debt securities, are beneficially owned, directly or indirectly, by fewer than 15 securityholders in each of the jurisdictions of Canada and fewer than 51 securityholders in total worldwide;

(b) no securities of the Applicant, including debt securities, are traded in Canada or another country on a marketplace as defined in National Instrument 21-101 Marketplace Operation or any other facility for bringing together buyers and sellers of securities where trading data is publicly reported;

(c) the Applicant is applying for a decision that it is not a reporting issuer in all of the jurisdictions of Canada in which it is currently a reporting issuer; and

(d) the Applicant is not in default of any of its obligations under the Legislation as a reporting issuer.

Each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the decision has been met and orders that the Applicant is not a reporting issuer.

"Shannon O'Hearn"
Manager, Corporate Finance
Ontario Securities Commission

2.1.4 Whiterock Real Estate Investment Trust

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – exemption granted from continuous disclosure and certification requirements to a co-obligor of debentures – continuous disclosure of parent co-obligor will be provided in lieu.

Applicable Legislative Provisions

National Instrument 51-102 Continuous Disclosure Obligations.
National Instrument 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings.

July 31, 2012

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO
(the "Jurisdiction")

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
WHITEROCK REAL ESTATE INVESTMENT TRUST
(the "Filer")

DECISION

Background

The principal regulator has received an application from the Filer for a decision under the securities legislation of the principal regulator (the "**Legislation**") granting the Filer relief (the "**Exemptions Sought**") from the following:

1. the continuous disclosure requirements contained in National Instrument 51-102 – *Continuous Disclosure Obligations* ("NI 51-102"), as amended from time to time (the "**Continuous Disclosure Requirements**"); and

2. the certification requirements contained in National Instrument 52-109 – *Certification of Disclosure in Issuers' Annual and Interim Filings* ("NI 52-109"), as amended from time to time (the "**Certification Requirements**").

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application),

1. the Ontario Securities Commission is the principal regulator for the application, and

2. the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* ("**MI 11-102**") is intended to be relied upon in British Columbia, Alberta, Saskatchewan, Manitoba, Québec, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland and Labrador.

Interpretation

Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

Representations

The decision is based on the following facts represented by the Filer:

1. The Filer is an unincorporated, open ended real estate investment trust created by a declaration of trust dated May 17, 2005.

2. The Filer's head office is located at 30 Adelaide Street East, Suite 1600, Toronto, Ontario, M5C 3H1.

3. The Filer is a reporting issuer in all of the provinces of Canada.

4. Dundee is an unincorporated, open-ended real estate investment trust created by a declaration of trust dated May 9, 2003, as amended and restated.

5. Dundee's head office is located at 30 Adelaide Street East, Suite 1600, Toronto, Ontario, M5C 3H1.

6. Dundee is a reporting issuer in all of the provinces of Canada.

7. On March 2, 2012, Dundee acquired the Filer. The acquisition was effected by means of a take-over bid by Dundee to acquire any or all of the outstanding units of the Filer, the acquisition by Dundee of all or substantially all of the assets of the Filer and the redemption by the Filer of all of its issued and outstanding units other than 100 units held by Dundee (the "**Transaction**"). The units of the Filer were delisted by the TSX as of the close of business on March 5, 2012.

8. As a result of the Transaction, all of the issued and outstanding units of the Filer are held by an affiliate of Dundee. The units of the Filer are the only voting securities of the Filer. Accordingly, Dundee is the beneficial owner of all the outstanding voting securities of the Filer.

9. In connection with the Transaction, Dundee (as successor to and co-obligor with the Filer) assumed the obligation for the due and punctual

payment of all of the Filer's debentures outstanding at the time of completion of the Transaction, the interest thereon and all other moneys payable under the indentures governing such debentures. Dundee also agreed to observe and perform all of the covenants and obligations of the Filer under such indentures and such debentures. Such debentures are collectively referred to in this decision as the "**Dundee Debentures**".

10. The Filer remained as a co-obligor under the indentures governing the Dundee Debentures. The obligation of the Filer in respect of Dundee Debentures is limited to the obligation, as co-obligor with Dundee, for the due and punctual payment of the principal amount of Dundee Debentures, the interest thereon and all other moneys payable under the indentures governing such Dundee Debentures.

11. The obligations of Dundee and the Filer as co-obligors for the amounts payable pursuant to the Dundee Debentures (as referred to in paragraph 10) are joint and several.

12. As of June 14, 2012, the following principal amount of Dundee Debentures were issued and outstanding:

    (a) $667,000 aggregate principal amount of 6% Redeemable Subordinated Convertible Debentures, Series F (CUSIP No. 265270AG3), which are referred to in this decision as the "Series F Debentures";

    (b) $1,669,000 aggregate principal amount of 7% 7.0% Series G Convertible Unsecured Subordinated Debentures (CUSIP No. 265270AF5), which are referred to in this decision as the "Series G Debentures";

    (c) $51,128,000 aggregate principal amount of 5.50% Series H Convertible Unsecured Subordinated Debentures (CUSIP No. 265270AH1), which are referred to in this decision as the "Series H Debentures";

    (d) $25,000,000 aggregate principal amount of 5.95% Senior Unsecured Debentures, Series K (CUSIP No. 265270AJ7); and

    (e) $10,000,000 aggregate principal amount of 5.95% Senior Unsecured Debentures, Series L (CUSIP No. 265270AK4).

13. The Series F Debentures, Series G Debentures and Series H Debentures are convertible in accordance with their terms into units of Dundee.

14. The Filer has no assets other than a receivable from an affiliate in the amount of approximately $65.6 million. The Filer has no liabilities other than its obligations under the Dundee Debentures.

15. The Filer does not have any securities outstanding other than (i) the Dundee Debentures and (ii) the units of the Filer which are held by an indirect affiliate of Dundee.

16. No person or company has provided a guarantee or alternative credit support (as defined in section 13.4 of NI 51-102) in respect of the Dundee Debentures. No person or company, other than Dundee and the Filer, has any obligation for the due and punctual payment of the principal amount of Dundee Debentures, the interest thereon and all other moneys payable under the indentures governing such Dundee Debentures.

17. The Filer is not in default of any of its obligations under the Legislation other than its obligations to file audited financial statements, accompanying management's discussion and analysis of financial condition and certificates of its Chief Executive Officer and Chief Financial Officer in respect of the fiscal year ended December 31, 2011 and the three months ended March 31, 2012.

Decision

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemptions Sought are granted provided that:

1. In respect of the Exemption Sought from the Continuous Disclosure Requirements,

    (a) Dundee is, and continues to be, a co-obligor for the due and punctual payment of the principal amount of the Dundee Debentures, the interest thereon and all other moneys payable under the indentures governing the Dundee Debentures;

    (b) the Filer satisfies, and continues to satisfy, the conditions set out in subsection 13.4(2) of NI 51-102, except as modified as follows:

        (i) any reference to parent credit supporter in section 13.4 of NI 51-102 shall mean Dundee;

        (ii) any reference to credit support issuer in section 13.4 of NI 51-102 shall mean the Filer; and

        (iii) any reference to designated credit support securities in sec-

tion 13.4 of NI 51-102 shall include the Dundee Debentures;

(c) the Filer does not issue any additional Dundee Debentures nor any other securities in respect of which Dundee is a co-obligor; and

(d) The Filer does not issue any Designated Credit Support Securities (as defined in section 13.4 of NI 51-102).

2. In respect of the Exemption Sought from the Certification Requirements, the Filer satisfies, and continues to satisfy, the conditions in respect of the Exemption Sought from the Continuous Disclosure Requirements set forth above in paragraph 1.

"Jo-Anne Matear"
Manager

2.1.5 Franklin Templeton Investments Corp.

Headnote

NP 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – mutual fund manager granted exemption to replace earlier relief which expired as a result of sunset clause – exemption allows mutual fund manager to pay a participating dealer direct costs incurred relating to a sales communication, investor conference or investor seminar prepared or presented by the participating dealer which has a primary purpose of providing educational information concerning tax or estate planning matters – exemption will also permit a participating dealer to solicit and accept payments of direct costs relating to such sales communications, investor conferences or investor seminars in accordance with subsection 2.2(2) of NI 81–105 – initial sunset clause will continue to apply to new applicants seeking similar exemptive relief.

Applicable Legislative Provisions

National Instrument 81-105 Mutual Fund Sales Practices, ss. 5.1(a, 9.1.

July 24, 2012

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO
(THE "JURISDICTION")

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
FRANKLIN TEMPLETON INVESTMENTS CORP.
(THE "FILER")

DECISION

Background

The principal regulator in the Jurisdiction has received an application from the Filer for a decision under the securities legislation of the Jurisdiction (the "Legislation") for relief from subsection 5.1(a) of National Instrument 81-105 *Mutual Fund Sales Practices* ("NI 81-105") to permit the Filer to pay a participating dealer direct costs incurred by the participating dealer relating to a sales communication, investor conference or investor seminar prepared or presented by the participating dealer (each individually referred to as a Cooperative Marketing Initiative" and collectively as "Cooperative Marketing Initiatives") if the primary purpose of the Cooperative Marketing Initiative is to provide educational information concerning tax or estate planning matters (the "Exemption Sought").

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

(a) the Ontario Securities Commission is the principal regulator for this application; and

(b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport Syste*m ("MI 11-102") is intended to be relied upon in British Columbia, Alberta, Saskatchewan, Manitoba, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Northwest Territories, Yukon and Nunavut.

Interpretation

Defined terms contained in National Instrument 14-101 *Definitions*, MI 11-102 and NI 81-105 have the same meaning in this decision unless they are defined in this decision.

Representations

This decision is based on the following facts represented by the Filer:

1. The Filer is a corporation organized under the laws of the Province of Ontario with its head office based in Toronto, Ontario.

2. The Filer manages a number of retail mutual funds (the "Funds") that are qualified for distribution to investors in each of the provinces and territories of Canada (the "Jurisdictions"). Securities of the Funds are distributed by participating dealers in the Jurisdictions.

3. The Filer is a "member of the organization" (as that term is defined in NI 81-105) of the Funds as it is the manager of the Funds.

4. The Filer complies with NI 81-105, in particular Part 5 of NI 81-105, in respect of its marketing and educational practices. The Filer is not in default of securities legislation in any of the Jurisdictions.

5. Under subsection 5.1(a) of NI 81-105, the Filer is currently permitted to pay a participating dealer direct costs incurred by the participating dealer relating to a Cooperative Marketing Initiative if the primary purpose of the Cooperative Marketing Initiative is to promote, or provide educational information concerning, a mutual fund, the mutual fund family of which the mutual fund is a member, or mutual funds generally.

6. Under subsection 5.2(a) of NI 81-105, the Filer is permitted to sponsor events attended by representatives of participating dealers which have the provision of educational information about, among other things, financial planning, investing in securities or mutual fund industry matters as their primary purpose.

7. Subsection 5.1(a) prohibits the Filer from paying to a participating dealer direct costs incurred by the participating dealer relating to a Cooperative Marketing Initiative where the primary purpose is to provide educational information about tax or estate planning matters.

8. The Filer has expertise in tax and estate planning matters or may retain others with such expertise. In addition to the topics currently permitted under subsection 5.1(a) of NI 81-105, the Filer wishes to sponsor Cooperative Marketing Initiatives where the primary purpose of the Cooperative Marketing Initiatives is to provide educational information concerning tax or estate planning matters. The Filer will comply with subsections 5.1(b) – (e) of NI 81-105 in respect of such Cooperative Marketing Initiatives it sponsors.

9. The Filer has previously applied for and obtained the Exemption Sought, and Cooperative Marketing Initiatives conducted in respect of such previously granted exemption have been carried out in accordance with the terms and conditions of that exemption and in compliance with the applicable rules set out in NI 81-105.

10. The Filer is of the view that sponsoring Cooperative Marketing Initiatives where the primary purpose is to provide educational information about tax or estate planning matters will benefit investors.

Decision

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemption Sought is granted, provided that in respect of a Cooperative Marketing Initiative the primary purpose of which is to provide educational information concerning tax or estate planning matters:

(i) the Filer does not require any participating dealer to sell any of the Funds or other financial products to investors;

(ii) other than as permitted by NI 81-105, the Filer does not provide participating dealers and their representatives with any financial or other incentives for recommending any of the Funds to investors;

(iii) the materials presented in a Cooperative Marketing Initiative concerning tax or estate planning matters contain only general educational information about tax or estate planning matters;

(iv) the Filer prepares or approves the content of the general educational information about tax or estate planning matters presented in a Cooperative Marketing Initiative it sponsors and selects or approves an appropriately qualified speaker for each presentation about tax or estate planning matters delivered in a Cooperative Marketing Initiative;

(v) any general educational information about tax or estate planning matters presented in a Cooperative Marketing Initiative contains an express statement that the content presented is for information purposes only, and is not providing advice to the attendees of the investor conference or investor seminar or the recipients of the sales communication, as applicable; and

(vi) any general educational information about tax or estate planning matters presented in a Cooperative Marketing Initiative contains an indication of the types of professionals who may generally be qualified to provide advice on the subject matter of the information presented.

"Wes M. Scott"
Commissioner
Ontario Securities Commission

"Christopher Portner"
Commissioner
Ontario Securities Commission

2.1.6 Pyramis Global Advisors, LLC

Headnote

Relief granted from margin rate applicable to U.S. money market mutual funds in calculation of market risk in Form 31-103F1 – margin rate for funds qualified for distribution in Canada is 5%, while funds qualified for distribution in U.S. is 100% – similar regulation of money market funds – NI 31-103 – Ontario-only decision, filer provided undertaking not to passport decision to jurisdictions outside of Ontario.

Applicable Legislative Provisions

National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations, ss. 12.1, 15.

July 30, 2012

IN THE MATTER OF
NATIONAL INSTRUMENT 31-103
EGISTRATION REQUIREMENTS, EXEMPTIONS
AND ONGOING REGISTRANT OBLIGATIONS
("NI 31-103")

AND

IN THE MATTER OF
PYRAMIS GLOBAL ADVISORS, LLC
(the "Filer")

DECISION

Background

The Director has received an application from the Filer for a decision under subsection 15.1 of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("NI 31-103") for relief from the requirement in section 12.1 of NI 31-103 that the Filer calculate its excess working capital using Form 31-103F1 (the "Form F1") only to the extent that the Filer be able to apply the same margin rate to investments in money market mutual funds qualified for sale by prospectus in the United States of America as is the case for money market mutual funds qualified for sale in a province of Canada when calculating market risk pursuant to Line 9 of Form F1 (the "Exemption Sought").

Interpretation

Defined terms contained in NI 31-103 have the same meanings in this decision (the "Decision") unless they are otherwise defined in this Decision.

Representations

This Decision is based on the following facts represented by the Filer:

1. The Filer is a limited liability company established under the laws of the State of Delaware in the

United States of America ("U.S.") with its head office located in Boston, Massachusetts.

2. The Filer is registered as an adviser in the category of portfolio manager under the *Securities Act* (Ontario) and as a commodity trading manager under the *Commodity Futures Act* (Ontario).

3. The Filer is not a reporting issuer in any jurisdiction of Canada and is not, to its knowledge, in default of securities regulation in any jurisdiction of Canada, other than as outlined in paragraph 9 of this Decision.

4. The Filer is an indirect majority owned subsidiary of its ultimate parent company, FMR LLC. The Filer acts as portfolio manager (or sub-adviser) for a number of mutual fund and pooled funds as well as for other institutional clients such as pension plans and endowments.

5. The Filer is registered with the U.S. Securities and Exchange Commission (the "SEC") as an investment adviser under the United States *Investment Advisers Act of 1940*, as amended (the "1940 Act").

6. The Filer invests its cash balances in money market mutual funds qualified for sale by prospectus in the U.S., specifically money market mutual funds which are registered investment companies under the United States *Investment Company Act of 1940*, as amended (the "Investment Company Act"), and which comply with Rule 2a-7 thereunder ("Rule 2a-7").

7. It is not practicable for the Filer to invest its cash balances in money market mutual funds qualified for sale by prospectus in a province of Canada because: (i) such mutual funds are unlikely to be qualified for sale in the U.S.; (ii) they are not offered by the financial institution used by the Filer; (ii) they are not easily used for cash management purposes; (iii) there may be foreign exchange issues as the Filer invests in U.S. dollar denominated securities; and (iv) there may be tax implications relating to the conversion of the funds.

8. Under Schedule 1 of Form F1 an investment in the securities of a money market mutual fund qualified for sale by prospectus only in the U.S. would be subject to a margin rate of 100% of the market value of such investments for the purposes of Line 9 of Form F1.

9. The Filer would have excess working capital as calculated using Form F1 of less than zero unless relief is granted, and could not meet the capital requirements under NI 31-103.

10. The margin rate required for a money market mutual fund qualified for sale by prospectus in a province of Canada is 5% of the market value of such investment, as opposed to 100% for the market value of investments in a money market mutual fund qualified for sale by prospectus in the U.S.

11. The regulatory oversight and the quality of investments held by a money market mutual fund qualified for sale by prospectus in each of the U.S. and a province of Canada is similar. In particular Rule 2a-7 sets out requirements dealing with portfolio maturity, quality, diversification and liquidity, which are similar to requirements under National Instrument 81-102 *Mutual Funds* ("NI 81-102").

12. The Filer undertakes not to rely upon section 4.7(1) Multilateral Instrument 11-102 *Passport System* to passport this decision into jurisdictions outside of Ontario.

Decision

The Director is satisfied that the Decision meets the test set out in the securities legislation of Ontario (the "Legislation") for the Director to make the Decision.

The Decision of the Director under the Legislation is that the Exemption Sought is granted so long as:

(a) any money market mutual fund invested in by the Filer is qualified for sale by prospectus in the U.S. as a result of being a registered investment company under the Investment Company Act, which complies with Rule 2a-7;

(b) the requirements for money market mutual funds under Rule 2a-7 or any successor rule or legislation are similar to the requirements for Canadian money market mutual funds under NI 81-102 or any successor rule or legislation; and

(c) the Filer is registered with the SEC as an investment adviser under the 1940 Act.

“Marrianne Bridge”
Deputy Director,
Compliance and Registrant Regulation
Ontario Securities Commission

2.1.7 Perimeter Markets Inc.

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – relief from the requirement that an ATS shall not execute trades in securities other than exchange-traded securities, corporate debt securities, government debt securities, or foreign exchange-traded securities – National Instrument 21-101 Marketplace Operation.

Applicable Legislative Provisions

National Instrument 21-101 Marketplace Operation, s. 6.3.

July 30, 2012

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO
(the Jurisdiction)

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
PERIMETER MARKETS INC.
(the Filer)

DECISION

Background

The principal regulator in the Jurisdiction has received an application from the Filer for a decision under the securities legislation of the Jurisdiction of the principal regulator (the Legislation) for an exemption from section 6.3 of NI 21-101 *Marketplace Operation* (the Exemption Sought).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

(a) the Ontario Securities Commission is the principal regulator for this application, and

(b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (MI 11-102) is intended to be relied upon in British Columbia, Alberta, Saskatchewan, Manitoba, Québec, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland and Labrador.

Interpretation

Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

Representations

This decision is based on the following facts represented by the Filer:

1. The Filer is a corporation formed under the laws of the Province of Ontario and its principal business is to operate an alternative trading system (ATS) as defined in NI 21-101.

2. The head office of the Filer is located in Toronto, Ontario.

3. The Filer is a member of the Investment Industry Regulatory Organization of Canada (IIROC), the Canadian Investor Protection Fund (CIPF) and the Bourse de Montreal and is registered in all provinces as a dealer in the category of investment dealer, as a derivative dealer in Quebec and as a futures commission merchant in Ontario and Manitoba.

4. Bondview and CBID are trademarks of Perimeter.

5. The Perimeter System is an ATS exclusively for trading over-the-counter fixed income securities by Institutional Subscribers (defined in Appendix A).

6. The Filer will be the sole party furnishing access to the Perimeter System in Ontario to Institutional Subscribers.

7. The following non-Canadian debt securities are offered through the Platform:

   (a) high-grade and high-yield U.S. corporate bonds;

   (b) U.S. government debt securities and debt securities issued by U.S. governmental agencies;

   (c) emerging market bonds, which are defined as U.S. dollar or Euro-denominated bonds issued by sovereign entities or corporations domiciled in a developing country, including both high grade and non-investment grade debt; and

   (d) European high-grade corporate bonds, which are defined as corporate bonds issued by entities domiciled in Europe (together, Non-Canadian Fixed Income Securities).

8. Institutional Subscribers are responsible for execution, clearing and settlement of trades through the Perimeter System using their customary procedures.

9. Section 6.3 of NI 21-101 provides, in part, that an ATS can only execute trades in corporate debt securities and government debt securities. The definition of corporate debt security only includes debt securities issued in Canada by companies or corporations that are not listed on a recognized exchange or quoted on a recognized quotation and trade reporting system. The definition of government debt security only includes, in part, a debt security issued or guaranteed by the government of Canada, or any province or territory of Canada.

10. The Filer has requested an exemption from section 6.3 of NI 21-101 to be able to offer Non-Canadian Fixed Income Securities to Institutional Subscribers in Ontario.

Decision

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemption Sought is granted provided that:

1. The Perimeter System is only made available in Canada to Institutional Subscribers; and

2. Dealer participants of the Perimeter System trading with Institutional Subscribers who are not registered as an investment dealer under the securities legislation of a jurisdiction of Canada will rely on and comply with the international dealer registration exemption in section 8.18 of NI 31-103 *Registration Requirements*.

“Tracey Stern”
Manager, Market Regulation
Ontario Securities Commission

Appendix A

In this order, "Institutional Subscriber" means:

(a) a bank listed in Schedule I or II of the *Bank Act* (Canada), or an authorized foreign bank listed in Schedule III of that Act;

(b) the Business Development Bank incorporated under the *Business Development Bank Ac*t (Canada);

(c) a loan corporation, trust corporation, savings company or loan and investment society registered under the *Loan and Trust Corporations Act* (Ontario) or under the *Trust and Loan Companies Ac*t (Canada);

(d) a co-operative credit society, credit union central, federation of caisses populaires, credit union or league, or regional caisse populaire, or an association under the *Cooperative Credit Associations Act* (Canada), in each case, located in Canada;

(e) a company licensed to do business as an insurance company in a province of Canada;

(f) a subsidiary of any company referred to in paragraph (a), (b), (c), (d) or (e), where the company owns all of the voting shares of the subsidiary;

(g) a person or company registered under the securities legislation of a jurisdiction of Canada as an adviser, investment dealer, mutual fund dealer, or exempt market dealer;

(h) the government of Canada or a jurisdiction of Canada, or any Crown corporation, agency, or wholly-owned entity of the Government of Canada or a jurisdiction of Canada;

(i) any municipality, public board, or commission in Canada;

(j) any national, federal, state, provincial, territorial or municipal government of or in any foreign jurisdiction, or any agency of that government;

(k) a pension fund that is regulated by either the federal Office of the Superintendent of Financial Institutions or a pension commission or similar regulatory authority of a jurisdiction of Canada or a wholly-owned subsidiary of such a pension fund;

(l) a registered charity under the *Income Tax Act* (Canada);

(m) a person or company other than an individual or an investment fund that has net assets of at least $25 million as reflected in its most recently prepared financial statements;

(n) a person or company, other than an individual, that is recognized by the Ontario Securities Commission as an "exempt purchaser" or "accredited investor" or, under National Instrument 45-106 as an "accredited investor";

(o) an investment fund if one or both of the following apply:

  (i) the fund is managed by a person or company registered as an investment fund manager under the securities legislation of a jurisdiction of Canada;

  (ii) the fund is advised by a person or company authorized to act as an adviser under the securities legislation of a jurisdiction of Canada;

(p) an account that is fully managed by a registered portfolio manager or an entity listed in paragraphs (a), (c), (d) or (e);

(q) an entity organized in a foreign jurisdiction that is analogous to any of the entities referred to in paragraphs (a) through (f) and paragraph (k); and

(r) a person or company in respect of which all of the owners of interests, direct or indirect, legal or beneficial, are persons or companies that are Institutional Investors; provided that:

  (i) two or more persons who are the joint registered holders of one or more securities of the issuer shall be counted as one beneficial owner of those securities; and

(ii) a corporation, partnership, trust or other entity shall be counted as one beneficial owner of securities of the issuer unless the entity has been created or is being used primarily for the purpose of acquiring or holding securities of the issuer, in which event each beneficial owner of an equity interest in the entity or each beneficiary of the entity, as the case may be, shall be counted as a separate beneficial owner of those securities of the issuer.

2.1.8 Invesco Canada Ltd. et al.

Headnote

NP 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – Approval of mutual fund mergers – approval required because mergers do not meet the criteria for pre-approval – certain mergers have differences in investment objectives – certain mergers not a "qualifying exchange" or a tax-deferred transaction under Income Tax Act – securityholders of terminating funds provided with timely and adequate disclosure regarding the mergers.

Applicable Legislative Provisions

National Instrument 81-102 Mutual Funds, ss. 5.5(1)(b), 5.5(3), 5.6.

July 5, 2012

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO
(the "Jurisdiction")

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
INVESCO CANADA LTD.
(the "Manager")

AND

INVESCO GLOBAL EQUITY CLASS AND
INVESCO GLOBAL BALANCED FUND
(each a "Terminating Fund", and together,
the "Terminating Funds")

DECISION

Background

The principal regulator in the Jurisdiction has received an application from the Manager on behalf of the Terminating Funds for a decision under the securities legislation of the Jurisdiction of the principal regulator (the "**Legislation**") for approval under subsection 5.5(1)(b) of National Instrument 81-102 *Mutual Funds* ("**NI 81-102**") to merge each Terminating Fund into the Continuing Fund opposite its name below (the "**Proposed Mergers**").

Terminating Fund	**Continuing Fund**
Invesco Global Equity Class ("**Invesco Equity Class**")	Trimark Global Dividend Class ("**Trimark Dividend Class**")
Invesco Global Balanced Fund ("**Invesco Balanced Fund**")	Trimark Global Balanced Fund ("**Trimark Balanced Fund**")

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

(a) the Ontario Securities Commission is the principal regulator for this application, and

(b) the Manager has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* ("**MI 11-102**") is intended to be relied upon in all of the other provinces and territories of Canada.

Interpretation

Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

Representations

This decision is based on the following facts represented by the Manager:

1. The Manager is a corporation amalgamated under the laws of Ontario. The Manager is an indirect wholly-owned subsidiary of Invesco Ltd., a global investment manager, and is not in default of applicable securities legislation in any jurisdiction. The head office of the Manager is located in Toronto, Ontario.

2. The Manager is the manager of the Continuing Funds and Terminating Funds (collectively, the "**Funds**") and the trustee of Invesco Balanced Fund and Trimark Balanced Fund (the "**Trust Funds**").

3. Each of Invesco Equity Class and Trimark Dividend Class (the "**Classes**") is a separate class of Invesco Corporate Class Inc. ("**Corporate Class**"), a mutual fund corporation incorporated by articles of incorporation under the laws of Ontario on October 4, 1994.

4. Each of the Trust Funds is an open-end mutual fund trust established under the laws of Ontario by a declaration of trust.

5. Each of the Funds is a reporting issuer under applicable securities legislation of each province and territory of Canada and is not in default of applicable securities legislation in any jurisdiction.

6. Securities of the Funds are currently qualified for sale by a simplified prospectus and annual information form dated July 29, 2011, as amended, which has been filed and receipted in all of the provinces and territories of Canada.

7. Other than circumstances in which the securities regulatory authority of a province or territory of Canada has expressly exempted a Fund therefrom, each of the Funds follows the standard investment restrictions and practices established by NI 81-102.

8. The net asset value for each series of the Funds is calculated on a daily basis on each day that The Toronto Stock Exchange is open for trading.

9. Pre-approval of the Proposed Mergers under section 5.6 of NI 81-102 is not available in the case of the Proposed Merger of:

    a) Invesco Equity Class into Trimark Dividend Class as a reasonable person would not consider the fundamental investment objectives of the Funds to be substantially similar; and

    b) Invesco Balanced Fund into Trimark Balanced Fund as the Proposed Merger will not be implemented on a tax-deferred basis.

10. Except as described above, the Proposed Mergers meet all of the other criteria for pre-approved reorganizations and transfers under section 5.6 of NI 81-102.

11. The Manager believes that the Proposed Mergers of the Terminating Funds into the applicable Continuing Funds are in the best interests of securityholders of the Terminating Funds as each Terminating Fund is unable to pay all fees and expenses associated with its operations and the Manager is unwilling to continue waiving and absorbing such fees and expenses.

12. The Funds' independent review committee ("**IRC**") has reviewed and made a positive recommendation with respect to the Proposed Mergers, having determined that the Proposed Mergers, if implemented, achieve a fair and reasonable result for each Fund. The decision of the IRC was included in the management information circular as required by section 5.1(2) of National Instrument 81-107 – *Independent Review Committee for Investment Funds*.

13. On May 24, 2012, the Manager issued a press release announcing the Proposed Mergers, the proposed date (July 20, 2012) for the securityholders' meetings to vote on the Proposed Mergers and the proposed merger date (close of business on or about July 27, 2012). A material change report and amendments to the simplified prospectus, annual information form and fund facts of the applicable Funds relating to the Proposed Mergers were filed via SEDAR on May 29, 2012.

14. The Manager will be seeking the approval of the Proposed Mergers by securityholders of each Terminating Fund pursuant to subsection 5.1(f) of NI 81-102 at meetings of securityholders to be held on July 20, 2012 (the "**Meeting**"). In addition, the Manager will also be seeking the approval of the Proposed Merger by Series A and F securityholders of Trimark Dividend Class pursuant to the *Business Corporations Act* (Ontario).

15. As required by the *Business Corporations Act* (Ontario), Invesco Corporate Class Voting Trust I and Invesco Corporate Class Voting Trust II, the current shareholders of all of the issued and outstanding common shares of Corporate Class, will be asked to approve the Proposed Merger of the Classes.

16. On June 1, 2004, in connection with a prior fund merger, the Manager received, amongst other things, exemptions from the requirement to deliver the current simplified prospectus of the continuing fund to securityholders of terminating funds in connection with all future mergers of mutual funds managed by the Manager (the "**Future Mergers**") pursuant to section 5.6(1)(f)(ii) of NI 81-102 (the "**Prospectus Delivery Relief**").

17. In accordance with the Prospectus Delivery Relief, the material that will be sent to securityholders of the Terminating Funds will include a tailored simplified prospectus consisting of:

    (a) the current Part A of the simplified prospectus of the applicable Continuing Fund, and

    (b) the current Part B of the simplified prospectus of the applicable Continuing Fund.

18. In accordance with the Prospectus Delivery Relief, amongst other things,the management information circular sent to securityholders provides sufficient information about the relevant Proposed Merger to permit securityholders to make an informed decision about the Proposed Merger.

19. The management information circular delivered to securityholders of the Terminating Funds will contain the following information so that the securityholders of the Terminating Funds may consider this information before voting on the Proposed Mergers:

    (a) the differences between the Terminating Funds and the Continuing Funds;

    (b) the tax implications of the Proposed Mergers;

    (c) a statement that the securities of the Continuing Funds acquired by securityholders upon the Proposed Mergers are subject to the same redemption charges to which their securities of the Terminating Funds were subject prior to the Proposed Merger;

    (d) a statement that any redemption fees payable in connection with securities purchased under the deferred sales charge option will apply when securityholders redeem securities of the Terminating Fund; and

    (e) the fact that securityholders can obtain, at no cost, the annual information form, most recently filed fund facts, the most recent interim and annual financial statements, most recent management report of fund performance that have been made public by contacting the Manager or by accessing the documents on the Manager's website.

20. The notice of meeting, form of proxy and management information circular were mailed to securityholders of the Terminating Funds and Series A and F securityholders of Trimark Dividend Class on June 26, 2012 and were filed via SEDAR on June 27, 2012.

21. Securityholders of a Terminating Fund will continue to have the right to redeem securities of the Terminating Fund for cash at any time up to the close of business on the effective date of the Proposed Mergers. Effective close of business July 20, 2012, the Terminating Funds will cease distribution of securities (including purchases under existing pre-authorized chequing plans which will run in the Continuing Fund on the first business day following the Merger Date) other than purchases that are Canada Education Savings Grants made into registered educations savings plans. Following the Proposed Mergers, all systematic investment programs and systematic withdrawal programs that had been established with respect to the Terminating Funds, will be re-established on a series-for-series basis in the Continuing Fund unless securityholders advise the Manager otherwise. Securityholders may change or cancel any systematic program at any time.

22. Each Terminating Fund is expected to merge into the applicable Continuing Fund on or about the close of business July 27, 2012 (the "**Merger Date**") and the Continuing Funds will continue as publicly offered open-end mutual funds governed by the laws of Ontario.

23. The Proposed Merger of the Classes will be a tax deferred transaction under subsection 86(1) of the *Income Tax Act* (Canada) but the Proposed Merger of the Trust Funds will not be a tax deferred transaction.

24. The Proposed Merger of the Classes will be structured as follows:

    (a) the Manager anticipates that there will be a period of approximately 5 business days between the Meeting and the Merger Date. If all necessary approvals are obtained, prior to the date of the Proposed Merger, Invesco Equity Class will liquidate all of the assets in its portfolio that the portfolio manager of Trimark Dividend Class does not wish to have in Trimark Dividend Class' portfolio, and may hold the proceeds in cash, money market instruments or securities of affiliated money market funds. Accordingly, Invesco Equity Class may not be fully invested in accordance with its investment objectives for this brief period of time prior to the Proposed Merger;

    (b) Invesco Equity Class will satisfy or otherwise make provisions for any liabilities attributable to it out of the assets attributable to it;

    (c) the value of the underlying portfolio of assets attributable to Invesco Equity Class will be determined at the close of business on the effective date of the filing of the articles of amendment of Corporate Class that change the securities of Invesco Equity Class to securities of Trimark Dividend Class;

    (d) all of the issued and outstanding securities of Invesco Equity Class will be converted into securities of Trimark Dividend Class on a dollar-for-dollar and series-by-series basis and distributed to the securityholders of Invesco Equity Class;

    (e) the securities of Trimark Dividend Class received by each securityholder of Invesco Equity Class will have the same aggregate net asset value as the securities of Invesco Equity Class held by that securityholder on the Merger Date;

    (g) the aggregate net asset value of all of the securities of Trimark Dividend Class received by all securityholders of Invesco Equity Class will equal the value of the portfolio and other assets attributable to Invesco Equity Class, and the securities of Trimark Dividend Class will be issued at the applicable series net asset value per security of Trimark Dividend Class as of the close of business on the Merger Date;

    (h) the underlying portfolio of assets attributable to Invesco Equity Class will be included in the underlying portfolio of assets attributable to Trimark Dividend Class; and

    (i) as soon as reasonably possible, the securities of Invesco Equity Class will be cancelled.

25. The Proposed Merger of the Trust Funds will be structured as follows:

    (a) the Manager anticipates that there will be a period of approximately 5 business days between the Meeting and the Merger Date. If all necessary approvals are obtained, prior to the date of the Proposed Merger, Invesco Balanced Fund will liquidate all of the assets in its portfolio that the portfolio manager of Trimark Balanced Fund does not wish to have in Trimark Balanced Fund's portfolio, and may hold the proceeds in cash, money market instruments, securities of affiliated money market funds, bonds or other debt securities. Accordingly, Invesco Balanced Fund may not be fully invested in accordance with its investment objectives for this brief period of time prior to the Proposed Merger;

    (b) Invesco Balanced Fund will satisfy or otherwise make provisions for any liabilities attributable to it out of the assets attributable to it;

    (c) the value of Invesco Balanced Fund's portfolio and other assets will be determined at the close of business on the Merger Date in accordance with Invesco Balanced Fund's declaration of trust;

    (d) Trimark Balanced Fund will acquire the investment portfolio and other assets of Invesco Balanced Fund in exchange for securities of Trimark Balanced Fund;

    (e) Trimark Balanced Fund will not assume the liabilities of Invesco Balanced Fund, and Invesco Balanced Fund will retain sufficient assets to satisfy its estimated liabilities, if any, as of the date of the Proposed Merger;

    (f) the securities of Trimark Balanced Fund received by each securityholder of Invesco Balanced Fund will have the same aggregate net asset value as the securities of Invesco Balanced Fund held by that securityholder on the Merger Date;

(g) the aggregate net asset value of all of the securities of Trimark Balanced Fund received by all securityholders of Invesco Balanced Fund will equal the value of the portfolio and other assets attributable to Invesco Balanced Fund, and the securities of Trimark Balanced Fund will be issued at the applicable series net asset value per security as of the close of business on the Merger Date;

(h) immediately thereafter, the securities of Trimark Balanced Fund received by Invesco Balanced Fund will be distributed to securityholders of Invesco Balanced Fund on a dollar-for-dollar and series-by-series basis in exchange for their securities in Invesco Balanced Fund; and

(i) as soon as reasonably possible following the Proposed Mergers Invesco Balanced Fund will be wound-up.

26. The Manager will pay for the costs of the Proposed Mergers. These costs consist mainly of brokerage charges associated with the trades that occur both before and after the date of the Proposed Mergers and legal, proxy solicitation, printing, mailing and regulatory fees.

27. No sales charges will be payable in connection with the acquisition by a Continuing Fund of the investment portfolio of the applicable Terminating Fund.

Decision

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Proposed Mergers are approved.

“Raymond Chan”
Manager, Investment Funds
Ontario Securities Commission

2.1.9 Flint Energy Services Ltd.

Headnote

National Policy 11-203 Process For Exemptive Relief Applications in Multiple Jurisdictions – exemption granted from continuous disclosure filing requirements and certification requirements – filer unable to rely on exemption for credit support issuers in applicable securities legislation as it is unable to file the required consolidating summary financial information concurrently with the filing of the parent credit supporter's interim financial statements for the first interim period following the plan of arrangement – relief granted for one interim period on condition that the filer is in compliance with the other requirements and conditions of section 13.4 of National Instrument 51-102 Continuous Disclosure Obligations and that the consolidating financial information is filed on or before August 28, 2012.

Applicable Legislative Provisions

National Instrument 51-102 Continuous Disclosure Obligations.
National Instrument 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings.

Citation: Flint Energy Services Ltd. , Re, 2012 ABASC 337

July 31, 2012

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ALBERTA AND ONTARIO
(the Jurisdictions)

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
FLINT ENERGY SERVICES LTD.
(the Filer)

DECISION

Background

The securities regulatory authority or regulator in each of the Jurisdictions (the **Decision Maker**) has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the **Legislation**) exempting the Filer from the requirements of:

(a) National Instrument 51-102 *Continuous Disclosure Obligations* (**NI 51-102**); and

(b) National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* (**NI 52-109**),

provided that certain requirements are met (collectively, the **Exemption Sought**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a dual application):

(a) the Alberta Securities Commission is the principal regulator for this application;

(b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport Systems* (**MI 11-102**) is intended to be relied upon in British Columbia, Saskatchewan, Manitoba, Québec, Newfoundland and Labrador, Nova Scotia, Prince Edward Island and New Brunswick, and

(c) this decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

Interpretation

Terms defined in National Instrument 14-101 *Definitions*, MI 11-102 and NI 51-102 have the same meanings if used in this decision, unless otherwise defined herein.

Representations

This decision is based on the following facts represented by the Filer:

1. The Filer is a corporation existing under the *Business Corporations Act* (Alberta) (**ABCA**). The Filer's head office is located in Calgary, Alberta.

2. The Filer is a reporting issuer in each Province of Canada and is not in default of any requirement of securities legislation in any such Province.

3. The authorized capital of the Filer consists of an unlimited number of common shares, of which 100 common shares have been issued, and an unlimited number of preferred shares, issuable in series, of which no preferred shares have been issued.

4. The Filer's financial year end is the Friday closest to December 31.

5. On June 8, 2011, the Filer issued by way of private placement an aggregate principal amount of $175,000,000 7.50% senior unsecured notes due June 15, 2019 (the **Notes**) to subscribers in various Provinces of Canada and in the United States. The Notes were issued under an indenture among the Filer, Computershare Trust Company of Canada and certain of the Filer's subsidiaries

as guarantors of the obligations of the Filer, dated June 8, 2011.

6. On May 14, 2012, URS Corporation (**URS**) indirectly acquired all of the issued and outstanding common shares of the Filer pursuant to a court-approved plan of arrangement under the ABCA involving the Filer, URS Canada Holdings Ltd. (**CanCo**), a wholly-owned subsidiary of URS, and the shareholders, optionholders and other equity-based compensation holders of the Filer (the **Transaction**). Upon completion of the Transaction, the Filer became a wholly-owned subsidiary of URS.

7. On May 15, 2012, the Filer vertically amalgamated with CanCo and continued under the name of "Flint Energy Services Ltd".

8. On May 17, 2012, the common shares of the Filer which previously traded under the symbol "FES" were de-listed from the Toronto Stock Exchange. The Filer's securities are not currently listed, traded or quoted for trading on any "marketplace" in Canada (as defined in National Instrument 21-101 *Marketplace Operation*), and as a result, the Filer remains a reporting issuer and is a venture issuer within the meaning ascribed to such term under NI 51-102.

9. The Notes currently remain outstanding after completion of the Transaction.

10. URS is a corporation existing under the laws of the State of Delaware.

11. URS's common stock is listed on the New York Stock Exchange.

12. URS files its financial statements in accordance, and is in compliance, with the standards imposed by the US Securities Exchange Commission (**SEC**) under the United States Securities Act of 1933, the *United States Securities Exchange Act of 1934* (the **US Exchange Act**) and the *United States Sarbanes-Oxley Act of 2002*, each as amended.

13. URS is an "SEC issuer" within the meaning ascribed to such term under NI 51-102.

14. URS is a large accelerated filer pursuant to Rule 12b-2 of the US Exchange Act which requires URS to file its Form 10-Q quarterly reports within 40 days after the quarter end.

15. URS's financial year end is the Friday closest to December 31.

16. Immediately following the completion of the Transaction, URS and certain of its subsidiaries (the **Guarantor Subsidiaries**) provided a full and unconditional guarantee of the Filer's obligations under the Notes (the **Guarantees**).

17. As URS and the Guarantor Subsidiaries provided the Guarantees in respect of the Notes, the Filer has opted to avail itself of the Credit Support Exemption set forth in section 13.4 of NI 51-102 to allow the Filer to file on SEDAR the interim and annual financial statements and other disclosure documents of URS, its parent corporation.

18. In order to rely upon the credit support exemption, pursuant to section 13.4(2.1)(c) of NI 51-102, when the Filer files URS's interim or annual consolidated financial statements on SEDAR, the Filer must also concurrently file consolidating summary financial information which includes a separate column for each of the following: (i) URS, (ii) the Filer, (iii) each of the Guarantor Subsidiaries on a combined basis; (iv) each subsidiary of URS, other than the Guarantor Subsidiaries, on a combined basis; (v) consolidating adjustments, and (vi) total consolidated amounts (the **Consolidating Summary Financial Information**).

19. URS intends to file its interim financial statements (Form 10-Q) for the period ended June 29, 2012 (the **URS Interim Financials**) with the SEC on or about August 7, 2012. The URS Interim Financials will then be filed by the Filer on SEDAR as soon as practicable thereafter pursuant to section 13.4(2.1)(a) of NI 51-102.

20. URS has historically prepared consolidated financial statements but has not been required to prepare separate financial statements for each of its subsidiaries. In order to prepare the Consolidating Summary Financial Information, the Filer requires financial information at the legal entity level for each URS subsidiary. URS has over 500 legal entities and affiliates in jurisdictions all over the world as well as multiple accounting systems. A significant number of adjustments will be required: allocating to the subsidiaries entries previously recorded at the consolidated parent level only; recording equity earnings of subsidiaries to each of their respective legal entities and adjusting certain eliminations among and between guarantors and non-guarantors. The adjustments will require URS to go through the historical financial information, prepare the necessary calculations and perform manual reviews in order to prepare the Consolidating Summary Financial Information in the manner required pursuant to section 13.4(2.1)(c) of NI 51-102.

21. The Transaction was only recently completed on May 14, 2012 and has resulted in the combination of two large companies, each with a significant number of business divisions, subsidiaries and employees.

22. As a venture issuer, the Filer would not be required to file its interim financial statements for the period ended June 29, 2012 until August 28, 2012.

23. The Filer seeks an extension of time to file the Consolidating Summary Financial Information required to be filed with the URS Interim Financials pursuant to section 13.4(2.1)(c) of NI 51-102. Accordingly, the Filer is requesting the Exemption Sought for the interim period ended June 29, 2012.

24. URS and the Filer anticipate that they will be able to meet all the conditions in subsection 13.4(2.1) of NI 51-102 to be able to rely on the exemption provided in section 13.4 of NI 51-102 for interim and annual periods ended after June 29, 2012.

Decision

Each of the Decision Makers is satisfied that the decision meets the test set out in the Legislation for the Decision Maker to make the decision.

The decision of the Decision Makers under the Legislation is that the Exemption Sought is granted provided that:

(a) the Filer is in compliance with the requirements and conditions of section 13.4 of NI 51-102, other than the requirement in subsection 13.4(2.1)(c);

(b) the Filer files, in electronic format, in respect of the period covered by the URS Interim Financials, consolidating summary financial information on or before August 28, 2012 for the parent credit supporter presented with a separate column for each of the following:

(i) the parent credit supporter;

(ii) the credit support issuer;

(iii) each subsidiary credit supporter on a combined basis;

(iv) any other subsidiaries of the parent credit supporter on a combined basis;

(v) consolidating adjustments; and

(vi) the total consolidated amounts; and

(c) the Filer can only rely on the Exemption Sought for the Filer's interim period ended June 29, 2012.

"Blaine Young"
Associate Director, Corporate Finance

2.1.10 CE Franklin Ltd. – s. 1(10)

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – application for an order that the issuer is not a reporting issuer.

Ontario Statutes

Securities Act, R.S.O. 1990, c. S.5, as am., s. 1(10).

August 7, 2012

Fraser Milner Casgrain LLP
15th Floor, Bankers Court
850 – 2 Street SW
Calgary, AB T2P 0R8

Attention: Toby B. Allan

Dear Sir:

Re: CE Franklin Ltd. (the Applicant) – Application for a decision under the securities legislation of Alberta and Ontario (the Jurisdictions) that the Applicant is not a reporting issuer

The Applicant has applied to the local securities regulatory authority or regulator (the **Decision Maker**) in each of the Jurisdictions for a decision under the securities legislation (the **Legislation**) of the Jurisdictions that the Applicant is not a reporting issuer.

In this decision, "securityholder" means, for a security, the beneficial owner of the security.

The Applicant has represented to the Decision Makers that:

(a) the outstanding securities of the Applicant, including debt securities, are beneficially owned, directly or indirectly, by fewer than 15 securityholders in each of the jurisdictions of Canada and fewer than 51 securityholders in total worldwide;

(b) no securities of the Applicant, including debt securities, are traded in Canada or another country on a marketplace as defined in National Instrument 21-101 *Marketplace Operation* or any other facility for bringing together buyers and sellers of securities where trading data is publicly reported;

(c) the Applicant is applying for a decision that it is not a reporting issuer in all of the jurisdictions of Canada in which it is currently a reporting issuer; and

(d) the Applicant is not in default of any of its obligations under the Legislation as a reporting issuer,

each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the decision has been met and orders that the Applicant is deemed to have ceased to be a reporting issuer.

"Blaine Young"
Associate Director, Corporate Finance
Alberta Securities Commission

2.1.11 SEB S.A

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – Application for relief from prospectus and dealer registration requirements in respect of certain trades in units made in connection with an employee share offering by a French issuer – Relief from prospectus and dealer registration requirements upon the redemption of units for shares of the issuer – The offering involves the use of a collective employee shareholding vehicle, a fonds communs de placement d'entreprise (FCPE) – The Filer cannot rely on the employee prospectus exemption in section 2.24 of National Instrument 45-106 Prospectus and Registration Exemptions and the Manager cannot rely on the plan administrator exemption in section 8.16 of National Instrument 31-103 Registration Requirements and Exemptions as the shares are not being offered to Canadian employees directly by the issuer but through the FCPE – Canadian employees will receive disclosure documents – The FCPE is subject to the supervision of the French Autorité des marchés financiers – Relief granted, subject to conditions.

Applicable Ontario Statutory Provisions

Securities Act, R.S.O. 1990, c. S.5, as am., ss. 25, 53, 74(1).
National Instrument 31-103 Registration Requirements and Exemptions.
National Instrument 45-102 Resale of Securities.
National Instrument 45-106 Prospectus and Registration Exemptions.

August 7, 2012

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO
(the "Jurisdiction")

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
SEB S.A
(the "Filer")

DECISION

Background

The principal regulator in the Jurisdiction has received an application from the Filer for a decision under the securities legislation of the Jurisdiction (the "**Legislation**") for:

1. an exemption from the prospectus requirements of the Legislation (the "**Prospectus Relief**") so that such requirements do not apply to

   (a) trades in units (the "**Units**") of SEB International (the "**Classic FCPE**"), which is a fonds commun de placement d'entreprise or "**FCPE**," a form of collective shareholding vehicle commonly used in France for the conservation of shares held by employee-investors made pursuant to the Employee Share Offering (as defined below) to or with Qualifying Employees (as defined below) resident in the Jurisdiction or in the Province of Québec (collectively, the "**Canadian Employees**," and Canadian Employees who subscribe for Units, the "**Canadian Participants**"); and

   (b) trades of ordinary shares of the Filer (the "**Shares**") by the Classic FCPE to or with Canadian Participants upon the redemption of Units thereof as requested by Canadian Participants;

2. an exemption from the dealer registration requirements of the Legislation (the "**Registration Relief**") so that such requirements do not apply to the SEB Group (as defined below and which, for clarity, includes the Filer and the

Canadian Affiliate (as defined below)), the Classic FCPE and Natixis Asset Management (the "**Management Company**") in respect of:

(a) trades in Units made pursuant to the Employee Share Offering to or with Canadian Employees; and

(b) trades in Shares by the Classic FCPE to or with Canadian Participants upon the redemption of Units as requested by Canadian Participants.

(the Prospectus Relief and the Registration Relief, collectively, the "**Offering Relief**")

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application),

(a) the Ontario Securities Commission is the principal regulator for this application, and

(b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* ("**MI 11-102**") is intended to be relied upon in Québec (together with the Jurisdiction, the "**Jurisdictions**").

Interpretation

Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning as used in this decision, unless otherwise defined.

Representations

This decision is based on the following facts represented by the Filer:

1. The Filer is a corporation formed under the laws of France. It is not, and has no current intention of becoming, a reporting issuer under the Legislation or the securities legislation of the other Jurisdictions. The head office of the Filer is located in France and the Shares are listed on NYSE Euronext Paris. The Filer is not in default under the Legislation or the securities legislation of the other Jurisdictions.

2. The Filer carries on business in Canada through Groupe SEB Canada, Inc. (the "**Canadian Affiliate**," and together with the Filer and other affiliates of the Filer, the "**SEB Group**"). The Canadian Affiliate is an indirectly controlled subsidiary of the Filer and is not, and has no current intention of becoming, a reporting issuer under the Legislation or the securities legislation of the other Jurisdictions. The Canadian Affiliate is not in default under the Legislation or the securities legislation of the other Jurisdictions.

3. The Filer has established a global employee share offering for employees of the SEB Group (the "**Employee Share Offering**"). As of the date hereof and after giving effect to the Employee Share Offering, Canadian residents do not and will not beneficially own (which term, for the purposes of this paragraph, is deemed to include all Shares held by the Classic FCPE on behalf of Canadian Participants) more than 10% of the Shares and do not and will not represent in number more than 10% of the total number of holders of the Shares as shown on the books of the Filer.

4. The Employee Share Offering is comprised of one subscription option, being an offering of Shares to be subscribed through the Classic FCPE (the "**Classic Plan**").

5. Only persons who are employees of a member of the SEB Group during the subscription period for the Employee Share Offering and who meet other employment criteria (the "**Qualifying Employees**") will be permitted to participate in the Employee Share Offering.

6. The Classic FCPE was established for the purpose of implementing the Employee Share Offering. There is no current intention for the Classic FCPE to become a reporting issuer under the Legislation or the securities legislation of the other Jurisdictions.

7. The Classic FCPE has been registered with the French Autorité des marchés financiers (the "**French AMF**"). Only Qualifying Employees will be allowed to hold Units issued pursuant to the Employee Share Offering.

8. Under the Classic Plan, the subscription price will be the Canadian dollar equivalent of the average of the opening price of the Shares on NYSE Euronext Paris (expressed in Euros) on the 20 trading days preceding the date of the fixing of the subscription price, less a 20% discount.

9. For every Share that a Canadian Participant purchases under the Classic Plan (the amount of the subscription corresponding to such Share being referred to as the "**Employee Contribution**") up to the first 10 Shares, the

Canadian Affiliate that employs such Canadian Participant will make a contribution to the Classic Plan, for the benefit of, and at no cost to, the Canadian Participant (the "**Employer Contribution**"), of an amount equal to 100% of such Employee Contribution in respect of the first 10 Shares. For each additional Share that the Canadian Participant purchases (beginning with the 11th Share and up to and including the 80th Share), the Canadian Affiliate will provide an Employer Contribution of 50% of such additional Employee Contribution. No Employer Contribution will apply in respect of the portion of the Employee Contribution that exceeds 80 Shares.

10. The Classic FCPE will apply the cash received from the Employee Contributions and the Employer Contributions to subscribe for Shares from the Filer which will be held in the Classic FCPE. The Canadian Participants will receive Units in the Classic FCPE.

11. The Units will be subject to a hold period of approximately five years (the "**Lock-Up Period**"), subject to certain exceptions prescribed by French law (such as a release on death or involuntary termination of employment).

12. Canadian Participants may select one of the two following options for treatment of dividends paid to the Classic FCPE in respect of Shares represented by their Units: a) for dividends to be used to purchase additional Shares, in which case new Units (or fractions thereof) of the Classic FCPE will be issued to such Canadian Participants or (b) for dividends to be paid out to such Canadian Participants.

13. At the end of the Lock-Up Period a Canadian Participant may (i) request the redemption of Units in the Classic FCPE in consideration for the underlying Shares or a cash payment equal to the then market value of the Shares, or (ii) continue to hold Units in the Classic FCPE and request the redemption of those Units at a later date in consideration for the underlying Shares or a cash payment equal to the then market value of the Shares.

14. In the event of an early unwind resulting from a Canadian Participant exercising one of the exceptions to the Lock-Up Period prescribed by French law and meeting the applicable criteria, the Canadian Participant may request the redemption of Units in the Classic FCPE in consideration for a cash payment equal to the then market value of the Shares held by the Classic FCPE corresponding to such Units.

15. An FCPE is a limited liability entity under French law. The Classic FCPE's portfolio will consist almost entirely of Shares of the Filer and may, from time to time, also include cash in respect of dividends paid on the Shares which will be reinvested in Shares, and cash or cash equivalents pending investments in Shares and for the purposes of Unit redemptions.

16. The Management Company is a portfolio management company governed by the laws of France. The Management Company is registered with the French AMF to manage French investment funds. To the best of the Filer's knowledge, the Management Company is not, and has no current intention of becoming, a reporting issuer under the Legislation or the securities legislation of the other Jurisdictions.

17. The Management Company's portfolio management activities in connection with the Employee Share Offering and the Classic FCPE are limited to purchasing Shares from the Filer, selling such Shares as necessary in order to fund redemption requests, and investing available cash in cash equivalents.

18. The Management Company is also responsible for preparing accounting documents and publishing periodic informational documents as provided by the rules of the Classic FCPE. The Management Company's activities do not affect the underlying value of the Shares. To the best of the Filer's knowledge, the Management Company is not in default of the Legislation or the securities legislation of the other Jurisdictions.

19. Shares issued in the Employee Share Offering will be deposited in the Classic FCPE through CACEIS BANK (the "**Depositary**"), a large French commercial bank subject to French banking legislation. The Depositary carries out orders to purchase, trade and sell securities in the portfolio and takes all necessary action to allow the Classic FCPE to exercise the rights relating to the securities held in its portfolio.

20. All management charges relating to the Classic FCPE will be paid from the assets of the Classic FCPE or by the Filer, as provided in the regulations of the Classic FCPE.

21. Participation in the Employee Share Offering is voluntary, and the Canadian Employees will not be induced to participate in the Employee Share Offering by expectation of employment or continued employment.

22. The total amount invested by a Canadian Employee in the Employee Share Offering cannot exceed 25% of his or her gross annual compensation, and is subject to a limit of 150 Shares.

23. None of the Filer, the Management Company, the Canadian Affiliates or any of their employees, agents or representatives will provide investment advice to the Canadian Employees with respect to an investment in the Shares or the Units.

24. The Shares are not currently listed for trading on any stock exchange in Canada and the Filer has no intention to have the Shares so listed. As there is no market for the Shares in Canada, and none is expected to develop, any first trades of Shares by Canadian Participants will be effected through the facilities of, and in accordance with the rules and regulations of, a foreign stock exchange outside of Canada.

25. Canadian Employees will receive, or will be notified of their ability to request, an information package which will include a summary of the terms of the Employee Share Offering, a tax notice containing a description of Canadian income tax consequences of subscribing for and holding the Units and redeeming Units at the end of the Lock-Up Period.

26. Upon request, Canadian Employees may receive copies of the Filer's French *Document de Référence* filed with the French AMF in respect of the Shares and a copy of the rules of the Classic FCPE (which are analogous to company by-laws). The Canadian Employees will also have access to copies of the continuous disclosure materials relating to the Filer that are furnished to holders of the Shares.

27. Canadian Participants will receive an initial statement of their holdings under the Classic Plan, together with an updated statement at least once per year.

28. There are approximately 56 Qualifying Employees resident in Canada (approximately 55 in Ontario, and 1 in Quebec), who represent, in the aggregate, less than 1% of the number of employees in the SEB Group worldwide.

Decision

The principal regulator is satisfied that the test contained in the Legislation that provides the principal regulator with the jurisdiction to make the decision has been met.

The decision of the principal regulator under the Legislation is that the Offering Relief is granted provided that the prospectus requirements of the Legislation will apply to the first trade in any Units or Shares acquired by Canadian Participants pursuant to this decision unless the following conditions are met:

(a) the issuer of the security

  (i) was not a reporting issuer in any jurisdiction of Canada at the distribution date, or

  (ii) is not a reporting issuer in any jurisdiction of Canada at the date of the trade;

(b) at the distribution date, after giving effect to the issue of the security and any other securities of the same class or series that were issued at the same time as or as part of the same distribution as the security, residents of Canada

  (i) did not own, directly or indirectly, more than 10% of the outstanding securities of the class or series, and

  (ii) did not represent in number more than 10% of the total number of owners, directly or indirectly, of securities of the class or series; and

(c) the first trade is made

  (i) through an exchange, or a market, outside of Canada, or

  (ii) to a person or company outside of Canada.

"Wes M. Scott"
Commissioner
Ontario Securities Commission

"Paulette Kennedy"
Commissioner
Ontario Securities Commission

2.2 Orders

2.2.1 Lyndz Pharmaceuticals Inc. et al. – ss. 127, 127.1

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

AND

IN THE MATTER OF
LYNDZ PHARMACEUTICALS INC.,
JAMES MARKETING LTD.,
MICHAEL EATCH AND RICKEY MCKENZIE

ORDER
(Sections 127 and 127.1 of the Securities Act)

WHEREAS on December 4, 2008, the Ontario Securities Commission (the "**Commission**") ordered pursuant to sections 127(1) and 127(5) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") that immediately for a period of 15 days from the date thereof: (a) all trading in securities of Lyndz Pharmaceuticals Inc. ("**Lyndz**") shall cease; (b) all trading in securities by Lyndz, Lyndz Pharma Ltd. ("**Lyndz UK**"), James Marketing Ltd. ("**James Marketing**"), Michael Eatch ("**Eatch**") and Rickey McKenzie ("**McKenzie**") shall cease; and (c) the exemptions contained in Ontario securities law do not apply to the Respondents (the "**Temporary Order**");

AND WHEREAS on December 8, 2008, the Commission issued a Notice of Hearing, accompanied by Staff's Statement of Allegations in support of the Temporary Order;

AND WHEREAS on December 17, 2008, February 13, 2009, April 21, 2009, July 6, 2009, July 29, 2009, and September 1, 2009, the Temporary Order was continued following a hearing before the Commission;

AND WHEREAS on September 23, 2009, following a hearing, the Commission removed Lyndz UK from the Temporary Order and continued the Temporary Order, as amended, until the conclusion of the hearing on the merits;

AND WHEREAS on September 23, 2009, Staff issued a Statement of Allegations and the Commission issued a Notice of Hearing with respect to the hearing on the merits;

AND WHEREAS the Commission held pre-hearing conferences on May 6, 7 and 19, 2010;

AND WHEREAS the hearing on the merits took place on May 31 and June 1, 2010 (the "Merits Hearing") and on May 16, 2011, the Commission issued its decision on the merits ("Merits Decision");

AND WHEREAS, in the Merits Decision, the Commission concluded that Eatch, McKenzie, Lyndz and James Marketing (together, the "**Respondents**") distributed Lyndz securities without a preliminary prospectus and a prospectus having been filed and receipted by the Director, no exemption being available, contrary to subsection 53(1) of the Act; and perpetrated a fraud on Lyndz investors, contrary to subsection 126.1(b) of the Act;

AND WHEREAS on March 28, 2012, a hearing to consider appropriate sanctions and costs was held before the Commission (the "**Sanctions and Costs Hearing**");

AND WHEREAS Staff filed and served written submissions on sanctions and costs on February 22, 2012, and, on March 28, 2012, counsel for Staff and Eatch, representing himself and Lyndz, appeared at the Sanctions and Costs Hearing and gave oral submissions;

AND WHEREAS no one appeared at or participated in the Sanctions and Costs Hearing for McKenzie or James Marketing;

AND WHEREAS we were satisfied that McKenzie and James Marketing were given reasonable notice of the Sanctions and Costs Hearing in accordance with section 6 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "**SPPA**"), and therefore that we were authorized to proceed in their absence, pursuant to s. 7(1) of the SPPA and Rule 7.1 of the Commission's *Rules of Procedure* (2010), 33 O.S.C.B. 8017;

AND WHEREAS, having considered the written submissions of counsel for Staff and the oral submissions of counsel for Staff and of Eatch, we have determined that the following sanctions and costs are in the public interest;

IT IS ORDERED THAT:

1. pursuant to paragraph 2 of subsection 127(1) of the Act, all trading in any securities by Eatch, Lyndz, McKenzie and James Marketing shall cease permanently, and all trading in securities of Lyndz and James Marketing shall cease permanently;

2. pursuant to paragraph 2.1 of subsection 127(1) of the Act, the acquisition of any securities by Eatch, Lyndz, McKenzie and James Marketing shall cease permanently;

3. pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Eatch, Lyndz, McKenzie and James Marketing permanently;

4. pursuant to paragraph 6 of subsection 127(1) of the Act, Eatch and McKenzie are hereby reprimanded;

5. pursuant to paragraphs 7 and 8 of subsection 127(1) of the Act, Eatch shall

resign all positions he holds as a director or officer of any issuer and he is prohibited permanently from becoming or acting as a director or officer of any issuer;

6. pursuant to paragraphs 7 and 8 of subsection 127(1) of the Act, McKenzie shall resign all positions he holds as director or officer of any issuer and he is prohibited permanently from becoming or acting as a director or officer of any issuer;

7. pursuant to paragraph 10 of subsection 127(1) of the Act, Lyndz shall disgorge to the Commission the amount of $400,000, to be designated for allocation to or for the benefit of third parties, in accordance with subsection 3.4(2)(b) of the Act;

8. pursuant to paragraph 10 of subsection 127(1) of the Act, Lyndz and James Marketing shall jointly and severally disgorge to the Commission the amount of $345,000, to be designated for allocation to or for the benefit of third parties, in accordance with subsection 3.4(2)(b) of the Act;

9. pursuant to paragraph 10 of subsection 127(1) of the Act, Eatch, Lyndz and James Marketing shall jointly and severally disgorge to the Commission the amount of $655,000, to be designated for allocation to or for the benefit of third parties, in accordance with subsection 3.4(2)(b) of the Act;

10. pursuant to paragraph 10 of subsection 127(1) of the Act, McKenzie, Lyndz and James Marketing shall jointly and severally disgorge to the Commission the amount of $700,000, to be designated for allocation to or for the benefit of third parties, in accordance with subsection 3.4(2)(b) of the Act;

11. pursuant to paragraph 9 of subsection 127(1) of the Act, Eatch shall pay an administrative penalty of $500,000, to be designated for allocation to or for the benefit of third parties, in accordance with subsection 3.4(2)(b) of the Act; and

12. pursuant to paragraph 9 of subsection 127(1) of the Act, McKenzie shall pay an administrative penalty of $600,000, to be designated for allocation to or for the benefit of third parties, in accordance with subsection 3.4(2)(b) of the Act.

DATED at Toronto this 31st day of July, 2012.

“Mary G. Condon”

“Sinan O. Akdeniz”

2.2.2 IIROC v. Mark Allen Dennis – ss. 21.7, 8

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

AND

IN THE MATTER OF
AN APPLICATION FOR A HEARING AND REVIEW OF A DECISION OF THE ONTARIO DISTRICT COUNCIL OF THE INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA PURSUANT TO SECTION 21.7 OF THE SECURITIES ACT, R.S.O. c. S.5, AS AMENDED

AND

IN THE MATTER OF
DISCIPLINE PROCEEDINGS PURSUANT TO THE BY-LAWS OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA AND THE DEALER MEMBER RULES OF THE INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA

BETWEEN

STAFF OF THE INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA

AND

MARK ALLEN DENNIS

ORDER
(Sections 21.7 and 8)

WHEREAS on June 30, 2011, Staff of the Investment Industry Regulatory Organization of Canada applied under section 21.7 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended, for a hearing and review of a decision of a hearing panel of the Ontario District Council (the "Hearing Panel") of the Investment Industry Regulatory Organization of Canada ("IIROC") dated June 3, 2011, (the "IIROC Decision") issued in respect of a discipline proceeding against Mark Allen Dennis ("Dennis");

AND WHEREAS on November 21, 2011, a hearing and review of the IIROC Decision was held before the Ontario Securities Commission (the "Commission");

AND WHEREAS on July 31, 2012, the Commission issued its Reasons and Decision setting aside the IIROC Decision;

AND WHEREAS for the reasons set out in the decision of the Commission issued July 31, 2012, the Commission considers it proper to make this Order in place of the IIROC Decision;

IT IS ORDERED THAT

1. There will be a permanent bar on Dennis's approval with IIROC;

2. Dennis shall pay a fine in the amount of $1,450,000 with respect to his misappropriation of funds from a client;

3. Dennis shall pay a fine in the amount of $25,000 for his failure to provide information to IIROC in connection with their investigation; and

4. Dennis shall pay costs in the amount of $7,500.

Dated at Toronto this 31st day of July, 2012

"Mary G. Condon"

"Sinan O. Akdeniz"

2.2.3 Paul Donald – ss. 127, 127.1

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

AND

IN THE MATTER OF
PAUL DONALD

ORDER
(Sections 127 and 127.1)

WHEREAS on May 20, 2012 the Ontario Securities Commission (the "Commission") issued a Notice of Hearing pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act"), accompanied by a Statement of Allegations dated May 20, 2012 filed by staff of the Commission ("Staff") in respect of Paul Donald;

AND WHEREAS a hearing on the merits in this matter was held before the Commission on March 21, 22, 23, 24, 25, 28, 29, 30 and April 7, 2011;

AND WHEREAS, following the hearing on the merits, the Commission issued its Reasons and Decision with respect to the merits on August 1, 2012;

IT IS ORDERED that the hearing to determine sanctions and costs will be held at the offices of the Commission at 20 Queen Street West, Toronto, commencing on September 13, 2012 at 10:00 a.m.;

IT IS FURTHER ORDERED that, upon the failure of any party to attend at the time and place aforesaid, the hearing may proceed in the absence of that party, and such party is not entitled to any further notice of the proceeding.

Dated at Toronto this 1st day of August, 2012.

"Christopher Portner"

"Paulette L. Kennedy"

2.2.4 TSX Inc. – s. 15.1 of NI 21-101 Marketplace Operation

Headnote

Exemption granted to TSX Inc. from the requirement in subsection 3.2(2) of National Instrument 21-101 Marketplace Operation to file an amendment to Form 21-101F1 within specified timeline prior to implementation of a change to fees.

Applicable Legislative Provisions

National Instrument 21-101 Marketplace Operation, s. 5.1.

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

AND

IN THE MATTER OF
TSX INC.

ORDER
(Section 15.1 of National Instrument 21-101
Marketplace Operation **("NI 21-101"))**

UPON the application (the "Application") of TSX Inc. (the "Applicant") to the Director for an order pursuant to section 15.1 of NI 21-101 exempting the Applicant from the requirement in subsection 3.2(2) of NI 21-101 to file an amendment to the information previously provided in Form 21-101F1 (the "Form") regarding Exhibit L - Fees seven days before implementation of a change to fees (the "seven day filing requirement");

AND UPON the Applicant filing an updated Form on July 27, 2012, describing a fee change to be effective as of August 1, 2012, (the "Fee Change");

AND UPON considering the Application and the recommendation of staff of the Commission;

AND UPON the Applicant having represented to the Director as follows:

1. The Applicant operates the Toronto Stock Exchange and is a recognized exchange in Ontario with its head office in Toronto;

2. The Applicant would like to implement the Fee Change on August 1, 2012;

3. The final recognition order with respect to the acquisition by Maple Group Acquisition Corporation of TMX Group Inc., the parent company of the Applicant, is expected to come into force on July 31, 2012 ("Maple Recognition Order");

4. The Fee Change amends fees that would otherwise not be in compliance with the Maple Recognition Order; and

5. The Fee Change is not complex and should not raise any regulatory concerns, and can therefore be reviewed prior to the effective date of the Maple Recognition Order.

AND UPON the Director being satisfied to do so would not be prejudicial to the public interest.

IT IS ORDERED by the Director, pursuant to section 15.1 of NI 21-101, that the Applicant is exempted from the seven day filing requirement with respect to the Fee Change.

DATED this 31st day July, 2012.

"Tracey Stern"
Manager, Market Regulation
Ontario Securities Commission

2.2.5 Marlon Gary Hibbert et al.

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

AND

IN THE MATTER OF
MARLON GARY HIBBERT, ASHANTI CORPORATE SERVICES INC., DOMINION INTERNATIONAL RESOURCE MANAGEMENT INC., KABASH RESOURCE MANAGEMENT, POWER TO CREATE WEALTH INC. AND POWER TO CREATE WEALTH INC. (PANAMA)

ORDER

WHEREAS on January 28, 2011, the Ontario Securities Commission (the "Commission") issued a temporary cease trade order (the "Temporary Order") pursuant to subsections 127(1) and 127(5) of the *Securities Act*, R.S.O. 1990, c.S.5, as amended (the "Act") in respect of all of the Respondents (the "Cease Trade Order");

AND WHEREAS on February 11, 2011, the Commission made an Order extending the Cease Trade Order until July 28, 2011;

AND WHEREAS on March 29, 2011, the Commission issued a Notice of Hearing pursuant to sections 127 and 127.1 of the Act in connection with a Statement of Allegations dated March 29, 2011 issued by Staff of the Commission ("Staff") with respect to the Respondents;

AND WHEREAS on April 27, 2011, the Commission held a hearing and ordered that: (1) the hearing on the merits shall commence on December 1, 2011; (2) a pre-hearing conference be held on October 11, 2011; and (3) the exchange of documents shall take place on August 12, 2011;

AND WHEREAS on July 26, 2011, the Commission made a further order extending the Cease Trade Order until the conclusion of the hearing on the merits;

AND WHEREAS on October 11, 2011, the Commission held a pre-hearing in this matter and heard submissions from Staff and Hibbert;

AND WHEREAS the hearing on the merits took place on December 5, 7 and 9, 2011 and January 11, 2012;

AND WHEREAS on April 4, 2012, the Panel issued its Reasons and Decision and found the Respondents breached the Act by: trading in securities without being registered to do so; acting as advisors with respect to investing in, buying or selling securities without registration; engaging in activities which constituted a distribution in securities for which no preliminary prospectus or prospectus had been filed and for which no receipt had been issued by the Director; and further, that Marlon Gary Hibbert ("Hibbert") had directly or indirectly engaged or participated in acts, practices or a course of conduct relating to securities that he knew or ought reasonably to have known would perpetrate a fraud on persons; and that Hibbert had misled Staff;

AND WHEREAS a sanctions hearing was scheduled for August 1, 2012;

AND WHEREAS on July 18, 2012, the Commission made an Order pursuant to subsection 144(1) of the Act varying the Cease Trade Order to permit Hibbert and Power To Create Wealth Inc. (Panama) ("PCWP") to trade in securities solely to transfer approximately $650,000.00 from a trading account held in the name of PCWP located in Panama to the Ontario Securities Commission by way of a bank draft or direct wire transfer to an account held by or in the name of the Commission;

AND WHEREAS on August 1, 2012, counsel for Hibbert requested an adjournment of the sanctions hearing as the $650,000.00 had not yet been transferred from a trading account held in the name of PCWP located in Panama to the Ontario Securities Commission;

AND WHEREAS Staff did not oppose the adjournment;

AND WHEREAS the Commission is of the opinion that it is in the public interest to make this Order:

IT IS ORDERED that the sanctions hearing is adjourned to August 13, 2012 at 2:30 p.m. on a peremptory basis with respect to Hibbert.

DATED at Toronto this 1st day of August, 2012.

"James D. Carnwath"

2.2.6 Ground Wealth Inc. et al. – ss. 127(7), 127(8)

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

AND

IN THE MATTER OF
GROUND WEALTH INC., ARMADILLO ENERGY INC., PAUL SCHUETT, DOUG DEBOER, JAMES LINDE, SUSAN LAWSON, MICHELLE DUNK, ADRION SMITH, BIANCA SOTO AND TERRY REICHERT

TEMPORARY ORDER
(Subsections 127(7) & 127(8))

WHEREAS the Ontario Securities Commission (the "Commission") issued a temporary order on July 27, 2011 (the "Temporary Order") pursuant to subsections 127(1) and 127(5) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act") that:

1. pursuant to paragraph 2 of subsection 127(1), all trading in the securities of Armadillo Energy Inc. ("the Armadillo Securities") shall cease;

2. pursuant to paragraph 2 of subsection 127(1), Armadillo Energy Inc. ("Armadillo), Ground Wealth Inc. ("GWI"), Paul Schuett ("Schuett"), Doug DeBoer ("DeBoer"), James Linde ("Linde"), Susan Lawson ("Lawson"), Michelle Dunk ("Dunk"), Adrion Smith ("Smith"), Bianca Soto ("Soto") and Terry Reichert ("Reichert") (collectively, the "Respondents") shall cease trading in all securities; and

3. pursuant to subsection 127(6), the Temporary Order shall take effect immediately and shall expire on the fifteenth day after its making unless extended by order of the Commission;

AND WHEREAS on August 11, 2011, the Commission held a hearing to consider whether it was in the public interest to extend the Temporary Order, and heard submissions from Staff of the Commission ("Staff") and counsel for the Respondents;

AND WHEREAS on August 11, 2011, the Commission extended the Temporary Order to February 13, 2012 (the "Amended Temporary Order") on the same terms and conditions as provided for in the Temporary Order; provided that the Temporary Order shall not prevent a Respondent from trading for the Respondent's own account, solely through a registered dealer or a registered dealer in a foreign jurisdiction (which dealer must be given a copy of the Amended Temporary Order), in (a) any "exchange traded security" or "foreign exchange traded security" within the meaning of National Instrument 21-101, provided the Respondent does not own beneficially or exercise control or direction over more than 5 per cent of the voting or equity securities of the issuer of any such securities, or (b) any security issued by a mutual fund that is a reporting issuer; and provided the Respondent provides Staff with the particulars of the accounts in which such trading is to occur before any trading in such accounts occurs;

AND WHEREAS on February 8, 2012, the Commission held a hearing to consider whether it was in the public interest to extend the Amended Temporary Order pursuant to subsections 127(7) and 127(8), and heard submissions from Staff and from counsel for the Respondents;

AND WHEREAS on February 8, 2012, the Commission extended the Amended Temporary Order to August 8, 2012 (the "February 2012 Temporary Order") on the following terms: pursuant to paragraph 2 of subsection 127(1), all trading in the Armadillo Securities shall cease; pursuant to paragraph 2 of subsection 127(1), the Respondents shall cease trading in Armadillo Securities and/or in securities of a nature similar to Armadillo Securities, which are securities evidencing an interest in the production of barrels of oil still in the ground; and this Order shall not prevent Staff from applying to the Commission for a variation of this Order if Staff considers that doing so is in the public interest;

AND WHEREAS on August 2, 2012, the Commission held a hearing to consider whether it was in the public interest to extend the February 2012 Temporary Order pursuant to subsections 127(7) and 127(8), and heard submissions from Staff and from counsel for the Respondents;

AND WHEREAS the Commission is of the opinion that it is in the public interest to make this order;

IT IS HEREBY ORDERED pursuant to subsections 127(7) & 127(8) of the Act that:

1. the February 2012 Temporary Order is extended to February 4, 2013, or until further order of the Commission; and

2. the matter shall return before the Commission on February 1, 2013 at 10:00 a.m. or on such other date as set by the Office of the Secretary and agreed to by the parties.

DATED at Toronto this 2nd day of August, 2012.

"James E. A. Turner"

2.2.7 One Financial All-Weather Profit Family Corp. – s. 158(1.1)

Headnote

Order pursuant to subsection 158(1.1) of the Business Corporations Act (Ontario) that an offering corporation is authorized to dispense with its audit committee – Issuer is a family of corporate class investment funds – Issuer exempt from audit committee requirements of Multilateral Instrument 52-110 Audit Committees – Relief conditional upon issuer continuing to satisfy the criteria for relief from audit committee requirements of MI 52-110 or a successor instrument.

Ontario Legislative Provisions Cited

Business Corporations Act, R.S.O. 1990, c. B.16, s. 158(1.1).
Multilateral Instrument 52-110 Audit Committees.
National Instrument 81-106 Investment Fund Continuous Disclosure.
National Instrument 81-107 Independent Review Committee for Investment Funds.

July 25, 2012

IN THE MATTER OF
THE BUSINESS CORPORATIONS ACT,
R.S.O. 1990, CHAPTER B. 16, AS AMENDED
(the "OBCA")

AND

IN THE MATTER OF
ONE FINANCIAL ALL-WEATHER PROFIT FAMILY CORP.

ORDER
(Subsection 158(1.1) of the OBCA)

UPON the application of ONE Financial All-Weather Profit Family Corp. (the "**Applicant**") to the Ontario Securities Commission (the "**Commission**") for an order pursuant to subsection 158(1.1) of the OBCA for a determination that the Applicant be authorized to dispense with an audit committee;

AND UPON considering the application and the recommendation of staff of the Commission;

AND UPON the Applicant having represented to the Commission that:

1. The Applicant is a mutual fund corporation incorporated under the OBCA on December 9, 2011.

2. The Applicant is an investment fund under applicable securities legislation.

3. None of the Applicant, ONE Financial Corporation, any of the Funds (defined below) or any of the Investment Pools (defined below) is in default under any applicable securities legislation in any of the provinces or territories of Canada.

4. The Applicant has launched a family of open-end commodity pools (the "**Funds**") pursuant to a preliminary long form prospectus (the "**Prospectus**") dated December 29, 2011, which has been filed with the securities regulatory authority in each of the provinces and territories of Canada.

5. Each Fund will gain exposure to one or more investment pools (the "**Investment Pools**") which will be formed as investment trusts.

6. No securities of the Applicant, the Funds or the Investment Pools will be listed for trading on a stock exchange.

7. ONE Financial Corporation will be appointed manager of the Funds and the Investment Pools pursuant to a management agreement between ONE Financial Corporation and the Applicant. ONE Financial Corporation is a corporation incorporated under the laws of the province of Ontario having its head office in Toronto, Ontario. ONE Financial Corporation is registered as an investment fund manager, portfolio manager, exempt market dealer and commodity trading manager with the Commission. ONE Financial Corporation is not a reporting issuer in any province or territory of Canada.

8. Multilateral Instrument 52-110 – *Audit Committees* does not apply to reporting issuers that are investment funds.

9. The Applicant is subject to the investment fund specific continuous disclosure and conflict of interest rules found in National Instrument 81-106 – *Investment Fund Continuous Disclosure* and National Instrument 81-107 – *Independent Review Committee for Investment Funds*.

AND UPON the Commission being satisfied that to do so would not be prejudicial to the Applicant's shareholders,

IT IS ORDERED, pursuant to subsection 158(1.1) of the OBCA, that the Applicant is authorized to dispense with an audit committee so long as the Applicant remains an investment fund under applicable securities legislation.

"Wesley M .Sott"
Commissioner

"Sarah B. Kavanagh"
Commissioner

2.2.8 NWQ U.S. Large Cap Value Fund – s. 1(10)(a)(ii)

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – Issuer deemed to no longer be a reporting issuer under securities legislation.

Applicable Legislative Provisions

Securities Act, R.S.O. 1990, c. S.5, as am., s. 1(10)(a)(ii).

July 25, 2012

Dawn Scott
Torys LLP
79 Wellington St. W
Toronto, Ontario M5K 1N2

Attention: Dawn Scott

Dear Ms. Scott:

Re: NWQ U.S. Large Cap Value Fund (the "Applicant") – Application for an order not to be a reporting issuer under the securities legislation of Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland & Labrador (the "Jurisdictions") dated June 8, 2012

The Applicant has applied to the local securities regulatory authority or regulator (the "Decision Maker") in each of the Jurisdictions for a decision under the securities legislation (the “Legislation") of the Jurisdictions not to be a reporting issuer in the Jurisdictions.

As the Applicant has represented to the Decision Makers that,

- the outstanding securities of the Applicant, including debt securities, are beneficially owned, directly or indirectly, by less than 15 security holders in each of the jurisdictions in Canada and less than 51 security holders in total in Canada;
- no securities of the Applicant are traded on a marketplace as defined in National Instrument 21-101 Marketplace Operation;
- the Applicant is applying for relief not to be a reporting issuer in all of the jurisdictions in Canada in which it is currently a reporting issuer; and
- the Applicant is not in default of any of its obligations under the Legislation as a reporting issuer,

each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the decision has been met and orders that the Applicant is not a reporting issuer .

“Darren McKall”
Manager, Investment Funds
Ontario Securities Commission

2.2.9 Saputo Inc. – s. 104(2)(c)

Headnote

Clause 104(2)(c) – Issuer bid – relief from issuer bid requirements in sections 94 to 94.8 and 97 to 98.7 of the Act – Issuer proposes to purchase, at a discounted purchase price, up to 1,200,000 of its common shares from one of its shareholders and/or such shareholder's affiliates – due to discounted purchase price, proposed purchases cannot be made through TSX trading system – but for the fact that the proposed purchases cannot be made through the TSX trading system, the Issuer could otherwise acquire the subject shares in reliance upon the issuer bid exemption available under section 101.2 of the Securities Act and in accordance with the TSX rules governing normal course issuer bid purchases – no adverse economic impact on or prejudice to issuer or public shareholders – proposed purchases exempt from issuer bid requirements in sections 94 to 94.8 and 97 to 98.7 of the Act, subject to conditions, including that the issuer not purchase more than one-third of the maximum number of shares to be purchased under its normal course issuer bid by way of off-exchange block purchases.

Statutes Cited

Securities Act, R.S.O. 1990, c. S.5, as am., ss. 94 to 94.8, 97 to 98.7, 104(2)(c).

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c.S.5, AS AMENDED
(the "Act")

AND

IN THE MATTER OF
SAPUTO INC.

ORDER
(clause 104(2)(c))

UPON the application (the "**Application**") of Saputo Inc. (the "**Issuer**") to the Ontario Securities Commission (the "**Commission**") for an order pursuant to clause 104(2)(c) of the Act exempting the Issuer from the requirements of sections 94 to 94.8 and 97 to 98.7 of the Act (the "**Issuer Bid Requirements**") in respect of the proposed purchases by the Issuer of up to 1,200,000 (collectively, the "**Subject Shares**") of its common shares (the "**Common Shares**") in one or more trades from The Toronto-Dominion Bank (the "**Selling Shareholder**");

AND UPON considering the Application and the recommendation of staff of the Commission;

AND UPON the Issuer (and the Selling Shareholder in respect of paragraphs 5, 6, 7, 8, 10, 21 and 22, as they relate to the Selling Shareholder) having represented to the Commission that:

1. The Issuer is a corporation governed by the *Canada Business Corporations Act*.

2. The head office and registered office of the Issuer are located at 6869, Métropolitain Boulevard East, Saint-Léonard, Québec, H1P 1X8.

3. The Issuer is a reporting issuer in each of the provinces and territories of Canada and the Common Shares of the Issuer are listed for trading on the TSX under the symbol "SAP". The Issuer is not in default of any requirement of the securities legislation in the jurisdictions in which it is a reporting issuer.

4. The authorized common share capital of the Issuer consists of an unlimited number of Common Shares, of which 198,127,281 were issued and outstanding as of June 30, 2012.

5. The corporate headquarters of the Selling Shareholder are located in the Province of Ontario.

6. The Selling Shareholder has advised the Issuer that it does not directly or indirectly own more than 5% of the issued and outstanding Common Shares.

7. The Selling Shareholder has advised the Issuer that it is the beneficial owner of at least 1,200,000 Common Shares and that the Subject Shares were not acquired in anticipation of resale pursuant to private agreements under an issuer bid exemption order issued by a securities regulatory authority ("**Off-Exchange Block Purchases**").

8. The Selling Shareholder is at arm's length to the Issuer and is not an "insider" of the Issuer or "associate" of an "insider" of the Issuer, or an "associate" or "affiliate" of the Issuer, as such terms are defined in the Act. The Selling Shareholder is an "accredited investor" within the meaning of National Instrument 45-106 *Prospectus and Registration Exemptions* ("**NI 45-106**").

9. Pursuant to a Notice of Intention to Make a Normal Course Issuer Bid dated November 9, 2011 (the "**Notice**"), the Issuer announced on November 9, 2011 a normal course issuer bid (the "**Normal Course Issuer Bid**") for up to 10,030,630 Common Shares. In accordance with the Notice, the Normal Course Issuer Bid is conducted through the facilities of the TSX or such other means as may be permitted by the TSX or a securities regulatory authority, in accordance with sections 628 to 629.3 of Part VI of the TSX Company Manual (the "**TSX NCIB Rules**"), including, further to an amendment to the Notice made and announced by the Issuer on June 5, 2012, private agreements under an issuer bid exemption order issued by a securities regulatory

authority. As of June 30, 2012, 3,356,700 Common Shares have been purchased under the Normal Course Issuer Bid, including 1,060,000 Common Shares which were purchased pursuant to Off-Exchange Block Purchases. Assuming completion of the purchase of the Subject Shares, the Issuer will have purchased under the Normal Course Issuer Bid an aggregate of 2,260,000 Common Shares pursuant to Off-Exchange Block Purchases, representing approximately 23% of the 10,030,630 Common Shares authorized to the purchased under the Normal Course Issuer Bid.

10. The Issuer and the Selling Shareholder intend to enter into one or more agreements of purchase and sale (each an "**Agreement**") pursuant to which the Issuer will agree to acquire the Subject Shares from the Selling Shareholder by one or more purchases each occurring on or prior to August 23, 2012 (each such purchase, a "**Proposed Purchase**") for a purchase price (the "**Purchase Price**") that will be negotiated at arm's length between the Issuer and the Selling Shareholder. The Purchase Price will be at a discount to the prevailing market price of the Common Shares on the TSX and below the bid-ask price for the Common Shares at the time of each Proposed Purchase.

11. The Subject Shares acquired under each Proposed Purchase will constitute a "block" as that term is defined in section 628 of the TSX NCIB Rules.

12. The purchase of the Subject Shares by the Issuer pursuant to each Agreement will constitute an "issuer bid" for purposes of the Act, to which the applicable Issuer Bid Requirements would apply.

13. Because the Purchase Price will be at a discount to the prevailing market price and below the bid-ask price for the Common Shares at the time of each Proposed Purchase, each Proposed Purchase cannot be made through the TSX trading system and, therefore, will not occur "through the facilities" of the TSX. As a result, the Issuer will be unable to acquire the Subject Shares from the Selling Shareholder in reliance upon the exemption from the Issuer Bid Requirements that is available pursuant to section 101.2(1) of the Act.

14. But for the fact that the Purchase Price will be at a discount to the prevailing market price and below the bid-ask price for the Common Shares at the time of each Proposed Purchase, the Issuer could otherwise acquire the Subject Shares as a block purchase (a "**Block Purchase**") in accordance with the block purchase exception in section 629(l)7 of the TSX NCIB Rules and the exemption from the Issuer Bid Requirements that is available pursuant to section 101.2(1) of the Act.

15. The sale of any of the Subject Shares to the Issuer will not be a "distribution" (as defined in the Act).

16. For each Proposed Purchase, the Issuer will be able to acquire the Subject Shares from the Selling Shareholder without the Issuer being subject to the dealer registration requirements of the Act.

17. The Issuer is of the view that it will be able to purchase the Subject Shares at a lower price than the price at which it would be able to purchase the Common Shares under the Normal Course Issuer Bid through the facilities of the TSX and the Issuer is of the view that this is an appropriate use of the Issuer's funds on hand.

18. The purchase of the Subject Shares will not adversely affect the Issuer or the rights of any of the Issuer's securityholders and it will not materially affect the control of the Issuer. To the knowledge of the Issuer, the Proposed Purchases will not prejudice the ability of other shareholders of the Issuer to otherwise sell Common Shares in the open market at the prevailing market price. The Proposed Purchases will be carried out with a minimum of cost to the Issuer.

19. To the best of the Issuer's knowledge, as of June 30, 2012, the "public float" for the Common Shares represented approximately 64% of all issued and outstanding Common Shares for purposes of the TSX NCIB Rules.

20. The market for the Common Shares is a "liquid market" within the meaning of section 1.2 of Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions*.

21. Other than the Purchase Price, no fee or other consideration will be paid in connection with the Proposed Purchases.

22. At the time that each Agreement is entered into by the Issuer and the Selling Shareholder, neither the Issuer, nor the Selling Shareholder will be aware of any "material change" or "material fact" (each as defined in the Act) in respect of the Issuer that has not been generally disclosed.

AND UPON the Commission being satisfied to do so would not be prejudicial to the public interest;

IT IS ORDERED pursuant to clause 104(2)(c) of the Act that the Issuer be exempt from the Issuer Bid Requirements in connection with each Proposed Purchase, provided that:

(a) the Proposed Purchases will be taken into account by the Issuer when calculating the maximum annual aggregate limit that is imposed upon the Normal

Course Issuer Bid in accordance with the TSX NCIB Rules;

(b) the Issuer will refrain from conducting a Block Purchase in accordance with the TSX NCIB Rules during the calendar week that it completes each Proposed Purchase and may not make any further purchases under the Normal Course Issuer Bid for the remainder of that calendar day on which it completes each Proposed Purchase;

(c) the Purchase Price is not higher than the last "independent trade" (as that term is used in paragraph 629(l)1 of the TSX NCIB Rules) of a board lot of Common Shares immediately prior to the execution of each Proposed Purchase;

(d) the Issuer will otherwise acquire any additional Common Shares pursuant to the Normal Course Issuer Bid in accordance with the Notice, as amended, and the TSX NCIB Rules, as applicable;

(e) immediately following each Proposed Purchase of the Subject Shares from the Selling Shareholder, the Issuer will report the purchase of the Subject Shares to the TSX;

(f) at the time that each Agreement is entered into by the Issuer and the Selling Shareholder, neither the Issuer, nor the Selling Shareholder will be aware of any "material change" or "material fact" (each as defined in the Act) in respect of the Issuer that has not been generally disclosed;

(g) the Issuer will issue a press release in connection with the first Proposed Purchase; and

(h) the Issuer does not purchase, pursuant to Off-Exchange Block Purchases, more than one-third of the maximum number of Common Shares the Issuer can purchase under the Normal Course Issuer Bid.

Dated at Toronto this 31st day of July, 2012.

"Judith Robertson"
Commissioner

"Paulette Kennedy"
Commissioner

2.2.10 Jite Technologies Inc. – s. 1(6) of the OBCA

Headnote

Filer deemed to have ceased to be offering its securities to the public under the OBCA.

Applicable Legislative Provisions

Business Corporations Act, R.S.O. 1990, c. B.16, as am., s. 1(6).

IN THE MATTER OF
THE BUSINESS CORPORATIONS ACT (ONTARIO)
R.S.O. 1990, c. B.16, AS AMENDED
(the OBCA)

AND

IN THE MATTER OF
JITE TECHNOLOGIES INC
(the Applicant)

ORDER
(Subsection 1(6) of the OBCA)

UPON the application of the Applicant to the Ontario Securities Commission (the **Commission**) for an order pursuant to subsection 1(6) of the OBCA to be deemed to have ceased to be offering its securities to the public.

AND UPON the Applicant representing to the Commission that:

1. The Applicant is a corporation constituted under the laws of Ontario by the amalgamation (the **Amalgamation**) on May 31, 2012 of Jite Technologies Inc. (**JTI**), a corporation formerly listed on the TSX Venture Exchange (**TSXV**) and an "offering corporation" as defined in the OBCA, and 1872706 Ontario Limited (**1872706**), a non-offering corporation and a wholly-owned subsidiary of McVicar Industries Inc. (**McVicar**). The Applicant has an authorized capital consisting of an unlimited number of common shares (the **Common Shares**) and an unlimited number of redeemable preference shares (**Preference Shares**).

2. The registered and head office of Applicant is located at 55 University Avenue, Suite 605, Toronto, Ontario M5J 2H7.

3. On February 28, 2012, McVicar made an offer (the **Offer**) to acquire all of the issued and outstanding common shares of JTI (the **JTI Shares**). The Offer expired on April 4, 2012.

4. Prior to making the Offer, McVicar held 11,285,250 JTI Shares, approximately 56.22% of the issued and outstanding JTI Shares.

5. On April 5, 2012, an aggregate of 7,517,356 JTI Shares, which represented approximately 37.45% of the issued and outstanding JTI Shares, validly tendered to the Offer were taken up by McVicar.

6. As a result of the Offer, McVicar increased its holdings to 18,802,606 JTI Shares representing approximately 93.67% of the issued and outstanding JTI Shares.

7. Pursuant to the Amalgamation, all of the 1,271,007 outstanding JTI Shares not held by McVicar were exchanged for Preference Shares and then redeemed for a cash amount per Preference Share equal to the cash price stipulated in the Offer. The JTI Shares held by McVicar were cancelled. The issued and outstanding shares of the McVicar subsidiary, 1872706 Ontario Limited, were exchanged for Common Shares.

8. As a result, McVicar became the sole beneficial holder of all of the Common Shares.

9. As of the date of this decision, all of the outstanding securities of the Applicant, including debt securities, which are beneficially owned, directly or indirectly, are held by McVicar as sole security holder.

10. The JTI Shares have been de-listed from the TSXV, effective as of the close of trading on June 4, 2012.

11. No securities of the Applicant are traded on a marketplace as defined in National Instrument 21-101 *Marketplace Operation*.

12. The Applicant has no intention to seek public financing by way of an offering of securities.

13. The Applicant is not a reporting issuer or equivalent in any jurisdiction in Canada.

AND UPON the Commission being satisfied to do so would not be prejudicial to the public interest;

IT IS HEREBY ORDERED by the Commission pursuant to subsection 1(6) of the OBCA that the Applicant be deemed to have ceased to be offering its securities to the public for the purpose of the OBCA.

DATED August 3, 2012.

“Paulette Kennedy”

“James Turner”

2.3 Rulings

2.3.1 Celernus Investment Partners Inc. – s. 74(1)

Headnote

Relief from the prospectus requirement of the Act to permit the distribution of pooled fund securities to managed accounts held by non-accredited investors on an exempt basis – NI 45-106 containing carve-out for managed accounts in Ontario prohibiting portfolio manager from making exempt distributions of securities of its proprietary pooled funds to its managed account clients in Ontario unless managed account client qualifies as accredited investor or invests $150,000 – distributions to Secondary Managed Account holders limited to family members and 0.5% of AUM for non-family members.

Applicable Legislative Provisions

Securities Act, R.S.O. 1990, c. S.5, as am., ss. 53, 74(1).

Rules Cited

National Instrument 45-106 Prospectus and Registration Exemptions.
National Instrument 31-103 Registration Requirements and Exemptions.

July 24, 2012

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, CHAPTER S.5, AS AMENDED
(the "Act")

AND

IN THE MATTER OF
CELERNUS INVESTMENT PARTNERS INC.
(the "Filer")

AND

ANY OPEN-ENDED MUTUAL FUNDS THAT ARE NOT REPORTING ISSUERS
ESTABLISHED BY THE FILER AND FOR WHICH THE FILER ACTS OR WILL ACT
AS INVESTMENT FUND MANAGER, TRUSTEE
(IF ESTABLISHED AS A TRUST) AND PORTFOLIO MANAGER
(the "Celernus Funds", and individually, a "Fund")

RULING
(Subsection 74(1) of the Act)

Background

The Filer has applied to the Ontario Securities Commission (the "**Commission**") on behalf of itself and the Celernus Funds, for a ruling pursuant to subsection 74(1) of the Act, that distributions of securities of the Celernus Funds to Secondary Managed Accounts (as defined below) for which the Filer provides discretionary investment management services will not be subject to the prospectus requirement under Section 53 of the Act (the "**Prospectus Requirement**") (the "**Requested Relief"**).

Interpretation

Defined terms contained in the Act and in National Instrument 14-101 – *Definitions* have the same meaning in this ruling unless they are defined in this decision.

Representations

This decision is based on the following facts represented by the Filer:

1. The Filer is incorporated under the laws of the province of Ontario. Its head office is in Toronto, Ontario.

2. The Filer is registered with the Commission in the categories of Portfolio Manager and Investment Fund Manager.

3. The Filer is currently the investment fund manager and portfolio manager of one open-ended mutual fund which is not a reporting issuer, and in the future, proposes to act as the investment fund manager, portfolio manager and/or trustee of additional open-ended mutual funds which are not reporting issuers. The Celernus Funds are, and will be, distributed pursuant to exemptions from the Prospectus Requirement.

4. The Filer and the Celernus Fund are not in default under the securities legislation in any province or territory of Canada.

5. The Filer offers investment management and financial counseling services primarily to high net worth individuals qualifying as "accredited investors", as such term is defined in National Instrument 45-106 – *Prospectus and Registration Exemptions* ("*NI 45-106*") (each such account hereinafter referred to as a "*Primary Managed Account*", and each such client herein referred to as a "*Primary Managed Account Client*"), or in reliance on another exemption from the Prospectus Requirement, such as the $150,000 exemption in NI 45-106.

6. The Filer's normal minimum aggregate balance for all of the Primary Managed Accounts of a Primary Managed Account Client is $250,000. This minimum will not be waived unless the Primary Managed Account Client is an "accredited" investor.

7. From time to time, the Filer may accept certain clients with less than $250,000 under management generally in order to solidify a Primary Managed Account Client relationship ("**Secondary Managed Account Clients**"). Such Secondary Managed Account Clients consist of family members or personal or business associates of Primary Managed Account Clients. Assets managed by the Filer for Secondary Managed Account Clients are incidental to the assets it manages for holders of Primary Managed Accounts. Managed accounts where the minimum aggregate balance has been waived for the reasons given above are hereinafter referred to as "**Secondary Managed Accounts**". Together, the Primary Managed Accounts and the Secondary Managed Accounts are referred to in this Application as the "**Managed Accounts**".

8. While the holders of the Primary Managed Accounts each qualify as accredited investors under Ontario securities law, the holders of the Secondary Managed Accounts do not always themselves qualify as accredited investors under Ontario securities law, nor do their investments meet the minimum investment threshold set out in NI 45-106. The Filer will typically service these Secondary Managed Account Clients as a courtesy to its Primary Managed Account Clients.

9. Investments in individual securities may not be ideal for the Secondary Managed Account Clients since they may not receive the same asset diversification benefits and may incur disproportionately higher brokerage commissions relative to the Primary Managed Account Clients due to minimum commission charges.

10. NI 45-106 does not recognize a portfolio manager acting on behalf of a managed account in Ontario as being an accredited investor if that account is acquiring a security of an investment fund. Accordingly, in the absence of relief from the Prospectus Requirement, the Celernus Funds will be available only to Clients that are accredited investors in their own right or are able to invest a minimum of $150,000 in a Fund in accordance with the requirements of NI 45-106. These requirements either act as a barrier to Secondary Managed Account Clients investing in the Funds, or may cause the Filer's portfolio manager to invest more of a Secondary Managed Account Client's portfolio in such a Fund than it might otherwise prefer to allocate.

11. To improve the diversification and cost benefits to Secondary Managed Account Clients, the Filer wishes to distribute securities of the Celernus Funds to Secondary Managed Accounts without a minimum investment. The Secondary Managed Account Client would be able to receive the benefit of the Filer's investment management expertise, regarding both asset allocation and individual stock selection, as well as receive the benefits of lower costs and broader asset diversification associated with pooled investments relative to direct holdings of individual securities.

12. All of the Managed Accounts are, and will be, serviced by individual portfolio managers of the Filer who meet the proficiency requirements of an advising officer or advising representative (or associate advising officer or associate advising representative) under Ontario securities law.

13. Each Primary Managed Account Client and Secondary Managed Account Client (together herein referred to as a "**Client**") executes a written agreement (the "**Investment Counsel Agreement**") whereby the Client appoints the Filer to act as portfolio manager in connection with an investment portfolio of the Client with full discretionary authority to trade in securities for the Managed Account without obtaining the specific consent of the Client to the trade. The Investment Counsel Agreement further sets out how the Managed Account operates and informs the Client of the Filer's various rules, procedures and policies.

14. At the initial meeting between a new Client and a portfolio manager, the portfolio manager establishes the Client's general investment goals and objectives, which is then documented in an investment objectives letter ("**IPS**") that describes the strategies that the Filer will employ to meet these objectives and include specific information on matters such as asset allocation, risk tolerance and liquidity requirements. To the extent that a Client's goals or circumstances have changed, a new IPS will be created to reflect those changes.

15. After the initial meeting, the Filer's portfolio manager meets at least once per year with his/her Clients (or more frequently as required) to review the performance of their account and their investment goals.

16. The custodian of each Client sends the Client a monthly statement showing all transactions carried out in their Managed Account during the month. On a monthly basis, the Filer sends its Clients a statement showing all holdings in their Managed Account and provides commentary on the investments contained in their Managed Account portfolio. The portfolio manager is available to review and discuss with Clients all account statements.

17. The Filer has determined that to best fulfill its fiduciary duty to its Clients, a portion of the asset mix in each Client's portfolio should be invested in the Celernus Funds.

18. One Fund has been established and additional Funds may be established by the Filer, in each case, with a view to achieving efficiencies in the delivery of portfolio management services to its Clients' Managed Accounts. The Filer has not and will not be paid any compensation with respect to the distribution of the Celernus Funds' securities to the Managed Accounts.

19. The operation and management of the Celernus Funds by the Filer is and will be incidental to the principal business activity of the Filer of providing personalized investment management services to Managed Account Clients.

20. The Filer will receive from each Fund an advisory fee, equal to 0.85% of the net asset value of the Fund, calculated and paid monthly. In addition, the Filer may earn and charge to each Fund a performance fee equal to 20% of the change in net assets between a new high water mark and the previous high water mark for which a performance fee was earned by the Manager and charged to the Fund. A performance fee will only be earned at such time as the compound annual return of the Fund is is greater or equal to 6%. The Filer will not charge a Client a duplicate fee in these circumstances as the investments in the Funds will be excluded from fee calculations for the Managed Account.

21. Each Fund will pay all administration fees and expenses relating to its operation. If, in the future, the Filer charges management fees or performance fees to a Fund and the Filer invests, on behalf of a Managed Account, in securities of such Fund, the necessary steps will be taken to ensure that there will be no duplication of fees between a Managed Account and the Celernus Funds.

22. While a Managed Account qualifies as an "accredited investor" in each province and territory outside Ontario, NI 45-106 contains a carve out for Managed Accounts in Ontario when the securities being purchased by the Managed Account are those of an investment fund. Absent the Requested Relief, the Celernus Funds are prohibited in Ontario from distributing, and the Filer is effectively prohibited from investing in, securities of the Celernus Funds for the Managed Accounts, in reliance upon the "accredited investor" exemption in NI 45-106 in circumstances where the individual Client who is the beneficial owner of the Managed Account is not otherwise qualified as an "accredited investor". Reliance upon the $150,000 minimum investment exemption available under NI 45-106 may not be appropriate for smaller Managed Accounts as this might require a disproportionately high percentage of the account to be invested in a Fund.

23. Under the exempt distribution rule applicable in each province and territory outside Ontario, there is no restriction on the ability of Managed Accounts to purchase investment fund securities on an exempt basis. Under NI 45-106, a Managed Account in each province and territory outside Ontario can acquire securities of the Celernus Funds as an "accredited investor".

Ruling

The Commission being satisfied that the relevant test contained in subsection 74(1) of the Act has been met, the Commission rules pursuant to subsection 74(1) of the Act that the Requested Relief from the Prospectus Requirement is granted in connection with the distribution of securities of the Celernus Funds to Clients provided that:

(a) this Ruling will terminate upon the coming into force of any legislation or rule of the Commission exempting a trade in a security of an investment fund to a fully managed account from the Prospectus Requirements;

(b) this Ruling will only apply with respect to a Secondary Managed Account, where the holder of the Secondary Managed Account is, and in the case of clauses (iii) to (vi) remains:

(i) an individual (of the opposite sex or same sex) who is or has been married to the holder of a Primary Managed Account, or is living or has lived with the holder of a Primary Managed Account in a conjugal relationship outside of marriage;

(ii) a parent, grandparent, child or sibling of either the holder of a Primary Managed Account or the individual referred to in clause (i) above;

(iii) a personal holding company controlled by an individual referred to in clause (i) or (ii) above;

(iv) a trust, other than a commercial trust, of which an individual referred to in clause (i) or (ii) above is a beneficiary;

(v) a private foundation controlled by an individual referred to in clause (i) or (ii) above; or

(vi) either a personal or business associate, employee or professional adviser to a holder of a Primary Managed Account, provided that:

(A) there are exceptional factors that have persuaded the Filer for business reasons to accept such personal or business associate, employee or professional adviser as a Secondary Managed Account Client, and a record is kept and maintained of the exceptional factors considered;

(B) the Primary Managed Account Client is an "accredited investor"; and

(C) the personal or business associates, employees and professional advisers to holders of Primary Managed Accounts shall not, at any time, represent more than one half of one percent (0.5%) of the Filer's total Managed Account assets under management; and

(c) the Filer does not receive any compensation in respect of the sale or redemption of securities of the Celernus Funds, including any redemption fees, and the Filer does not pay a referral fee to any person or company who refers Secondary Managed Account clients who invest in securities of the Celernus Funds in reliance on this Ruling.

"Charles Wesley Moore Scott"
Commissioner
Ontario Securities Commission

"Christopher Portner"
Commissioner
Ontario Securities Commission

Chapter 3

Reasons: Decisions, Orders and Rulings

3.1 OSC Decisions, Orders and Rulings

3.1.1 Lyndz Pharmaceuticals Inc. et al. – ss. 127, 127.1

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

AND

IN THE MATTER OF
LYNDZ PHARMACEUTICALS INC., JAMES MARKETING LTD.,
MICHAEL EATCH and RICKEY MCKENZIE

REASONS AND DECISION ON SANCTIONS AND COSTS
(Sections 127 and 127.1 of the Act)

Hearing:	March 28, 2012		
Decision:	July 31, 2012		
Panel:	Mary G. Condon	–	Vice-Chair and Chair of the Panel
	Sinan O. Akdeniz	–	Commissioner
Appearance:	Jonathon Feasby	–	For Staff of the Ontario Securities Commission
	Michael Eatch	–	For himself and Lyndz Pharmaceuticals Inc.
	No one appeared for Rickey McKenzie or James Marketing Inc.		

TABLE OF CONTENTS

REASONS AND DECISION ON SANCTIONS AND COSTS

I. INTRODUCTION

A. History of the Proceeding

[1] This was a hearing before the Ontario Securities Commission (the "**Commission**") pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") to consider whether it is in the public interest to make an order with respect to sanctions and costs against Lyndz Pharmaceuticals Inc. ("**Lyndz**"), James Marketing Ltd. ("**James Marketing**"), Michael Eatch ("**Eatch**") and Rickey McKenzie ("**McKenzie**") (collectively, the "**Respondents**").

[2] The hearing on the merits in this matter took place on May 31 and June 1, 2010 (the "**Merits Hearing**"), and the decision on the merits was issued on May 16, 2011 (2011), 34 O.S.C.B. 5845 (the "**Merits Decision**"). Following the release of the Merits Decision, a separate hearing to consider sanctions and costs was held on March 28, 2012 (the "**Sanctions and Costs Hearing**").

B. The Sanctions and Costs Hearing

[3] Staff of the Commission ("**Staff**") appeared at the Sanctions and Costs Hearing, made oral submissions and filed written submissions and a two-volume brief of authorities.

[4] Eatch appeared and made oral submissions on his own behalf and on behalf of Lyndz, of which he is the directing mind.

[5] No one appeared at the Sanctions and Costs Hearing for McKenzie or James Marketing, of which McKenzie is the directing mind. Staff provided an Affidavit of Service sworn by Sharon Nicolaides on March 22, 2012, as well as a copy of a letter sent to Staff and the Respondents by the Secretary to the Commission providing notice of the hearing and stating "in the event you do not appear in person or are not otherwise represented, the hearing may proceed and an Order may be issued by the Commission in your absence" (together, the "**Evidence of Service**"). Based on the Evidence of Service, we were satisfied that McKenzie and James Marketing were given reasonable notice of the hearing in accordance with section 6 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "**SPPA**") and therefore that we were authorized to proceed in their absence, pursuant to subsection 7(1) of the SPPA and Rule 7.1 of the Commission's *Rules of Procedure* (2010), 33 O.S.C.B. 8017 (the "**Rules**").

C. The Merits Decision

1. The Allegations

[6] Staff alleged that Lyndz and Eatch distributed Lyndz securities to Ontario investors from 1999 to 2004, and that all of the Respondents distributed Lyndz securities to investors in the United Kingdom from 2005 to 2008.

[7] Specifically, Staff alleged that:

- The Respondents diverted funds raised through the sale of shares in Lyndz to the personal benefit of Eatch and McKenzie via James Marketing and Lyndz UK, contrary to subsection 126.1(b) of the Act;
- The Respondents distributed securities in Lyndz in Ontario without being registered to do so under the Act, without having filed a prospectus and without the benefit of an applicable exemption, contrary to subsection 53(1) of the Act;

- Eatch and Lyndz made statements in shareholder correspondence and marketing materials that were materially misleading or untrue or failed to state facts that were required to be stated to make the statements not misleading, contrary to subsection 126.2(1) of the Act. These representations included the claim, with the intention of effecting a trade in the securities of Lyndz, that a person or company would repurchase the outstanding securities of Lyndz, contrary to subsection 38(1)(a) of the Act; and

- Eatch and Lyndz purported to issue shares in Lyndz and conducted themselves as if the corporation was a going concern during a 26 month period when Lyndz was dissolved as an Ontario corporation, contrary to subsections 126.1(b) and 126.2(1) of the Act.

(Merits Decision, paragraph 14)

2. The Merits Hearing

[8] At the commencement of the Merits Hearing on May 31, 2011, Staff and the Respondents submitted that they were able to resolve the factual issues in dispute, and they jointly filed two Agreed Statements of Facts. The Agreed Statement of Facts with respect to Eatch and Lyndz (the "**Eatch Agreed Statement**") was appended to the Merits Decision as Schedule "A", and the Agreed Statement of Facts with respect to McKenzie and James Marketing (the "**McKenzie Agreed Statement**") was appended as Schedule "B" (together, the "**Agreed Statements**").

[9] Two preliminary issues arose: (i) whether Staff should be permitted to introduce additional evidence beyond the Agreed Statements; and (ii) whether Staff should be permitted to pursue its allegation of fraud, though the characterization of the Respondents' conduct as fraud had been removed from the Agreed Statements.

(a) Staff's Additional Evidence

[10] Staff submitted that it had the right to call Staff's forensic accountant, Yvonne Lo ("**Lo**"), to testify about her analysis of the source and use of funds in the bank accounts controlled by the Respondents ("**Staff's Source and Use Analysis**"). The Respondents questioned the need for Lo's evidence in light of their admissions in the Agreed Statements as to the amounts raised and disbursed.

[11] After an adjournment, Staff and the Respondents agreed that, instead of calling oral evidence from Lo, Staff would file Staff's Source and Use Analysis, the transcripts of examinations of Eatch and McKenzie (together, the "**Individual Respondents**"), correspondence between the Individual Respondents, and copies of different versions of the Lyndz business plan (the "**Lyndz Business Plan**") that were given to investors (collectively, the "**Documentary Evidence**").

[12] The Commission admitted the Documentary Evidence, which, along with the Agreed Statements, constituted the entirety of Staff's evidence at the Merits Hearing.

(b) The Fraud Allegation

[13] The second preliminary issue at the Merits Hearing was addressed at paragraphs 20-23 of the Merits Decision, as follows:

> Staff completed its case on May 31, 2010. After Staff summarized its position on the Respondents' alleged illegal distribution and fraudulent conduct in closing, the Respondents expressed their belief that Staff would not be requesting a finding of fraud pursuant to the parties' partial resolution of the matter. Specifically, the Respondents stated they believed they were no longer facing an allegation of fraud because the paragraphs relating to fraud were struck out of the Agreed Statements of Facts at a pre-hearing conference.
>
> Staff submitted the parties were aware that what was removed was an acceptance of a characterization of the conduct as "fraud", which is different from removing the conduct, and that the allegation of fraud would be advanced on the basis of the facts set out in the Agreed Statements of Facts. It would be completely unreasonable, in Staff's view, for the Respondents to have understood that they were no longer facing an allegation of fraud.
>
> The Panel confirmed with the Respondents that Staff was seeking a finding of fraud against them and provided two options for the Respondents to consider. The Respondents could elect to dispute the allegation of fraud based on the Agreed Statements of Facts and other evidence adduced in this proceeding. In the alternative, if the Respondents took the position that the Agreed Statements of Facts were signed in error and they preferred to proceed to a full merits hearing, the Panel would

strike this proceeding and the matter would be heard by a new panel in a contested merits proceeding.

The Panel adjourned the hearing to afford the Respondents an opportunity to carefully consider the two options presented to them. After the adjournment, the Respondents expressed a preference to proceed on the basis of the Agreed Statements of Facts and additional evidence admitted on consent by the parties. The Respondents were then given an opportunity to present their evidence and to make submissions.

[14] Eatch and Lyndz elected to introduce evidence. Eatch testified briefly, and he introduced a letter purporting to document the supportive views of Lyndz shareholders.

[15] McKenzie did not testify and McKenzie and James Marketing led no other evidence.

[16] The Respondents gave oral submissions at the end of the hearing.

3. The Merits Decision

[17] In the Merits Decision, the Commission made the following findings about the investment scheme:

> **1. The Investment Scheme**
>
> **(a) 1999-2004**
>
> From 1999 to 2004, Lyndz securities were distributed to residents of Ontario and other provinces through at least 47 transactions. At least 14 of the 47 transactions, including transactions with Ontario investors, were made in exchange for funds totalling over $400,000. The remainder of those transfers of securities were made as gifts to friends and family of Eatch who had assisted him with his business.
>
> **(b) 2005-2008**
>
> From 2005 to 2008, Lyndz securities were distributed from Ontario to more than 70 residents of the United Kingdom through over 150 transactions. Lyndz investors in the United Kingdom paid between $0.15 and $0.33 per share. Approximately $1,700,000 was raised during this period.
>
> (Merits Decision, paragraphs 46-47)

[18] The Commission made the following findings about the role played by Eatch and Lyndz:

> **2. The Role of Lyndz and Eatch**
>
> Eatch is the directing mind of both Lyndz and Lyndz UK.
>
> **(a) 1999-2004**
>
> From 1999 to 2004, Lyndz and Eatch distributed Lyndz shares to residents of Ontario and other provinces through at least 47 transactions. The over $400,000 raised from this distribution was used for payments to Eatch's partner, Eatch's personal expenses, and some for Lyndz' business expenses. A precise accounting of the disposition of these funds is not available.
>
> **(b) 2005-2008**
>
> From 2005 to 2008, Lyndz and Eatch distributed Lyndz' shares from Ontario to more than 70 residents of the United Kingdom through over 150 transactions. Specifically, Lyndz and Eatch engaged in numerous acts in furtherance of that distribution, including the following:
>
> - Eatch prepared the Lyndz Business Plan to be distributed to investors;
> - Eatch sent correspondence to prospective investors on Lyndz letterhead soliciting them to invest in the shares of Lyndz;

- Eatch, with McKenzie's permission, sent correspondence to prospective investors on James Marketing letterhead soliciting them to invest in the shares of Lyndz;

- Eatch, with McKenzie's permission, used James Marketing's email account to invoice Lyndz' investors on the letterhead of James Marketing and instruct them to make payments to James Marketing;

- Eatch personally sent share certificates to a majority of Lyndz' investors;

- Eatch personally telephoned, met with and corresponded with investors in connection with their purchase of Lyndz securities; and

- Eatch maintained a bank account in the United Kingdom in the name of Lyndz UK for the purpose of receiving funds from James Marketing that had been deposited with James Marketing by Lyndz investors in exchange for shares in Lyndz (the "**Lyndz UK Account**").

In all of the documents and correspondence sent to Lyndz' shareholders by Lyndz and Eatch, Lyndz is purported to be developing a business of manufacturing and distributing pharmaceuticals and bringing affordable pharmaceuticals to the third world as a "humanitarian project". For example, Eatch prepared the Lyndz Business Plan, various versions of which were distributed by him and his company to Lyndz investors. The Lyndz Business Plan contains the following information about the company:

- Lyndz was planning an acquisition of a pharmaceutical production facility in British Columbia;

- Lyndz was planning to build a pharmaceutical plant with the assistance of John Buttner, "an architect and an Austrian registered engineer with more than 30 years of experience in the design, construction and project management of industrial and commercial buildings";

- Lyndz supported efforts to prevent and treat diseases and conditions in the developing world;

- Lyndz anticipated three different phases of financing over time; and

- A number of individuals were involved in Lyndz in management and consulting roles;

Lyndz and Eatch led investors to believe that the funds they exchanged for shares in Lyndz would be invested in the development of Lyndz' proposed pharmaceutical business and humanitarian projects in impoverished nations. However, this representation was false. There is no credible evidence that Lyndz had any legitimate underlying business or legitimate business purpose.

(Merits Decision, paragraphs 48-52)

[19] The Commission made the following findings about the role played by McKenzie and James Marketing:

3. The Role of James Marketing and McKenzie

McKenzie is the directing mind of James Marketing.

. . . .

(a) 1999-2004

Neither James Marketing nor McKenzie was involved in the distribution of Lyndz securities in this time period.

(b) 2005-2008

From 2005 to 2008, James Marketing and McKenzie distributed Lyndz shares from Ontario to more than 70 residents of the United Kingdom through over 150 transactions.

James Marketing and McKenzie engaged in numerous acts in furtherance of that distribution, including the following:

- McKenzie knowingly allowed Eatch to send correspondence to prospective investors on James Marketing letterhead soliciting them to invest in Lyndz;
- McKenzie gave Eatch access to James Marketing's email account for the purpose of allowing Eatch to invoice Lyndz' investors on the letterhead of James Marketing and instruct them to make payments to James Marketing;
- McKenzie personally sent share certificates to some Lyndz' investors;
- McKenzie personally telephoned, met with and corresponded with investors in connection with their purchase of Lyndz securities;
- James Marketing received funds totalling approximately $1,700,000 from the distribution of Lyndz' shares; and
- McKenzie maintained a bank account in the United Kingdom in the name of James Marketing (the "**James Marketing UK Account**") for the purpose of receiving funds from Lyndz investors.

In all documents and correspondence sent to Lyndz' shareholders by James Marketing and McKenzie, Lyndz is purported to be developing a business of manufacturing and distributing pharmaceuticals and bringing affordable pharmaceuticals to the third world as a "humanitarian project".

James Marketing and McKenzie led investors to believe that the funds they exchanged for shares in Lyndz would be invested in the development of Lyndz' proposed pharmaceutical business and humanitarian projects in impoverished nations. However, this representation was false. Lyndz had no underlying business or legitimate business purpose. McKenzie, because of his involvement in the receipt and the application of the funds, knew or ought to have known Lyndz had no legitimate business purpose or engagement.

(Merits Decision, paragraphs 53 and 55-59)

[20] The Commission found that Eatch received approximately $655,000 and McKenzie received approximately $700,000 of the investor funds raised from 2005 to 2008, and that the money was used for their personal expenses unrelated to the business of Lyndz or remains unaccounted for (Merits Decision, paragraphs 60-66).

[21] The Commission found that although most of the investors who purchased Lyndz securities from 2005 to 2008 were residents of the United Kingdom, the Commission had jurisdiction over the Respondents, considering the Respondents' admissions, in the Agreed Statements, that most of the correspondence to Lyndz investors was sent from Ontario, most instructions to financial institutions to transfer funds were issued in Ontario, and most of the cash withdrawals from investor funds occurred in Ontario (Merits Decision, paragraph 67). In addition, Eatch and McKenzie admitted they were residents of Ontario.

[22] The Commission noted that the fraud provision (subsection 126.1(b) of the Act) was proclaimed into force on December 31, 2005 and cannot apply to the distribution of Lyndz securities from 1999 to 2004.

[23] With respect to the 2005-2008 period, the Commission found that Eatch and Lyndz perpetrated a fraud by leading investors to believe that the funds they exchanged for shares in Lyndz would be invested in the development of Lyndz' proposed pharmaceutical business and humanitarian projects, although in fact Lyndz had no legitimate underlying business, by spending investors' money for personal purposes unrelated to the business of Lyndz, and by failing to exercise control over the disbursement of investor funds by McKenzie (Merits Decision, paragraphs 81-88).

[24] The Commission found that McKenzie and James Marketing perpetrated a fraud by allowing Eatch to use James Marketing's letterhead and email account to correspond with investors in connection with their purchases of Lyndz shares,

thereby contributing to the misrepresentations perpetrated by Eatch and Lyndz and by disposing of $700,000 of investor funds for personal purposes unrelated to the business of Lyndz, though he knew that Lyndz did not have an active business (Merits decision, paragraphs 89-93).

[25] The Commission summarized its findings as follows:

> Based on the Agreed Statements of Facts and the evidence tendered at the Merits Hearing ... , we find that this case involves an investment scheme in which the Respondents distributed securities to investors based on the premise that their funds would be invested in the development of Lyndz' proposed pharmaceutical business and humanitarian projects in developing nations. That premise was misleading and false and as a result of the Respondents' activities, Lyndz' investors were deprived of their funds. Investor funds were diverted by the Respondents to their personal benefit rather than being invested in a pharmaceutical business.
>
> (Merits Decision, paragraph 45)

[26] The Commission concluded that the Respondents distributed Lyndz securities without a preliminary prospectus and a prospectus having been filed and receipted by the Director, no exemption being available, contrary to subsection 53(1) of the Act; and that the Respondents perpetrated a fraud on Lyndz investors, contrary to subsection 126.1(b) of the Act.

II. SUBMISSIONS OF THE PARTIES

A. Staff's Submissions

[27] Staff requests that the following sanctions and costs orders be made against the Respondents:

- pursuant to paragraph 2, 2.1 and 3 of subsection 127(1) of the Act, that all trading in any securities by the Respondents cease permanently, and that all trading in securities of Lyndz and James Marketing cease permanently;
- pursuant to paragraph 2.1 of subsection 127(1) of the Act, that the acquisition of any securities by the Respondents cease permanently;
- pursuant to paragraph 3 of subsection 127(1) of the Act, that any exemptions contained in Ontario securities law do not apply to the Respondents permanently;
- pursuant to paragraph 6 of subsection 127(1) of the Act, that Eatch and McKenzie be reprimanded;
- pursuant to paragraphs 7 and 8 of subsection 127(1) of the Act, that Eatch resign all positions he holds as director or officer of any issuer and be prohibited permanently from becoming or acting as a director or officer of any issuer;
- pursuant to paragraphs 7 and 8 of subsection 127(1) of the Act, that McKenzie resign all positions he holds as director or officer of any issuer and be prohibited permanently from becoming or acting as a director or officer of any issuer;
- pursuant to paragraph 10 of subsection 127(1) of the Act, that Lyndz disgorge to the Commission the entirety of the $2,100,000 it obtained as a result of its non-compliance with Ontario securities law, to be allocated by the Commission to or for the benefit of third parties, in accordance with subsection 3.4(2)(b) of the Act, apportioned as follows:
  - $400,000 payable solely by Lyndz;
  - $345,000 payable jointly and severally with James Marketing;
  - $655,000 payable jointly and severally with James Marketing and Eatch; and
  - $700,000 payable jointly and severally with James Marketing and McKenzie.
- pursuant to paragraph 10 of subsection 127(1) of the Act, that James Marketing disgorge to the Commission the entirety of the $1,700,000 it obtained as a result of its non-compliance with Ontario securities law, to be allocated by the Commission to or for the benefit of third parties, in accordance with subsection 3.4(2)(b) of the Act, apportioned as follows:

- $345,000 payable jointly and severally with Lyndz;
- $655,000 payable jointly and severally with Lyndz and Eatch; and
- $700,000 payable jointly and severally with Lyndz and McKenzie.

- pursuant to paragraph 10 of subsection 127(1) of the Act, that Eatch disgorge to the Commission the sum of $655,000 he obtained as a result of his non-compliance with Ontario securities law, payable jointly and severally with Lyndz and James Marketing, to be allocated by the Commission to or for the benefit of third parties, in accordance with subsection 3.4(2)(b) of the Act;
- pursuant to paragraph 10 of subsection 127(1) of the Act, that McKenzie disgorge to the Commission the sum of $700,000 he obtained as a result of his non-compliance with Ontario securities law, payable jointly and severally with Lyndz and James Marketing, to be allocated by the Commission to or for the benefit of third parties, in accordance with subsection 3.4(2)(b) of the Act;
- pursuant to paragraph 9 of subsection 127(1) of the Act, that Eatch pay an administrative penalty of $750,000, to be allocated by the Commission to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act;
- pursuant to paragraph 9 of subsection 127(1) of the Act, that McKenzie pay an administrative penalty of $600,000, to be allocated by the Commission to or for the benefit of third parties in accordance with subsection 3.4(2)(b) of the Act;
- pursuant to section 37(1) of the Act, that Lyndz, James Marketing, Eatch and McKenzie be prohibited from telephoning any residence within or outside of Ontario for the purpose of trading in any security or derivative or in any class of securities or derivatives; and
- pursuant to section 127.1 of the Act, that Lyndz, James Marketing, Eatch and McKenzie pay, on a joint and several basis, the sum of $73,649.42, representing the costs and disbursements incurred in the investigation and hearing of this matter.

[28] Staff requests that amounts received by the Commission in compliance with the administrative penalty and disgorgement orders be allocated to or for the benefit of third parties, including investors who lost money as a result of investing in the investment schemes, in accordance with subsection 3.4(2)(b) of the Act, and that such amounts be distributed to investors who lost money as a result of investing in the fraudulent investment scheme on such basis, on such terms and to such investors as Staff in its discretion determines to be appropriate in the circumstances.

[29] Staff submits that the Respondents should be ordered to disgorge the amounts they obtained as a result of their non-compliance with the Act, and to pay administrative penalties of a magnitude sufficient to ensure effective specific and general deterrence, considering a number of factors. Staff submits that the Respondents engaged in significant contraventions of the Act over an extended period of time and that their conduct demonstrates their ability to plan and execute a complex securities fraud involving multiple bank accounts and corporations, a lengthy and detailed fraudulent business plan, and multiple distributions.

[30] Staff submits that the Agreed Statements merely reflect the Respondents' acknowledgement that Staff would likely be able to prove its case against them, and that the Respondents' refusal to admit that their conduct was fraudulent demonstrates their lack of remorse.

[31] Staff submits that there is no evidence that the Respondents have any experience in the capital markets other than conducting fraudulent distributions, and that their conduct demonstrates they must be permanently barred from participating in Ontario's capital markets.

[32] Staff submits that the level of planning and deliberation involved in the fraud, and the ongoing nature of the scheme, demonstrate the need to send a strong message of specific deterrence to Eatch and McKenzie. In addition, Staff submits that McKenzie's prior conviction for fraud over $5,000 demonstrates an increased need for specific deterrence in his case.

B. Eatch's Submissions

[33] At the Sanctions and Costs Hearing, Eatch stated that he did not receive anything close to the amount alleged by Staff, and that a banker's box of documentation has just become available to him that could substantiate some of his claims about where the investors' money went. He also stated that he was led to believe he was allowed to raise funds from up to 50 individuals in a private placement, and that a lawyer was involved.

[34] Eatch also stated that the Eatch Agreed Statement includes admissions that were untrue. He stated that he "was heavily compromised by Mr. McKenzie", who put him in "a very awkward situation and very embarrassing situation", and "made [Eatch] say that [he] had received all this cash" (Hearing Transcript, pp. 41-42). Eatch also stated that although he admitted using McKenzie's email account and writing letters on James Marketing letterhead, this "isn't altogether true": he "had some input into editing some of his content and letters and never used his e-mail" (Hearing Transcript, pp. 45-46).

[35] Essentially, Eatch claimed at the Sanctions and Costs Hearing that he believed the Respondents' conduct during the 1999-2004 period was legal, and that "the rest of it" – the Respondents' conduct during the 2005-2008 period – "is more severe with the ongoing antics of Mr. McKenzie" (Hearing Transcript, pp. 45-46).

[36] Responding specifically to Staff's request for an order requiring him to resign all positions he holds as director or officer of any issuer and prohibiting him permanently from becoming or acting as a director or officer of any issuer, Eatch stated that he would not be in a position to pay the amounts requested by Staff if he cannot be part of a company, and in any event, he has not been "able to get a decent job" because an internet search of his name brings up the Commission's website, and his reputation "has been totally shot" (Hearing Transcript, p. 47). Eatch stated that he would, with time, be able to pay the $73,000 costs order requested by Staff.

[37] Finally, Eatch expressed remorse for his conduct.

C. Staff's Reply Submissions

[38] In reply, Staff submitted that we should give no weight to the claims made by Eatch at the Sanctions and Costs Hearing, for which no evidence was provided.

[39] With respect to Eatch's claim that he was coerced at the Merits Hearing, Staff submitted that the Respondents were given an opportunity to resile from the admissions made in the Agreed Statements and to proceed to a full hearing on the merits, but they declined.

[40] In response to Eatch's claim that he is unable to pay the requested sanctions and costs, Staff submitted that Eatch provided no evidence of his financial circumstances, though he was aware that Staff would be seeking significant sanctions as a result of the findings set out in the Merits Decision.

[41] Finally, Staff submits that Eatch's expression of remorse is contradicted by the evidence, in particular his denial that he engaged in fraud and all of the other allegations, and his attempt, at the Merits Hearing and the Sanctions and Costs Hearing, to resile from his admissions in the Eatch Agreed Statement.

III. THE LAW ON SANCTIONS

[42] Pursuant to section 1.1 of the Act, the Commission's mandate is (i) to provide protection to investors from unfair, improper or fraudulent practices; and (ii) to foster fair and efficient capital markets and confidence in capital markets. In C*ommittee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132, the Supreme Court of Canada stated:

> … pursuant to s. 127(1), the OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so. … In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally. In addition, s. 127(1) is a regulatory provision. The sanctions under the section are preventive in nature and prospective in orientation.
>
> (A*sbestos*, *supra*, at paragraph 45)

[43] The Commission has stated:

> […] the role of this Commission is to protect the public interest by removing from the capital markets – wholly or partially, permanently or temporarily, as the circumstances may warrant – those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 [now 122] of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all.
>
> (*Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600, at pp. 1610 and 1611)

[44] The Commission has identified a number of factors to be considered, including:

(a) the seriousness of the allegations;

(b) the respondent's experience in the marketplace;

(c) the level of a respondent's activity in the marketplace;

(d) whether or not there has been a recognition of the seriousness of the improprieties;

(e) the need to deter a respondent and other like-minded individuals from engaging in similar abuses of the capital markets in the future;

(f) whether the violations are isolated or recurrent;

(g) the size of any profit obtained or loss avoided from the illegal conduct;

(h) any mitigating factors, including the remorse of the respondent;

(i) the effect any sanction might have on the livelihood of the respondent;

(j) the effect any sanction might have on the ability of a respondent to participate without check in the capital markets;

(k) in light of the reputation and prestige of the respondent, whether a particular sanction will have an impact on the respondent and be effective; and

(l) the size of any financial sanctions or voluntary payment when considering other factors.

(*Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 at p. 7746 ("***Re Belteco***"); *Re M.C.J.C. Holdings Inc. and Michael Cowpland* (2002), 25 O.S.C.B. 1133 ("***Re M.C.J.C. Holdings***") at p. 1136)

[45] We find that these factors remain relevant in determining appropriate sanctions. However, the applicability and importance of each factor will vary according to the facts and circumstances of each case.

[46] General deterrence is an important factor that the Commission should consider when determining appropriate sanctions. In *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 ("***Cartaway***"), the Supreme Court of Canada stated that "[…] it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventive" (*Cartaway*, *supra*, at paragraph 60).

[47] In determining the appropriate sanctions to order, we must consider the specific circumstances in each case and ensure that the sanctions are proportionate to those circumstances (*M.C.J.C. Holdings*, *supra*, at 1134).

[48] Further, in imposing administrative penalties and disgorgement, we will consider the overall financial sanctions imposed on each respondent (*Re Sabourin Sanctions and Costs* (2010), 33 O.S.C.B. 5299 ("***Re Sabourin***"), at paragraph 59).

IV. APPROPRIATE SANCTIONS IN THIS MATTER

A. Preliminary Issue: Fresh Evidence

[49] As stated at paragraphs 11-12 above, the limited evidence provided at the Merits Hearing consisted of the Agreed Statements, the Documentary Evidence adduced by Staff, and the brief testimony given by Eatch.

[50] At the Sanctions and Costs Hearing, Eatch stated that certain of his admissions in the Eatch Agreed Statement were untrue, and that a recently discovered bankers' box of documents could substantiate some of his claims (see the discussion at paragraphs 33-35 above).

[51] Staff submitted that Eatch's submissions at the Sanctions and Costs Hearing were not supported by any evidence, and therefore they should be given no weight. Staff characterized Eatch's submissions concerning the Eatch Agreed Statement as evidence of lack of remorse.

[52] At the conclusion of the Sanctions and Costs Hearing, we ruled that we are not in a position, for purposes of the Sanctions and Costs Decision, to consider the fresh evidence with respect to the Merits Decision that was referred to by Eatch.

We stated that it would be up to Eatch, if he so chose, to seek legal advice as to any avenues of redress he may have for bringing new evidence forward.

[53] In deciding on appropriate sanctions and costs in this matter, we have given no consideration to the submissions of Eatch or Staff, described at paragraphs 50-51 above, with respect to the Eatch Agreed Statement. Those were matters for consideration at the Merits Hearing, but are not properly before us. We have considered only the Merits Decision and the submissions of Staff and Eatch made in the Sanctions and Costs Hearing.

B. Retrospectivity

[54] Although the illegal distribution of Lyndz securities began in 1999, paragraphs 9 and 10 of s. 127(1) of the Act, which gave the Commission power to order administrative penalties and disgorgement, did not take effect until April 7, 2003.

[55] In *Re Rowan Sanctions and Costs* (2010), 33 O.S.C.B. 91 ("***Re Rowan***"), at paragraphs 94-96, appeal dismissed, *Rowan v. Ontario (Securities Commission)*, 2012 ONCA 208, affirming [2010] O.J. No. 5681 (Div. Ct.), and in *Re White Sanctions and Costs* (2010), 33 O.S.C.B. 8893 ("***Re White***"), at paragraph 35, the Commission held that s. 127(1)9 (administrative penalty) should not be applied retrospectively, and therefore an administrative penalty should not be ordered with respect to conduct prior to April 7, 2003. In both cases, the administrative penalty requested by Staff was reduced to reflect only post-April 7, 2003 conduct.

[56] In *Re White*, *supra*, at paragraph 36, the Commission held that because disgorgement is not a penalty, but an order that illegally obtained funds be removed from the wrongdoer, s. 127(1)10 applies to all amounts obtained as a result of a respondent's non-compliance with Ontario securities law, whether obtained before or after April 7, 2003.

[57] We agree with *Re Rowan* and *Re White*. Accordingly, we have considered only the Respondents' conduct after April 7, 2003 in considering Staff's administrative penalty request, but our disgorgement order is not limited to amounts obtained after April 7, 2003.

C. Specific Sanctioning Factors Applicable in this Matter

[58] Overall, the sanctions we impose must protect investors and Ontario capital markets by barring or restricting the Respondents from participating in those markets in the future and by sending a strong message of specific and general deterrence.

[59] In considering the sanctioning factors set out in the case law, we find the following specific factors and circumstances to be relevant in this matter, based on the findings made in the Merits Decision.

1. The seriousness of the proven allegations

[60] The Commission's findings, set out in paragraphs 17-26 above, demonstrate the seriousness of the Respondents' conduct. The Commission found that the Respondents distributed Lyndz securities without a prospectus, where no prospectus exemption was available, contrary to subsection 53(1) of the Act, and that the Respondents perpetrated a fraud on Lyndz investors, contrary to subsection 126.1(b) of the Act.

[61] The Commission found that the Respondents engaged in a fraudulent distribution of Lyndz securities that raised $2.1 million from investors, on the basis of their representations to investors that the money raised would be used to develop a business of manufacturing and distributing pharmaceuticals and bringing affordable pharmaceuticals to the third world as a "humanitarian project". These representations, contained in the Lyndz Business Plan and in correspondence sent to Lyndz investors, were false or misleading. In the Merits Decision, the Commission stated that Lyndz "does not have any assets, employees or physical location. It has no legitimate underlying business or legitimate business purpose" (Merits Decision, paragraph 82).

[62] Moreover, the Commission found that "contrary to what Lyndz and Eatch claimed about the company, few if any funds were invested in the development of Lyndz' pharmaceutical business or humanitarian projects". Instead, investors' money was used by the Respondents for purposes unrelated to the business of Lyndz or remains unaccountable. The Commission concluded that Lyndz investors were deprived of the funds they invested in Lyndz as a result of the Respondents' dishonest acts (misrepresentation and unauthorized diversion of investor funds) and that the Respondents knowingly perpetrated a fraud (Merits Decision, paragraphs 85-88 and 91-93).

[63] The Commission has stated that fraud is "one of the most egregious securities regulatory violations" and is both "an affront to the individual investors directly targeted" and something that "decreases confidence in the fairness and efficiency of the entire capital market system" (*Re Al-tar Energy Corp. Sanctions and Costs* (2011), 34 O.S.C.B. 447 ("***Re Al-tar***"), at

paragraph 214, citing *Re Capital Alternatives Inc.* (2007), A.B.A.S.C. 79 ("***Re Capital Alternatives***") at paragraph 308, citing D. Johnston & K.D. Rockwell, *Canadian Securities Regulation*, 4th ed., Markham: Lexis Nexis, 2007 at 420).

2. The level of the Respondents' activity in the marketplace

[64] The Respondents' non-compliance with Ontario securities law was not an isolated incident. It took place over an extended period of time and involved multiple transactions. In the Merits Decision, the Commission found that Eatch and Lyndz distributed Lyndz shares to investors in Ontario and other provinces through at least 47 transactions from 1999 to 2004, and that Eatch and Lyndz, along with McKenzie and James Marketing, distributed Lyndz shares to approximately 70 residents of the U.K. through over 150 transactions from 2005 to 2008 (Merits Decision, paragraphs 49-50 and 55-56).

3. The profit made or loss avoided as a result of the Respondents' non- compliance

[65] In the Merits Decision, the Commission found that the Respondents raised approximately $2.1 million from the sale of Lyndz securities, Eatch personally obtained approximately $655,000 of Lyndz investor funds, McKenzie personally obtained approximately $700,000 of Lyndz investor funds, and the remaining funds raised from Lyndz investors remain unaccounted for.

4. Remorse: the Respondents' recognition of the seriousness of their conduct

[66] We do not accept Staff's submission that the Respondents' refusal to admit fraud in the Agreed Statements attests to a lack of remorse. For the reasons given in paragraph 53 above, we consider the disagreement between Staff and the Respondents about the omission of any reference to fraud in the Agreed Statements to be a neutral factor with respect to sanctions and costs.

[67] Nevertheless, we are not persuaded that remorse is a mitigating factor in this case.

[68] McKenzie has not expressed any remorse for his conduct and did not appear at the Sanctions and Costs Hearing.

[69] Eatch did appear, and stated that he was sorry and "extremely remorseful" (Hearing Transcript, p. 47). However, other comments made by Eatch at the Sanctions and Costs Hearing lead us to question whether Eatch understands the seriousness of his misconduct. Referring to Staff's request for an order that each of the Individual Respondents resign all positions he holds as a director or officer of an issuer and be prohibited permanently from becoming or acting as a director or officer of an issuer, Eatch stated that he would not be able to pay the monetary sanctions requested by Staff if he could not be a director or officer of a company. More troubling are his comments suggesting that he would like to resume his capital-raising activities. He said: "I do have an outfit still very interested in working with me with respect to my mobile pharmaceutical project" (Hearing Transcript, p. 44). A little later, he said:

> ... some of the technology we have is in affiliation with another corporation, specifically in the water treatment part of this. And they're very anxious – anxiously looking at my whole mobile pharmaceutical plant which involved an integral part of this water technology, how to get bog water into potable water or water available for manufacturing of pharmaceuticals on the site. The idea behind that was like – it was about 12 different tractor trailers each purposely built to do something, one tabulating, one granulating, one capsulating, and one packaging, one just for water. And that was the idea of the humanitarian act that we were bringing to play. Unfortunately, everything sort of seized and stopped, and I wasn't really there to oversee it properly. So I am to blame.
>
> (Hearing Transcript, pp. 46-47)

[70] We are concerned that Eatch appears to be of the view that the only problematic aspects of his conduct were his "extremely clouded" judgment, which, according to Eatch, allowed him to be compromised by McKenzie, and his failure to "oversee" the humanitarian project (Hearing Transcript, pp. 43 and 47). We find that Eatch does not recognize the seriousness of his conduct.

5. Specific deterrence

[71] Given our concerns expressed at paragraphs 69-70 above, we place significant weight on specific deterrence in determining the appropriate sanctions to be ordered with respect to Eatch.

[72] Specific deterrence is also a significant factor with respect to McKenzie. Paragraph 31 of the McKenzie Agreed Statement states:

> In 2001, McKenzie was convicted of fraud over $5000 and conspiracy to commit an indictable offence under the *Criminal Code*, and received a total sentence of two years less a day. The

offences for which McKenzie was incarcerated concerned the telemarketing of a fraudulent gemstone investment from Ontario to Canadian investors, including Ontario residents.

[73] At paragraph 54 of the Merits Decision, the Commission stated that McKenzie's prior conviction "is irrelevant to our consideration on the merits and will be disregarded." However, we find that McKenzie's prior conviction is important in determining appropriate sanctions in this case. Like his conduct in the present matter, McKenzie's past conduct involved conduct of a financial nature – a fraudulent investment scheme. We accept that McKenzie's repeated conduct demonstrates an increased need for specific deterrence in his case.

[74] Our sanctions order must effectively prevent and deter Eatch and McKenzie from engaging in any further illegal or fraudulent conduct in the marketplace.

D. Appropriate Sanctions in this Matter

1. Reprimand

[75] We find it appropriate to reprimand the Respondents, pursuant to paragraph 6 of s. 127(1) of the Act, in order to reaffirm publicly that the Commission will not tolerate illegal and fraudulent conduct such as occurred in this case.

[76] The Respondents, by engaging in an illegal and fraudulent distribution of Lyndz securities in contravention of s. 53(1) and s. 126.1(b) of the Act, wrongfully deprived investors of $2.1 million dollars. Eatch and McKenzie misled investors about the business of Lyndz, and used the money that Lyndz investors were led to believe would be used to develop a pharmaceutical business and humanitarian project for personal purposes unrelated to the business of Lyndz. Much of the investors' money remains unaccounted for, and there appears to be little prospect that investors will be able to recover their losses.

[77] The Respondents are reprimanded for their non-compliance with Ontario securities law.

2. Market Participation Orders

[78] Staff submits that the Respondents should be subject to a permanent trading, acquisition and exemption ban, without a carve-out for personal trading in an RRSP account. Staff also seeks an order that each of the Individual Respondents resign any positions he holds as director or officer of an issuer and that both are subject to permanent director and officer bans.

[79] As noted at paragraph 36 above, Eatch objected to Staff's request for a director and officer ban on the basis that it would prevent him from earning a living sufficient to pay any monetary orders imposed by the Commission. Eatch also expressed his ongoing interest in the mobile pharmaceutical project, which leads us to have a concern that if Eatch is allowed to act as a director or officer of an issuer, he may once again engage in illegal distributions of securities. For the reasons stated at paragraphs 58-74 above, and particularly considering the seriousness of the proven allegations against Eatch as well as Eatch's failure to recognize the seriousness of his conduct, we find that Eatch cannot be trusted to act as a director or officer of any issuer. We also find that McKenzie, already a repeat offender, cannot be trusted to act as a director or officer of any issuer. We find that Eatch and McKenzie should be subject to an order that they resign all positions they hold as director or officer of an issuer and be banned permanently from becoming or acting as a director or officer of an issuer, pursuant to paragraphs 7 and 8 of subsection 127(1) of the Act, to ensure that they are never again in a position of control or trust of any issuer.

[80] We accept Staff's submission that the conduct of the Respondents demonstrates that they must be permanently barred from participating in Ontario's capital markets. We find that the Respondents should be subject to a permanent trading, acquisition and exemption ban, without a carve-out, pursuant to paragraphs 2, 2.1 and 3 of s. 127(1) of the Act, because their fraudulent conduct, which included providing misleading documents and correspondence to investors and engaging in unauthorized diversion of investor funds for personal purposes, demonstrates that they cannot be safely trusted to participate in the capital markets in any way (*Re St. John* (1998), 21 O.S.C.B. 3851, at paragraphs 130-133; *Re Ochnik* (2006), 29 O.S.C.B. 3929, at paragraphs 108-113); *Re Al-tar*, *supra*, at paragraph 31; and *Re Global Partners Capital Sanctions and Costs* (2011), 34 O.S.C.B. 10023 ("***Re Global Partners***"), at paragraphs 54-55, and the cases cited therein).

[81] The permanent trading, acquisition and exemption bans and permanent director or officer bans we are ordering will remove the Respondents from our capital markets and protect the investing public.

3. Subsection 37(1) Orders

[82] Staff seeks orders prohibiting the Respondents "from telephoning any residence within or outside of Ontario for the purpose of trading", pursuant to subsection 37(1) of the Act, which, at the time of the conduct in this matter, stated as follows:

> **37(1) Order prohibiting calls to residences** – The Commission may by order suspend, cancel, restrict or impose terms and conditions upon the right of any person or company named or described in the order to,
>
> (a) call at any residence; or
>
> (b) telephone from within Ontario to any residence within or outside Ontario,
>
> for the purpose of trading in any security or in any class of securities.

[83] The current version of subsection 37(1) of the Act is substantially identical except that it also refers to derivatives, in addition to securities.

[84] Staff's request for a s. 37(1) order was first set out in Staff's written submissions on sanctions and costs, which were served on the Respondents on February 22, 2012, some nine months after the Merits Decision was issued and just five weeks before the Sanctions and Costs Hearing. We were not provided with any explanation for this delay. In our view, fairness generally requires that respondents be given notice of the case they have to meet, including the nature of the orders requested by Staff, prior to the commencement of the merits hearing. In these circumstances, we are not persuaded a subsection 37(1) order is in the public interest in this case.

4. Disgorgement

[85] As stated in paragraph 27 above, Staff seeks an order that the Respondents disgorge the amounts they obtained as a result of their contraventions of Ontario securities law, pursuant to s. 127(1)10 of the Act. That provision states that if a person or company has not complied with Ontario securities law, the Commission may make an order requiring the person or company to disgorge to the Commission any amounts obtained as a result of the non-compliance.

[86] The disgorgement remedy is intended to ensure that respondents do not retain any financial benefit from their non-compliance with Ontario securities law so as to provide specific and general deterrence (*Re Sabourin*, *supra*, at paragraph 65). The Commission has held that "all money illegally obtained from investors can be ordered to be disgorged, not just the 'profit' made as a result of the activity" (*Re Limelight Sanctions and Costs* (2008), 31 O.S.C.B. 12030 ("***Re Limelight***"), at paragraph 49).

[87] In the Merits Decision, the Commission found that Eatch received approximately $655,000 and McKenzie received approximately $700,000 of the investor funds received from 2005 to 2008 (Merits Decision, paragraphs 62 and 65). Although Eatch disputed the $655,000 figure at the Sanctions and Costs Hearing, he provided no evidence in support of that finding, which was based, in part, on paragraphs 24-25 of the Eatch Agreed Statement, and we ruled that we were not in a position to consider fresh evidence in relation to the Merits Decision (see paragraphs 52-53 above).

[88] We accept Staff's submission that the amounts obtained by each of the two Individual Respondents should be disgorged jointly and severally with the two companies (Lyndz and James Marketing) through which they acted.

[89] Accordingly, Eatch will be ordered to disgorge to the Commission the amount of $655,000 that he obtained as a result of his non-compliance with Ontario securities law, on a joint and several basis with Lyndz and James Marketing. McKenzie will be ordered to disgorge to the Commission the amount of $700,000 that he obtained as a result of his non-compliance with Ontario securities law, on a joint and several basis with Lyndz and James Marketing.

[90] In the Merits Decision, the Commission found that Eatch and Lyndz raised over $400,000 through the distribution of Lyndz securities from 1999 to 2004; McKenzie and James Marketing were not involved during this period (Merits Decision, paragraphs 46 and 49). In recognition of Eatch's admission, in the Eatch Agreed Statement, that he obtained $655,000, Staff requests and we agree that Lyndz alone should be ordered to disgorge to the Commission the amount of $400,000 that it obtained as a result of its non-compliance with Ontario securities law from 1999 to 2004.

[91] In the Merits Decision, the Commission found that the Respondents raised approximately $1.7 million through the distribution of Lyndz securities from 2005 to 2008 (Merits Decision, paragraph 47). In addition to the $655,000 obtained by Eatch and the $700,000 obtained by McKenzie, another $345,000 of investor funds remains unaccounted for. Accordingly, Lyndz and James Marketing will be ordered to disgorge to the Commission, on a joint and several basis, the amount of $345,000 that these entities obtained as a result of their non-compliance with Ontario securities law from 2005 to 2008.

[92] The amounts ordered to be disgorged, as set out in paragraphs 89-91 above, shall be designated for allocation to or for the benefit of third parties, pursuant to s. 3.4(2)(b) of the Act.

5. Administrative Penalty

[93] As stated in paragraph 27 above, Staff seeks an order, pursuant to s. 127(1)9 of the Act, that Eatch pay an administrative penalty of $750,000 and that McKenzie pay an administrative penalty of $600,000.

[94] Staff submits that the administrative penalties requested are appropriate in the circumstances, considering the factors identified in paragraphs 29-32 above, the totality of the sanctions and the amount of disgorgement requested, and balancing the magnitude of the harm done to investors by the Respondents against that found in several other Commission cases. Staff provided, as a Schedule to their written submissions, a summary of cases, setting out the facts as proven and the sanctions ordered in *Re Global Partners*; *Re Al-tar*; *Re Chartcandle* (2010), 33 O.S.C.B. 10405 ("***Re Chartcandle***"); *Re Sulja Bros.Building Supplies Ltd. Sanctions and Costs* (2011), 34 O.S.C.B. 7515 ("***Re Sulja Bros.***"); *Re Lehman Cohort Global Group Inc. Sanctions and Costs* (2011), 34 O.S.C.B. 2999 ("***Re Lehman Cohort***"); *Re Sabourin*; *Re Limelight*; *Re Capital Alternatives*; and *Re Anderson* (2003) BCSECCOM 184 (British Columbia Securities Commission).

[95] In our view, the goals of specific and general deterrence are most effectively met by administrative penalties that are proportional to each respondent's culpability in the matter, take all the circumstances into account, consider administrative penalties imposed in similar cases, and have regard to any aggravating and mitigating factors (*Re Belteco*, *supra*, at 7747; *Re M.C.J.C. Holdings Inc.*, *supra*, at 1134 and 1136; *Re Limelight*, *supra*, at paragraph 71; *Re Rowan*, *supra*, at paragraph 106; *Re Sabourin*, *supra*, at paragraph 75; *Re White*, *supra*, at paragraph 50; and *Re IMAGIN*, *supra*, at paragraph 20).

[96] In summary, the Commission found, in the Merits Decision, that Eatch and McKenzie engaged in an illegal distribution of Lyndz securities, contrary to s. 53(1) of the Act, by raising approximately $1.7 million from more than 70 investors in over 150 transactions from 2005 to 2008. Although investors were led to believe that their money would be used in the development of Lyndz' proposed pharmaceutical business and humanitarian projects in the third world, this representation was false, and Lyndz had no underlying business or legitimate business purpose. Investor funds were used for the personal purposes of Eatch and McKenzie unrelated to the business of Lyndz or remain unaccounted for. The Commission found that the Respondents engaged in fraud contrary to s. 126.1(b) of the Act. The Respondents' non-compliance with Ontario securities law was very serious conduct contrary to the public interest. We find that Eatch and McKenzie should be ordered to pay administrative penalties of a magnitude sufficient to ensure effective specific and general deterrence.

[97] We are mindful that we have little basis for assessing aggravating and mitigating factors in this matter because of the limited evidence that was presented in the Merits Hearing, apart from McKenzie's admission relating to his prior fraud conviction, which was set out at paragraph 31 of the McKenzie Agreed Statement. Based on the Commission's findings in the Merits Decision, and having considered the previous cases relied on by Staff, we find that the Respondents' misconduct and investor losses in this case fall neither at the most nor the least serious end of the spectrum. Considering all of the relevant factors, we find that Eatch should be ordered to pay an administrative penalty of $500,000, rather than the $750,000 requested by Staff. We find that McKenzie should be ordered to pay an administrative penalty of $600,000, as requested by Staff.

[98] These amounts shall be designated for allocation to or for the benefit of third parties, pursuant to s. 3.4(2)(b) of the Act.

V. COSTS

A. Staff's Claim for Costs

[99] Staff seeks an order that the Respondents pay, on a joint and several basis, the sum of $73,649.92, representing the costs and disbursements incurred in the hearing of this matter, pursuant to s. 127.1(2) of the Act and Rule 18 of the Commission's Rules.

[100] In support of its costs claim, Staff filed the Affidavit of Kathleen McMillan, sworn February 21, 2012, which includes a summary of the hours spent by the three members of Staff whose time is claimed, as well as the receipts for preparation of the hearing briefs and binders. Staff submits that they have attempted to produce a conservative calculation of costs, and they note that they have not claimed for the investigation of the matter, they claimed only for the time of three members of Staff, although nine members of Staff docketed hours on the file, and they limited their claim for hearing preparation time to the four weeks before the start of the Merits Hearing on May 31, 2010. Staff also submits that the costs claimed have been calculated according to a schedule of hourly rates recommended by a consultant to be used by Staff to calculate costs.

[101] Staff submits that its already conservative claim for costs should not be reduced on the basis of the Respondents' admissions in the Agreed Statements because the Respondents made these admissions only on the very brink of the hearing, after Staff had already prepared for a contested hearing. Staff submits that because of the lateness of the Respondents' admissions, the majority of Staff's preparation time and the amounts disbursed in preparing Staff's hearing briefs were costs thrown away. Staff also submits that the Respondents refused to admit liability, causing substantial time to be wasted on hearing preparation. Staff submits that the majority of the costs incurred would have been avoided if the Respondents had conducted themselves in a manner consistent with clauses (h) and (j) of Rule 18.2.

B. Analysis and Conclusion

[102] Rule 18.2 says the following:

> **18.2 Factors Considered When Awarding Costs** – In exercising its discretion under section 127.1 of the Act to award costs against a person or company, a Panel may consider the following factors:
>
> (a) whether the respondent failed to comply with a procedural order or direction of the Panel;
>
> (b) the complexity of the proceeding;
>
> (c) the importance of the issues;
>
> (d) the conduct of Staff during the investigation and during the proceeding, and how Staff's conduct contributed to the costs of the investigation and the proceeding;
>
> (e) whether the respondent contributed to a shorter, more efficient, and more effective hearing, or whether the conduct of the respondent unnecessarily lengthened the duration of the proceeding;
>
> (f) whether any step in the proceeding was taken in an improper, vexatious, unreasonable, or negligent fashion or in error;
>
> (g) whether the respondent participated in the proceeding in a way that helped the Commission understand the issues before it;
>
> (h) whether the respondent participated in a responsible, informed and well-prepared manner;
>
> (i) whether the respondent co-operated with Staff and disclosed allrelevant information;
>
> (j) whether the respondent denied or refused to admit anything thatshould have been admitted; or
>
> (k) any other factors the Panel considers relevant.

[103] As Staff acknowledges in its written submissions, a costs order is not a sanction. Section 127.1 of the Act gives the Commission discretion to order costs so that the Commission can recover the costs of a hearing or investigation from a person or company who has not complied with Ontario securities law or acted contrary to the public interest. The factors set out in the Commission's Rule 18.2 are intended to encourage efficient use of the Commission's adjudicative resources.

[104] In this case, we are not persuaded that it is in the public interest to make a costs order against the Respondents, for two reasons.

[105] First, the Respondents, who were self-represented, were facing an allegation of fraud, as well as an allegation of illegal distribution. The fraud provision of the Act was proclaimed into law on December 31, 2005, and fraud allegations, which are amongst the most serious securities allegations, continue to raise novel issues at the Commission.

[106] In addition, we are not persuaded that the Respondents "refused to admit liability, causing substantial time to be wasted on the hearing and the preparation of written submissions", thereby engaging clause (j) of Rule 18.2. Based on the Merits Decision, we find that Staff and the Respondents disagreed about the scope of the Agreed Statements, and in particular whether Staff's allegation of fraud was still before the Commission, and we have no basis for concluding that the Respondents "refused to admit anything that should have been admitted." In our view, having admitted the essential facts, the Respondents were entitled to a hearing before the Commission to determine whether they had committed fraud.

[107] In the circumstances, considering the procedural and legal issues in this proceeding, we do not find it appropriate to impose a costs order under s. 127.1 of the Act.

VI. CONCLUSION

[108] Accordingly, for the reasons given above, we find that it is in the public interest to order the following sanctions, which reflect the seriousness of the Respondents' non-compliance with Ontario securities law and will deter the Respondents and other like-minded people from engaging in similar conduct.

[109] Our sanctions order will impose significant financial obligations on the Respondents. Eatch will be ordered to pay an administrative penalty of $500,000, and to disgorge to the Commission, on a joint and several basis with Lyndz and James Marketing, the amount of $655,000 that he obtained as a result of his non-compliance with Ontario securities law. McKenzie will be ordered to pay an administrative penalty of $600,000, and to disgorge to the Commission, on a joint and several basis with Lyndz and James Marketing, the amount of $700,000 that he obtained as a result of his non-compliance with Ontario securities law. Lyndz alone will be ordered to disgorge the amount of $400,000 that it obtained as a result of its non-compliance with Ontario securities law. Lyndz will also be ordered to disgorge, on a joint and several basis with James Marketing, the remaining $345,000 that the Respondents obtained as a result of their non-compliance with Ontario securities law. All these amounts will be designated for allocation to or for the benefit of third parties, pursuant to s. 3.4(2)(b) of the Act.

[110] We will issue a separate order giving effect to our decisions on sanctions and costs, as follows:

1. pursuant to paragraph 2 of subsection 127(1) of the Act, all trading in any securities by Eatch, Lyndz, McKenzie and James Marketing shall cease permanently, and all trading in securities of Lyndz and James Marketing shall cease permanently;

2. pursuant to paragraph 2.1 of subsection 127(1) of the Act, the acquisition of any securities by Eatch, Lyndz, McKenzie and James Marketing shall cease permanently;

3. pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Eatch, Lyndz, McKenzie and James Marketing permanently;

4. pursuant to paragraph 6 of subsection 127(1) of the Act, Eatch and McKenzie are hereby reprimanded;

5. pursuant to paragraphs 7 and 8 of subsection 127(1) of the Act, Eatch shall resign all positions he holds as a director or officer of any issuer and he is prohibited permanently from becoming or acting as a director or officer of any issuer;

6. pursuant to paragraphs 7 and 8 of subsection 127(1) of the Act, McKenzie shall resign all positions he holds as director or officer of any issuer and he is prohibited permanently from becoming or acting as a director or officer of any issuer;

7. pursuant to paragraph 10 of subsection 127(1) of the Act, Lyndz shall disgorge to the Commission the amount of $400,000, to be designated for allocation to or for the benefit of third parties, in accordance with subsection 3.4(2)(b) of the Act;

8. pursuant to paragraph 10 of subsection 127(1) of the Act, Lyndz and James Marketing shall jointly and severally disgorge to the Commission the amount of $345,000, to be designated for allocation to or for the benefit of third parties, in accordance with subsection 3.4(2)(b) of the Act;

9. pursuant to paragraph 10 of subsection 127(1) of the Act, Eatch, Lyndz and James Marketing shall jointly and severally disgorge to the Commission the amount of $655,000, to be designated for allocation to or for the benefit of third parties, in accordance with subsection 3.4(2)(b) of the Act;

10. pursuant to paragraph 10 of subsection 127(1) of the Act, McKenzie, Lyndz and James Marketing shall jointly and severally disgorge to the Commission the amount of $700,000, to be designated for allocation to or for the benefit of third parties, in accordance with subsection 3.4(2)(b) of the Act;

11. pursuant to paragraph 9 of subsection 127(1) of the Act, Eatch shall pay an administrative penalty of $500,000, to be designated for allocation to or for the benefit of third parties, in accordance with subsection 3.4(2)(b) of the Act; and

12. pursuant to paragraph 9 of subsection 127(1) of the Act, McKenzie shall pay an administrative penalty of $600,000, to be designated for allocation to or for the benefit of third parties, in accordance with subsection 3.4(2)(b) of the Act.

DATED at Toronto this 31st day of July 2012.

“Mary G. Condon”

“Sinan O. Akdeniz”

3.1.2 IIROC v. Mark Allen Dennis – ss. 27.1, 8(3)

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

AND

IN THE MATTER OF
AN APPLICATION FOR A HEARING AND REVIEW
OF A DECISION OF THE ONTARIO DISTRICT COUNCIL
OF THE INVESTMENT INDUSTRY REGULATORY
ORGANIZATION OF CANADA PURSUANT TO
SECTION 21.7 OF THE SECURITIES ACT,
R.S.O. c. S.5, AS AMENDED

AND

IN THE MATTER OF
DISCIPLINE PROCEEDINGS PURSUANT TO THE
BY-LAWS OF THE INVESTMENT DEALERS
ASSOCIATION OF CANADA AND THE DEALER
MEMBER RULES OF THE INVESTMENT INDUSTRY
REGULATORY ORGANIZATION OF CANADA

BETWEEN

STAFF OF THE INVESTMENT INDUSTRY
REGULATORY ORGANIZATION OF CANADA

AND

MARK ALLEN DENNIS

REASONS FOR DECISION
(Sections 27.1 and Subsection 8(3) of the Act)

Hearing:	November 21, 2011		
Decision:	July 31, 2012		
Panel:	Mary G. Condon	–	Chair of the Panel
	Sinan O. Akdeniz	–	Commissioner
Appearances:	Jennifer Lynch	–	For Staff of the Commission
	Philip Anisman and Rob DelFrate	–	For Staff of IIROC
		–	No one for Mark Allen Dennis

TABLE OF CONTENTS

REASONS FOR DECISION

I. BACKGROUND

[1] On November 21, 2011, a hearing was held before the Ontario Securities Commission (the "**Commission**") to consider an application for hearing and review (the "**Application**") brought by the Investment Industry Regulatory Organization of Canada ("**IIROC**") pursuant to sections 8 and 21.7 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**"). The Application seeks hearing and review of a June 3, 2011, decision of a hearing panel of the Ontario District Council of IIROC (the "**Hearing Panel**") in the matter of Mark Allen Dennis ("**Dennis**").

[2] The Applicant, IIROC, was represented at the hearing before the Commission by Philip Anisman and Rob DelFrate. Jennifer Lynch, Counsel with the Enforcement Branch of the Commission ("**Staff**") was also present at the hearing. Dennis was neither present nor represented at the hearing before the Commission.

Failure of Dennis to attend the proceedings

[3] As noted above, Dennis did not attend and did not participate, either in person or through an authorized representative, in the proceedings before the Commission. IIROC and Staff submit that Dennis was given proper notice of these proceedings and the Commission should proceed in his absence.

[4] Staff filed an Affidavit of Attempted Service sworn November 14, 2011, attesting to an attempt to serve Dennis with Staff's material on November 9, 2011. According to the Affidavit, service was not possible because the driveway to Dennis's last known address was gated and locked.

[5] IIROC submitted that Dennis was properly served a copy of the Application. IIROC directed the Panel to an Affidavit of Service which had previously been filed with the Office of the Secretary. The Affidavit of Service, received by the Office of the Secretary on July 7, 2011, states that Dennis was personally served with the Application on July 4, 2011, at his last known address for service.

[6] IIROC also submitted that Dennis had been properly notified of the hearing before the Commission. Mr. Anisman provided the Panel with a copy of a letter he had sent to Dennis at his last known address for service by regular and electronic mail on September 14, 2011, attaching a copy of the Notice from the Office of the Secretary advising the parties that "a hearing to consider the Application made by Staff of IIROC for a review of a Decision of a Hearing Panel of the IIROC dated June 3, 2011 … will be held on November 21, 2011, at 10:00 on the 17th floor of the Commission's offices at 20 Queen Street West, Toronto." Mr. Anisman submitted that the Notice from the Office of the Secretary was published on the Commission's website on September 13, 2011.

[7] Subsection 7(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "**SPPA**") provides that a tribunal may proceed in the absence of a party when that party has been given adequate notice. That section provides as follows:

> Where notice of an oral hearing has been given to a party to a proceeding in accordance with this Act and the party does not attend at the hearing; the tribunal may proceed in the absence of the party and the party is not entitled to any further notice in the proceeding.

[8] We note the following passage from *Administrative Law in Canada*:

> Where a party who has been given proper notice fails to respond or attend, the tribunal may proceed in the party's absence and the party is not entitled to further notice. All that the tribunal need establish, before proceeding in the absence of the party, is that the party was given notice of the date and place of the hearing. The tribunal need not investigate the reasons for the party's absence.
>
> (Sara Blake, *Administrative Law in Canada*, 5th ed. (Markham, Ont.: LexisNexis Butterworths, 2011) at p. 32)

[9] We find that Dennis was given sufficient notice of this hearing. We find that the Application, outlining the issues upon which IIROC sought to have the decision reviewed, was personally served on Dennis at his last known address for service. We further find that Dennis was advised, by regular and electronic mail, of the time and location of this hearing. If Dennis no longer resides at his last known address, any failure to advise IIROC or the Commission of changes to his address for service should not accrue to his benefit. We are satisfied that Dennis had adequate notice of this proceeding and that we are entitled to proceed in his absence in accordance with subsection 7(1) of the SPPA.

The Proceedings before the Hearing Panel

[10] On February 17, 2011, IIROC issued a Notice of Hearing advising that a Hearing Panel would be constituted and a hearing held into allegations that Dennis had:

- misappropriated funds from a client in contravention of By-law 29.1 of the Investment Dealers Association (now IIROC Dealer Member Rule 29.1); and
- refused and/or failed to attend and give information in respect of an investigation being conducted by IIROC, contrary to Dealer Member Rule 19.5.

[11] A hearing was conducted before the Hearing Panel on April 25, 2011. IIROC Enforcement Counsel was present at the hearing, while Dennis was neither present nor represented at the hearing. The Hearing Panel found that Dennis had been duly served with a Notice of Hearing containing full particulars of the allegations against him, and notifying him that the hearing would proceed in his absence if necessary. As a result, the hearing proceeded in Dennis's absence.

[12] After hearing the evidence from IIROC, the Hearing Panel found that Dennis had misappropriated $1,400,000 from a client, contrary to Dealer Member Rule 29.1. The Hearing Panel further found that Dennis had failed to cooperate with the IIROC investigation contrary to Dealer Member Rule 19.5.

[13] At the same hearing, IIROC Enforcement Counsel sought the following sanctions from the Hearing Panel with respect to Dennis's contravention of the Dealer Member Rules:

- a permanent bar on Dennis's "approval with IIROC";
- in respect of the misappropriation of client funds, a fine in the amount of $1,450,000 which would include disgorgement of the misappropriated funds plus an additional fine of $50,000; and
- in respect of Dennis's refusal to attend and give information during the IIROC investigation, a fine in the amount of $50,000.

[14] IIROC Enforcement Counsel argued that the proposed sanctions were in accordance with the Hearing Panel's authority to impose penalties following a disciplinary hearing, under Dealer Member Rule 20.33. Rule 20.33 reads:

> **Rule 20.33** (1) Upon conclusion of a disciplinary hearing, a Hearing Panel may impose the penalties set out at 20.33(2) if, in the opinion of the Hearing Panel, the Approved Person:
>
> (a) failed to comply with or carry out the provisions of any federal or provincial statute, regulation, ruling or policy relating to trading or advising in respect of securities or commodities;
>
> (b) failed to comply with the provisions of any Rule or Ruling of the Corporation; or
>
> (c) failed to carry out an agreement or undertaking with the Corporation.
>
> (2) Pursuant to subsection (1), a Hearing Panel may impose any one or more of the following penalties upon the Approved Person:
>
> (a) a reprimand;
>
> (b) a fine not exceeding the greater of:
>
> (i) $1,000,000 per contravention; and
>
> (ii) an amount equal to three times the profit made or loss avoided by such Approved Person by reason of the contravention.
>
> (c) suspension of approval for any period of time and upon any conditions or terms;
>
> (d) terms and conditions of continued approval;
>
> (e) prohibition of approval in any capacity for any period of time;

(f) termination of the rights and privileges of approval;

(g) revocation of approval;

(h) a permanent bar from approval with the Corporation; or

(i) any other fit remedy or penalty.

[15] IIROC Enforcement Counsel also requested a cost order against Dennis in the amount of $7,500.

[16] On June 30, 2011, the Hearing Panel released its decision. The Hearing Panel ruled that the fine authorized by Rule 20.33 is a penal sanction, and therefore Rule 20.33 must be given a strict construction. The Hearing Panel ruled that, under a strict construction, the authority to impose a fine greater than $1,000,000 was restricted to circumstances where there was a "true profit" made by the activity undertaken by the Member. The Hearing Panel stated:

> [16] The Panel took the view that sanction related to disgorgement of profit arose only in those circumstances where there was a true profit made by the activity undertaken, a profit in the nature of the sum remaining after deducting all costs. …

[17] As a result, the Hearing Panel rejected IIROC Enforcement Counsel's request for a fine of $1,450,000 in respect of the misappropriation of funds. The Hearing Panel imposed the following sanctions on Dennis:

- A permanent bar on his "approval with IIROC";
- a fine in the amount of $1,000,000 in respect of his misappropriation of funds from a client; and
- a fine in the amount $25,000 in respect of his failure to provide information to IIROC.

[18] The Hearing Panel also ordered Dennis to pay costs in the amount of $7,500.

The Application

[19] In this Application, IIROC seeks review of the decision of the Hearing Panel on the grounds that the Hearing Panel:

- Erred in principle by interpreting Dealer Member Rule 20.33 as a penal rule requiring strict interpretation;
- Erred in law by misinterpreting the word "profit" in Dealer Member Rule 20.33; and
- Interpreted Dealer Member Rule 20.33 in a manner inconsistent with the public interest.

Standard of Review

[20] In considering an application brought pursuant to section 21.7 of the Act, the Commission exercises original jurisdiction, as opposed to a more limited appellate jurisdiction, and is free to substitute its judgment for that of the self-regulatory organization ("**SRO**") such as IIROC. However, in practice the Commission takes a restrained approach. The Commission will not substitute its own view of the evidence for that of the SRO, in this case the IIROC Hearing Panel, just because the Commission might have reached a different conclusion. As stated in *Re: Canada Malting*, the leading case on this issue, and reaffirmed in a number of subsequent decisions, the Commission will intervene in a decision of an SRO if:

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.

(*Canada Malting Co., Re*, (1986) 9 O.S.C.B. 3566, at para. 24; *HudBay Minerals Inc., Re* (2009) 32 O.S.C.B. 3733, at para. 105; *Investment Dealers Assn. of Canada v. Kasman* (2009) 32 O.S.C.B. 5729, at para. 43; *Investment Industry Regulatory Organization of Canada v. Vitug* (2010) 33 O.S.C.B. 3965 at para. 48; and *Deutsche Bank Securities Ltd., Re* (2011) 34 O.S.C.B. 10333 at para. 26)

II. ISSUES

[21] No submissions were made by IIROC that issues 3 and 4 from the Canada Malting test were raised by the Hearing Panel decision. Accordingly we agree with counsel for IIROC that this Application raises the following issues:

- Did the Hearing Panel proceed on an incorrect principle?
- Did the Hearing Panel err in law?
- Does the Hearing Panel's perception of the public interest conflict with that of the Commission?

III. POSITIONS OF THE PARTIES

[22] IIROC made submissions that the Hearing Panel, by rejecting the request for a fine against Dennis in the amount of $1,450,000 in respect of his misappropriation of funds from a client, erred in a manner that engaged three of the *Canada Malting* factors: (i) it proceeded on an incorrect principle (ii) it made an error of law (iii) its perception of the public interest conflicted with that of the Commission.

Did the Hearing Panel proceed on an incorrect principle?

[23] IIROC submits that the Hearing Panel erred by treating Rule 20.33 as a penal sanction rather than a regulatory sanction. IIROC referred to its Sanctioning Guidelines, which states that the primary goals of sanctions imposed by a Hearing Panel are the protection of investors and the integrity of securities markets. In IIROC's view, any sanctions imposed by a Hearing Panel should be preventative in nature and prospective in their orientation, similar to sanctions imposed by the Commission under section 127 of the Act.

[24] IIROC submits that the Commission acknowledged, in its decision in *Re Rowan* (2009) 33 O.S.C.B. 91, that IIROC's sanctioning authority, like the Commission's own sanctioning authority, is regulatory in nature, not penal.

[25] In IIROC's view, by applying the strict construction required for penal sanctions to Rule 20.33, the Hearing Panel proceeded on an incorrect principle, which warrants intervention by the Commission.

[26] Staff agree with IIROC that the Hearing Panel proceeded on an incorrect principle, albeit for different reasons. Staff submit that the Hearing Panel inappropriately considered the existence of criminal and civil proceedings against Dennis as justification for their refusal to order full disgorgement of the misappropriated funds through the imposition of a fine. Staff refer to paragraph 25 of the Hearing Panel's Decision and Reasons (as reported), where the Panel, in response to IIROC Enforcement Counsel's argument that the authority to fine must be interpreted as an authority to deprive Dennis of any pecuniary benefit of his contraventions, states: "… there are the other two forums, the criminal and the civil court to deal with any pecuniary benefit".

[27] Staff submits that in determining a penalty for Dennis's contravention of the Dealer Member Rules, the Hearing Panel should have given consideration to the protection of the public and the specific and general deterrent effect of the penalty. Staff submits that the existence of criminal and civil proceedings against Dennis was an irrelevant factor in the Hearing Panel's determination. Therefore, in Staff's view, the Hearing Panel applied an incorrect principle in determining the appropriate penalty when it considered the existence of the criminal and civil proceedings against Dennis.

Did the Hearing Panel make an error of law?

[28] IIROC submits that the purpose of Rule 20.33 is to permit a hearing panel to impose a fine that ensures that a person who contravenes a rule is not permitted to retain any benefit obtained as a result of the contravention. In IIROC's submission, the purpose of Rule 20.33 is to deter a violator, or anyone else inclined to contravene the Rules in a similar fashion, from engaging in such conduct in the future. IIROC submits that the Hearing Panel committed an error of law by interpreting Rule 20.33 in a manner that does not allow for a penalty that provides sufficient deterrence.

[29] IIROC further submits that the Hearing Panel committed an error of law by interpreting the word "profit" in Rule 20.33 too narrowly. IIROC submits that the correct approach to interpreting the Dealer Member Rules, requires that the words of the rule be read purposively, in their grammatical and ordinary sense, in light of their regulatory context (In the Matter of X Inc. (2010) 33 OSCB 11369, at para. 37 – citing *BellExpressVu Limited v. R.* [2002] S.C.J. 43). IIROC submits that in the "regulatory context" of Rule 20.33, "profit" must include any pecuniary advantage or gain obtained from a violation of IIROC's rules, whether or not funds were expended to obtain the advantage or gain.

[30] IIROC submits that the regulatory history of Rule 20.33 supports their interpretation of the rule. They point out that Investment Dealer Association ("**IDA**") By-law 20.10, the predecessor of Dealer Member Rule 20.33, authorized a hearing panel

to impose a fine not exceeding $1,000,000 or an amount equal to three times the "pecuniary benefit which accrued to such person as a result of committing the violation". In May 2004 the By-laws were amended and the new wording was adopted.

[31] Prior to the amendment of the By-law the IDA published a Notice concerning the proposed amendments ((2003) 26 O.S.C.B. 7380). The Notice contained the following explanation concerning the proposed change to the wording of the limit on the maximum amount of a fine to be imposed under the By-laws:

> **Issue – Maximum Amount of Fine (Part 2 of the Formula)**
>
> The second part of the formula is based on a calculation of "three times the pecuniary benefit which accrued to the Member." The provision seeks to divest ill-gotten gains through calculation of a fine based on "disgorgement".
>
> **Proposed Solution – Improve Formula**
>
> The wording of the formula will be changed to "three times the profit gained or loss avoided" so as to ensure that the objective of the formula is met in that "loss avoided" is captured by the formula. The proposed wording is consistent with the wording in the Ontario Securities Act.

[32] IIROC submits that the regulatory history of Rule 20.33 supports their position that the purpose of the Rule is to provide for disgorgement of any amount accruing to the benefit of a person as a result of a contravention of the rules. IIROC submits that the Hearing Panel's narrow interpretation of Rule 20.33 effectively defeats the purpose of the Rule, and amounts to an error of law warranting intervention by the Commission.

[33] Finally, IIROC submits that there is no regulatory reason to cap a fine for misappropriating funds from a client at $1,000,000 (or $5,000,000 for a member firm) when there is no similar cap on fines for violations of a less serious nature, such as engaging in other business activities or commissions earned on improper trading. As a result, IIROC submits that the Hearing Panel's interpretation of the word "profit' in Rule 20.33 leads to arbitrary distinctions among fines available for contraventions of IIROC Member Rules.

[34] Staff agreed with IIROC that the Hearing Panel committed an error of law in misinterpreting Rule 20.33 in a manner that limited their authority to impose a penalty in this case to $1,000,000. Staff submits that the words "profit made or loss avoided" in Rule 20.33 are meant to encompass any benefit obtained by a person who violates the Dealer Member Rules. Staff submits that the error committed by the Hearing Panel in misinterpreting Rule 20.33 warrants intervention by the Commission.

Did the Hearing Panel's interpretation of the public interest conflict with that of the Commission?

[35] IIROC submitted that the public interest requires that persons who misappropriate funds from their clients should be ordered to fully disgorge those funds. IIROC argued that the Hearing Panel's interpretation of its sanctioning authority would allow individuals who misappropriate funds from their clients to retain any amounts in excess of $1,000,000. This, in IIROC's view, is not in the public interest.

[36] IIROC further submitted that the Hearing Panel's failure to order a fine that results in the full disgorgement of the misappropriated funds undermines the power of the fine to act as a general deterrent to others who may contemplate similar misconduct. In IIROC's submission, the Hearing Panel's decision is inconsistent with the Commission's view of the public interest as expressed in *Re Boulieris* (2004) 27 O.S.C.B. 1597 ("***Re Boulieris***").

[37] Staff agreed with IIROC, arguing that confidence in the securities market will be seriously eroded by the fact that Dennis was allowed to keep a significant portion of his ill-gotten gains. This, in Staff's submission, is contrary to the public interest.

IV. ANALYSIS

Did the Hearing Panel proceed on an incorrect principle?

[38] We agree that the Hearing Panel proceeded on an incorrect principle when it ruled that IIROC sanctioning power is penal in nature. As this Commission stated in *Rowan*, *supra*:

> [53] An even greater range for an administrative penalty is available to self-regulatory organizations recognized by this Commission (notwithstanding that the penalties are based on contractual agreements). The Investment Industry Regulatory Organization of Canada (formerly the Investment Dealers Association, hereinafter "IIROC"), the national self-regulatory organization for securities dealers, has the authority under the *Universal Market Integrity Rules* to impose a fine not

> to exceed the greater of $1,000,000 and an amount triple to the financial benefit which accrued to the person as a result of committing the contravention (*Universal Market Integrity Rules*, Rule 10.5(1)(b)). In addition, IIROC also has the authority to order its Approved Members and Dealer Members to pay a fine not exceeding the greater of $1,000,000 (in the case of Approved Persons) and $5,000,000 (in the case of Dealer Members) per contravention and an amount equal to three times the profit made or loss avoided by reason of the contravention (See: *IIROC Rule Book, Dealer Member Rules*, Rules 20.33 and 20.34).
>
> …
>
> [56] In pursuit of the legitimate regulatory goal of deterring others from engaging in illegal conduct, the Commission must, therefore, have proportionate sanctions at its disposal. The administrative penalty represents an appropriate legislative recognition of the need to impose sanctions that are more than "the cost of doing business". In the current securities regulation and today's capital markets context, a $1,000,000 administrative penalty is not *prima facie* penal.

[39] We confirm the position articulated in *In the Matter of Rowan*, (2010) 33 OSCB 91, *Re Mills* (2001) 24 OSCB 4146, and in the IIROC sanctioning guidelines themselves that the penalties authorized under Rule 20.33, like the penalties authorized under section 127 of the Act, are intended to regulate future conduct, not punish past conduct. The provisions authorizing those penalties are regulatory in nature, not penal. By construing Rule 20.33 as a penal provision requiring a strict construction, the Hearing Panel proceeded on an incorrect principle. IIROC proceedings have a distinct purpose which includes protection of the investing public and the prevention of future misconduct (*In the Matter of Kasman*, (2009) 32 OSCB 5729 at paragraph 50).

[40] We agree with Staff's submission that the Hearing Panel considered an irrelevant factor when it cited the existence of criminal and civil proceedings against Dennis as a justification for not ordering full disgorgement of the "pecuniary benefit" obtained through the contravention of the Member Rules (IDA By-law 20.10(a)(ii)(2)). Criminal and civil proceedings have different purposes and roles than do IIROC proceedings and sanctions.

[41] We find that the Hearing Panel also improperly considered the fact that Dennis's employer had "completed full restitution to" Dennis's former client (Transcript of the Hearing before the Hearing Panel at page 30, Record of Proceeding, Tab 8). The fact that his former client has been made whole by his former employer is an irrelevant factor in considering the appropriate regulatory penalty to impose against Dennis for his misconduct. By considering whether Dennis's former client received restitution as a factor affecting the appropriate disciplinary sanction to be imposed for Dennis's misconduct, the Hearing Panel proceeded on an incorrect principle.

Did the Hearing Panel make an error of law?

[42] We find that the Hearing Panel made an error of law by misinterpreting the word "profit" in Dealer Member Rule 20.33. The Hearing Panel's analysis of the term "profit" is expressed in paragraph 16 of its Decision and Reasons:

> [16] The Panel took the view that sanction related to disgorgement of profit arose only in those circumstances where there was a true profit made by the activity undertaken, a profit in the nature of the sum remaining after deducting all costs … This is strengthened by reference to loss in the same clause. Indeed, the word profit may mean many things, such as that the Respondent profited by the misappropriation of funds. However this is a penal section of the rules and should therefore be construed strictly and where profit and loss are used in the same clause it seems to the panel that profit should therefore be used in its more restricted use that is the sum left after deducting costs. Should the Association have intended that this penalty should apply to misappropriation cases it would have been quite simple to say so merely by adding "the profit made or the loss avoided or the amount misappropriated. ..."

[43] We disagree that the word "profit" in Dealer Member Rule 20.33 should be interpreted to mean "a profit in the nature of the sum remaining after deducting all costs". We accept the submissions of IIROC that a purposive reading of the provisions is more appropriate. We doubt that it can have been the intention of this rule to make a distinction between wrongdoers whose activities required an outlay of costs and those whose activities did not, and to levy sanctions accordingly. The perverse result of such a construction would be that those whose wrongful activities required no outlay might be less deterred from engaging in such activities on the basis that the sanction that could be imposed on them could not be more than $1 million, which might be less than the benefit to be gained from the activity. Such a result would not be rationally related to the purposes of the sanction rule. Nor would it assist in achieving the overriding goal of investor protection.

[44] We also agree with the submissions by counsel for IIROC with respect to the significance of the shift in language from "pecuniary benefit" to "profit made or loss avoided" when the Rule was amended in 2004. In our view, the 2004 amendment to the IDA By-laws (the predecessor of the IIROC Member Rules) which produced the current wording of Rule 20.33, was intended

to make the penalty formula more inclusive as opposed to less inclusive so as to better achieve the protection of investors. This is supported by the commentary that accompanied the revised wording of the Rule (set out at paragraph 31 above and reproduced here):

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

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

Does the Hearing Panel's interpretation of the public interest conflict with that of Commission?

[46] The Hearing Panel did not deal directly with the question of how its conclusions as to the appropriate sanction to be levied would be in the public interest. Given that the decision of the Hearing Panel makes no direct statement as to the public interest, and given our findings that the Hearing Panel proceeded on an incorrect principle and erred in law, it is not necessary for us to address this ground of review.

[47] However, to the extent that the Hearing Panel's interpretation of the Rule (which could encompass the result that a member who misappropriates funds from a client can retain any funds in excess of $1,000,000) may be seen as an expression of its perception of the public interest, the Hearing Panel's interpretation of the public interest is not consistent with that of the Commission. As the Commission stated in Re Boulieris:

> [50] Where a registrant has willfully (sic) 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 (sic) conduct. (emphasis added)

V. ORDER

[48] For the Reasons set out above, we find that the Hearing Panel proceeded on an incorrect principle and made an error of law in imposing a fine against Dennis which does not achieve disgorgement of the entire amount that he was found to have misappropriated from his client.

[49] Both Staff and IIROC made submissions that, should we be inclined to grant the Application, we should not to refer the matter back to the District Council but rather substitute our decision in place of the decision of the original Hearing Panel. We agree that this is a case where it would be appropriate for the Commission to substitute its decision for that of the Hearing Panel. As this Commission stated in *Re Boulieris*, where no further evidence or argument is required to make the Order, it is not necessary to refer the matter back for a further hearing. In such cases, it is more efficient for the Commission to substitute its decision for that of the original Hearing Panel.

[50] We conclude that it would be appropriate and in the public interest to allow the Application and to substitute our decision for that of the Hearing Panel. In our view, the appropriate sanctions against Dennis should include a fine in the amount of $1,450,000, representing full disgorgement of the misappropriated funds as well as an additional fine of $50,000, as requested by IIROC. We would not disturb any of the other sanctions imposed by the Hearing Panel. Our decision will vary the decision of the Hearing Panel only in respect of the fine for misappropriation.

[51] We did give some consideration to imposing a higher amount of penalty than the $1,450,000 requested by IIROC staff, and we canvassed this issue with IIROC's counsel at the hearing. We have broad authority under s.8 to make "such other decision as the Commission considers proper". We note that our interpretation of Rule 20.33 could allow for a fine of up to $4,200,000 to be imposed on Dennis. However we have ultimately not taken this step, in light of circumstances particular to this hearing. These circumstances include the fact that we were not requested to impose a higher amount by IIROC staff in their request for review under s.8, with the result that Mr. Dennis, who did not attend the hearing, would have had no notice of this possibility. Further, while we are ultimately substituting our decision for that of the IIROC panel, we remain mindful of the practice, as expressed in cases such as *Boulieris*, that the Commission should exercise restraint in so doing.

[52] Accordingly, we order that as sanctions for his breaches of Dealer Member Rules 29.1 and 19.5:

- There will be a permanent bar on Dennis's approval with IIROC;
- Dennis shall pay a fine in the amount of $1,450,000 with respect to his misappropriation of funds from a client;
- Dennis shall pay a fine in the amount of $25,000 for his failure to provide information to IIROC in connection with their investigation; and
- Dennis shall pay costs in the amount of $7,500.

[53] A separate Order of the Commission will be issued to give effect to the Panel's ruling above.

Dated at Toronto this 31st day of July, 2012.

"Mary G. Condon"

"Sinan O. Akdeniz"

3.1.3 Paul Donald – s. 127

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

AND

IN THE MATTER OF
PAUL DONALD

REASONS AND DECISION
(Subsection 127(1) of the Act)

Hearing:	March 21 to 25, 2011 March 28 to 30, 2011 April 7, 2011		
Decision:	August 1, 2012		
Panel:	Christopher Portner	–	Commissioner and Chair of the Panel
	Paulette L. Kennedy	–	Commissioner
Appearances:	Cullen Price Amanda Heydon	–	For Staff of the Commission
	Joseph Groia	–	for Paul Donald
			Kevin Richard

TABLE OF CONTENTS

REASONS AND DECISION

I. OVERVIEW

A. Introduction

[1] This was a hearing before the Ontario Securities Commission (the "**Commission**") pursuant to subsection 127(1) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**"). This matter arises from a Notice of Hearing issued by the Commission on May 20, 2010 in relation to a Statement of Allegations issued by Staff of the Commission ("**Staff**") with respect to Paul Donald ("**Donald**") on the same date.

[2] Staff alleges that Donald purchased securities of Certicom Corp. ("**Certicom**") in August and September 2008 while he was a person in a special relationship with Certicom and while he had knowledge of material facts with respect to Certicom that had not been generally disclosed, contrary to subsection 76(1) of the Act.

[3] In 2008, Certicom was a provider of cryptography used by software vendors and wireless device manufacturers, including Research in Motion ("**RIM"),** to provide security in their products. Certicom's technology was based on elliptical curve cryptography ("**ECC**") which provides the most security per bit of any known public-key security technology. Devices using ECC require less storage, power, memory and bandwidth than other technologies. Consequently, the use of ECC technology in hand-held communication devices is important as it provides a high level of security. Prior to its acquisition by RIM in 2009, Certicom was a reporting issuer in Ontario and its common shares were listed on the Toronto Stock Exchange (the "**TSX**"). As of July 14, 2008, Certicom had a market capitalization of $69,449,338.

[4] RIM is a designer, manufacturer and marketer of wireless devices for the mobile communications market. In 2008, RIM incorporated Certicom's ECC technology in its mobile products, notably its BlackBerry devices. RIM has its head office in Waterloo, Ontario and its common shares are listed on the TSX and the NASDAQ Stock Market. As of May 30, 2008, RIM had a market capitalization of $77,556,637,669 and had $984,217,000 in cash and cash equivalents on hand.

[5] Donald commenced working at RIM in May 1999 and held a number of positions over the course of his employment with RIM, which ended in March 2009. During the relevant period of time, Donald was RIM's Vice President for Code Division Multiple Access ("**CDMA**"). In this position, Donald managed RIM's relationships with telecom carriers that used CDMA technology in connection with the sale of RIM's BlackBerry devices in Canada, the United States (the "**U.S.**") and Latin America.

[6] On August 20, 2008, RIM hosted a golf tournament and dinner for its executives (the "**2008 RIM Golf Event**") at the Redtail Golf Course, a private golf course in Port Stanley, Ontario ("**Redtail**"). Following a day of golf, a private dinner was served in Redtail's dining room. During the dinner, Donald had a conversation regarding Certicom with Chris Wormald, RIM's Vice President of Strategic Alliances ("**Wormald**"), one of the other RIM officers who were seated at the same table. Staff alleges that during this conversation, Donald became aware of material facts relating to Certicom that had not been generally disclosed.

[7] On the following day, August 21, 2008, Donald instructed his broker to purchase $300,000 worth of Certicom shares at a price not to exceed $1.55 per share. Between August 21, 2008 and September 15, 2008, Donald acquired 200,000 shares of Certicom through his broker at a total cost of $305,000.

[8] On December 3, 2008, RIM announced its intention to make an offer to acquire all of Certicom's shares at a price of $1.50 per share. Following a number of intervening events, on February 10, 2009, Certicom announced that it had entered into an arrangement agreement with RIM pursuant to which RIM would acquire all of Certicom's common shares at a price of $3.00 per share. On March 26, 2009, following the implementation of RIM's plan of arrangement, Donald received the proceeds of the sale of his Certicom shares in the amount of $600,000.

[9] This hearing was held on nine days between March 21, 2011 and April 7, 2011. Donald was represented by counsel at the hearing and attended the hearing in person every day.

B. The Allegations

[10] Staff alleges that, at the time of his purchases of Certicom shares, Donald was in a special relationship with Certicom because:

(a) He learned of material facts with respect to Certicom that had not been generally disclosed while he was an insider, officer and employee of RIM, at a time when RIM was a company:

(i) proposing to make a take-over bid for Certicom;

(ii) proposing to become a party to a reorganization, amalgamation, merger or arrangement or similar business combination with Certicom; and/or

(iii) engaging in business with Certicom; and

(b) He learned of material facts with respect to Certicom from Wormald, who was in a special relationship with Certicom, in circumstances where Donald knew or ought reasonably to have known that Wormald was a person in such a relationship.

[11] Staff alleges that, at the time of his purchases of Certicom shares, Donald had knowledge of material facts relating to Certicom that had not been generally disclosed. More specifically, the material facts of which Staff alleges Donald had knowledge were that:

(a) RIM had been in confidential discussions with Certicom relating to a potential acquisition of Certicom by RIM;

(b) RIM was in talks with Scott Vanstone ("**Vanstone**"), Certicom's founder and a former Chief Executive Officer ("**CEO**") and a member of Certicom's board of directors;

(c) RIM had a continuing interest in the acquisition of Certicom; and

(d) Donald understood from Wormald that Certicom's then current share price was dramatically undervalued based on Certicom's licensing agreements;

(collectively, the "**Four Facts**").

[12] Staff alleges that Donald purchased securities of Certicom while in a special relationship with Certicom and with knowledge of material facts about Certicom that had not been generally disclosed, contrary to subsection 76(1) of the Act.

[13] Further, and in any event, Staff alleges that, by purchasing securities of Certicom in the circumstances, Donald acted contrary to the public interest.

C. The Respondent, Paul Donald

[14] Donald joined RIM in May 1999 as a Channel Manager for its operations in the U.S. He was subsequently asked to head RIM's Independent Software Vendors ("**ISV**") Alliances program, working with smaller software companies to create solutions for the BlackBerry device that extended its utility beyond e-mail, contacts and calendar functions. In 2000, Donald was

promoted to Vice President, ISV Alliances. In this capacity, Donald established RIM's CDMA business.[1] From 2003 to early 2005, CDMA had become a dominant business for RIM in North America, and Donald focused exclusively on CDMA from that point until he left RIM on March 3, 2009.

[15] Prior to joining RIM, Donald had experience with two other software companies. Donald, who had worked as an electrician, founded Current Network Technologies, a company that supplied Canadian chartered banks with custom computers and managed their networks in the late 1980s. In 1994, Donald started PeerDirect Corporation ("**PeerDirect**"), a company that worked in the field of secure data transmission. Donald was the CEO of PeerDirect from 1994 until he joined RIM in May 1999.

[16] From 1994 to 1999, while he was with PeerDirect, Donald worked closely with Certicom as PeerDirect was a user of Certicom's technology. Donald worked with Certicom's then-CEO, Phil Deck ("**Deck**"), at the time PeerDirect first employed Certicom's technology in its products. Donald worked less closely with Deck once PeerDirect established a purely licensing arrangement with Certicom.

D. Overview of the Evidence

(a) Witness Testimony

[17] We heard from nine witnesses at the hearing as described below.

[18] The following is a brief summary of the background and testimony of five RIM employees who testified on behalf of Staff:

(a) Wormald, RIM's Vice President of Strategic Alliances, and the alleged source of the material facts Donald possessed when he purchased Certicom securities. Wormald testified about the investigatory work relating to Certicom undertaken by RIM's Strategic Alliances group, for which he was responsible (the "**Strategic Alliances Group**"), and his recollection of his discussion with Donald at the 2008 RIM Golf Event.

(b) Herb Little ("**Little**"), RIM's Director of Handheld Application Prototypes, who had previously been RIM's Director of BlackBerry Security. Little's testimony included information regarding Certicom's ECC technology and its importance and value to RIM.

(c) Alex McCallum ("**McCallum**"), RIM's Director of the ISV Alliances program. During the relevant time, McCallum, who was then a Manager in the Strategic Alliances Group reporting to Wormald, was responsible for conducting the due diligence relating to Certicom prior to RIM's eventual bid for Certicom's shares in December 2008.

(d) James Belcher ("**Belcher**"), a Manager in the Strategic Alliances Group, who joined RIM on July 14, 2008. Belcher's role was to look for companies with which RIM could partner to help fill resource gaps in its technology through licensing, investments or mergers and acquisitions activity. Belcher joined McCallum in the review of Certicom on his arrival at RIM. Prior to joining RIM, Belcher worked as a Chartered Accountant at KPMG LLP.

(e) James Yersh ("**Yersh**"), RIM's Vice President and Controller. In that role, and in his role as Senior Vice President and Controller at the time of the hearing, Yersh had accountability for RIM's accounting and oversight of its financial reporting, Sarbanes-Oxley compliance program and certain aspects of its risk management programs, including insurance. Yersh was seated at the same table at the 2008 RIM Golf Event as Donald and Wormald.

[19] Kasei Hinsperger ("**Hinsperger**"), an investment advisor with BMO Nesbitt Burns in Waterloo, Ontario, also testified for Staff. Hinsperger had acted as Donald's investment advisor since 2001 or 2002. Donald instructed Hinsperger to purchase shares of Certicom on August 21, 2008.

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[1] Donald explained CDMA and his role in developing RIM's CDMA business in his testimony:

"… [CDMA] is an acronym for a technology that Qualcomm in the U.S. – it's a North American standard for wireless operators. Best way for me to describe it is Bell and Telus, up until about two years ago, were CDMA operators, and Rogers was a GSM operator.

So those are the two dominant standards globally and still until this day are. So at this stage, Verizon and Sprint are CDMA operators, and AT&T and T-Mobile are GSM operators. So I established and built out our CDMA business, which was establishing relationships with the number 1 CDMA operator globally, which was Verizon wireless.

I then established relationships with Sprint, Bell Mobility, and Telus, U.S. Cellular, Cellular South. And eventually, that grew to be a multi-billion-dollar business for RIM. And I started that in 2003." (Hearing Transcript, March 28, 2011 at page 46, line 19 to page 47, line 11)

[20] Karna Gupta ("**Gupta**"), who was called as a witness by Donald, was the CEO of Certicom from January 2008 to June 2009.

[21] Dr. Robert Comment ("**Dr. Comment**") testified as an expert witness on behalf of Donald. Dr. Comment is a financial economist and a faculty member of the Johns Hopkins University Carey School of Business. Dr. Comment testified and provided a report in the form of an affidavit in which he expressed his opinion as to the materiality of the Four Facts.

[22] Donald also testified on his own behalf.

(b) Documentary Evidence

[23] In addition to the testimony of the witnesses, we also rely on documentary evidence introduced during the hearing, some of which, including a number of e-mail messages, was hearsay evidence.

[24] Subsection 15(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "**SPPA**"), which governs the procedure of a Commission hearing, permits us to rely on evidence, including hearsay evidence, that may not be otherwise admissible in a court.

[25] The parties also filed a brief Statement of Agreed Facts at the commencement of the hearing.

(c) Expert Evidence

[26] We admitted the testimony of Donald's expert witness, Dr. Comment, who also provided an affidavit setting out his opinion with respect to the materiality of the information concerning Certicom that was provided to Donald at the 2008 RIM Golf Event. We note that Staff did not object to Dr. Comment giving evidence at the hearing, but noted that it was Staff's view that evidence from an expert on the issue of materiality was not required in the circumstances. We agree with Staff's view in this regard.

[27] Dr. Comment is an expert in the field of financial economics, which he describes as being concerned with investor preferences and market prices:

> Financial economics differs from economics I would say principally in that we don't worry too much about supply and demand curves intersecting to give us a price for in financial economics the price is based on information. So a stock price would reflect the information about future prospects of the company or the price of a bond would reflect information about the likelihood that the coupon and interest and principal would be paid.
>
> (Hearing Transcript, March 30, 2011 at page 10, lines 1 to 9)

[28] The Commission is a tribunal that is comprised of members with specialized expertise. Although we considered the expert evidence of Dr. Comment, we note that, as the Panel hearing this matter, we are responsible for the ultimate determination of materiality in this case. As has been previously stated by the Commission:

> Ultimately, materiality is a question of mixed fact and law that falls squarely within the specialized expertise of the Commission. It is for us to determine whether the statements made by Biovail were, in a material respect and at the time and in the light of the circumstances under which they were made, misleading or untrue.
>
> (*Re Biovail Corp.* (2010), 33 O.S.C.B. 8914 ("***Biovail***") at para. 213)

[29] As materiality is a question of mixed fact and law to be assessed by the Panel, we must determine, based on the evidence before us, whether Donald had knowledge of a material fact or facts that had not been generally disclosed when he purchased shares of Certicom in August and September 2008. While we admitted Dr. Comment's evidence at the hearing, we did so based on his expertise as a financial economist. We give no weight to his opinion as to the materiality of the Four Facts, which is a question to be decided by the Panel. We did not admit Dr. Comment's evidence with respect to the ultimate issue of materiality, but, erring on the side of caution, we allowed his testimony on the basis that his expert evidence with respect to share price from a financial economist's perspective might be of assistance.

II. PRELIMINARY ISSUES

A. The Standard of Proof

[30] The standard of proof applicable in the hearing is as described by the Supreme Court of Canada in *F.H. v. McDougall*, [2008] 3 S.C.R. 41 ("***McDougall***"). The Court held in *McDougall* that there is one standard of proof in civil proceedings, namely, proof on a balance of probabilities, and that the requirement for evidence that is "clear, convincing and cogent" does not elevate this standard of proof beyond a balance of probabilities:

> … 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 improbabilities or the seriousness of the allegations or consequences. However, these considerations do not change the standard of proof.
>
> (*McDougall*, *supra* at para. 40)

[31] The Supreme Court reaffirmed that "the evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*McDougall*, *supra* at para. 46).

B. The Admissibility of Evidence

[32] During the hearing, we heard submissions from the parties on the admissibility of the transcripts of Donald's compelled examination by Staff and of other documentary evidence.

[33] Under subsection 15(1) of the SPPA, which is set out below, we have the discretion to admit evidence that may otherwise be inadmissible as evidence in a court:

> 15. (1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
>
> (a) any oral testimony; and
>
> (b) any document or other thing,
>
> relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

[34] Staff requested that they be permitted to read excerpts of the transcript of their compelled examination of Donald into the record of the hearing. We determined that as Donald intended to testify on his own behalf, his direct testimony would provide us with the best evidence. We therefore decided that Staff would not be permitted to read in excerpts of their compelled examination of Donald, with the exception that Donald's prior evidence given under oath could be used in cross-examination to impeach his testimony. We also decided that, in the event that Donald chose not to testify, it would be open to Staff to read-in excerpts of the transcript of his compelled examination. Donald did testify as a witness on his own behalf, and Staff did not read-in excerpts from his examination transcript, other than during their cross-examination of Donald.

III. THE 2008 RIM GOLF EVENT AND DONALD'S PURCHASES OF CERTICOM SHARES

A. The 2008 RIM Golf Event

[35] On August 20, 2008, RIM held its annual golf and dinner event for its executives at Redtail. After a day of golf, the 50 to 60 RIM executives in attendance were served dinner in Redtail's dining room. As RIM rented the entire Redtail facility, no club members were in attendance and the only people at Redtail that day who were not RIM employees were employees of Redtail. According to Wormald's testimony, there were no more than a dozen clubhouse staff working at the dinner on August 20, 2008.

[36] At about 6:30 that evening, following the golf and prior to the dinner, Donald and other attendees mingled and had drinks on the patio of the clubhouse. Yersh was introduced to Wormald by Brian Bidulka ("**Bidulka**"), who was RIM's Chief Accounting Officer in 2008 and was the Chief Financial Officer of RIM at the time of the hearing in this matter. Bidulka introduced Wormald as the person with whom Yersh would be dealing when RIM was pursuing acquisitions of other companies, and the three of them discussed past RIM acquisitions as well as Yersh's background in that area. About 15 minutes into their conversation, Donald joined the group on the patio and was introduced to Yersh. It appears from the testimony that Donald and Wormald had previously met at one or more earlier meetings of RIM's Vice Presidents.

[37] Donald testified that he and two others were the last to leave the patio before going inside for dinner at approximately 7:00 p.m. Donald was invited to take a seat beside Bidulka with whom he had golfed earlier in the day. Although there is some uncertainty as to the seating arrangements at dinner that night, it appears that among the other diners at their table were Wormald, Yersh, David Yach ("**Yach**") (Vice President, Software), Roger Witteveen (Vice President, Taxation) and Ray Dikun (Vice President, Products). It appears from Donald's and Yersh's testimony, that Donald sat between Bidulka and Yersh and that Yersh sat across the table from Wormald. The dinner began at 7:15 or 7:30 p.m. and was served by Redtail staff who also served wine throughout the evening. Donald testified that the RIM executives left Redtail after dinner by bus at approximately 10:00 p.m. and arrived back at RIM's offices at approximately 11:30 p.m.

[38] Wormald, Yersh and Donald testified that the 2008 RIM Golf Event could be characterized as more of a social event amongst colleagues than a formal business meeting. However, some RIM business was discussed during the course of the day. Donald testified that in the four years that he attended this annual event, he was never once engaged in confidential discussions. He testified that: "It was a day to put business aside, relax, and enjoy each other's company" (Hearing Transcript, March 28, 2011 at page 25, lines 12-13). Wormald described the event as being:

> … just a fun, relaxed, enjoyable tradition-type day. You know, a chance to get out and play and enjoy a game of golf with some colleagues on a really beautiful golf course. And the dinner following really just continued that social environment of the day … as an informal discussion and mingling type social opportunity.
>
> (Hearing Transcript, March 21, 2011 at page 107, lines 16 to 24)

[39] During the dinner, RIM's Co-CEO, Jim Balsillie ("**Balsillie**"), 'roasted' at least one of the people in attendance. Conversations during the cocktail and dinner portions of the event were generally about subjects such as friends and family, and were not business discussions of a serious nature.

(a) Wormald's Version of the Certicom Discussion

[40] During the dinner, Wormald and Donald had a discussion in which the topic of Certicom arose. Wormald testified that he had two general conversations with Donald at dinner, one about marathon training (as they were both runners), and the other about Certicom. Wormald's version of the discussion is that Certicom came up in the context of a "what are you working on" type of conversation. Wormald testified:

> … my recollection of it is that I indicated we had some talks with their [Certicom's] management team about buying them and that there was frustration on our side over a lack of progress. They were on their – at that point in time, they were on their third CEO, so I likely made reference to the fact that they are a company in transition. They don't know what they want to be when they grow up, but we've – you know, we've expressed an interest in acquiring them and are really, you know, the key word I would use is frustrated, had been frustrated in our attempts to have a meaningful dialogue with Certicom.
>
> (Hearing Transcript, March 21, 2011 at page 111, lines 4 to 15)

[41] Wormald recalled that Donald knew more about Certicom than Wormald would have expected from someone in Donald's position, and that Donald suggested that Wormald get in touch with Deck, Certicom's former CEO whom he knew from his previous employment with PeerDirect, who might be able to help RIM in its attempts to work through its frustration with the status of discussions with Certicom at that time. Wormald estimated that their discussion about Certicom lasted about four or five minutes, but, at the time of the hearing, he did not recall all of the specifics of what was discussed:

> I know we talked about Certicom. I know we talked about Phil Deck. I know we talked about being frustrated about – I know I talked about being frustrated about sort of the current status and I know that Mr. Donald indicated more knowledge about Certicom than I expected him to have. So beyond those things, I don't – I can't get much more specific than that.
>
> (Hearing Transcript, March 22, 2011 at page 172, lines 17 to 24)

(b) Donald's Version of the Certicom Discussion

[42] Donald testified that, shortly after he sat down to dinner, he started a conversation with Yach, asking him about running, which they both had in common. Donald testified that Wormald joined this discussion and mentioned that he had recently become interested in running and was training as well. According to Donald, this conversation about running and training led to other discussions around the table, including a discussion of then current market conditions. This topic of conversation then led to a discussion of undervalued companies:

> And from the tech sector, the market had come down quite a ways by then. Little did I [Donald] know that was only the start of the great recession. But there was a discussion around the markets. And then the discussion moved to undervalued companies.
>
> And within the context of undervalued companies, I brought up the company that I felt was a good value, and that some might know around the table called Sandvine, which was a Waterloo-based technology firm.
>
> (Hearing Transcript, March 28, 2011 at page 14, lines 9 to 18)

Donald estimated that he talked about Sandvine for about four or five minutes. Wormald and Yersh, however, did not recall that Sandvine was a topic of conversation at dinner that evening.

[43] Donald testified that, after his discussion about Sandvine, Wormald brought up Certicom as another company he thought was undervalued at that time:

> After I spoke about Sandvine, Chris Wormald brought up Certicom as a company he felt was undervalued. And he stated – or he said – best of my recollection was that he felt that Certicom was worth about $5 per share. I said, wow, interesting. I know Certicom quite well.
>
> In fact, in my previous company before coming to Research in Motion, my company was PeerDirect. I had a lot of dealings with Certicom. In fact, we were an early licensee of their ECC library. ...
>
> ...
>
> So to make a long story short, I gave Chris a bit of a background of my knowledge of Certicom and acknowledged that they had very valuable technology. And Chris, from that, went on to say that RIM had been interested in acquiring Certicom but that Certicom's board was not interested in engaging in any acquisition talks.
>
> He had also mentioned that he had kept a dialogue open with Mr. Vanstone, Mr. Scott Vanstone. And from that, I said, well, I know Phil Deck. So if you're interested in talking with Phil Deck, let me know. I can give you his contact information. [Emphasis added.]
>
> (Hearing Transcript, March 28, 2011 at page 15, line 24 to page 17, line 20)

[44] During his examination by Staff on June 22, 2009, Donald told Staff that Wormald stated that he felt that Certicom shares would be worth $5.00 per share based on their patents and licence agreements and how important the Company was to any technology providers that required security. In Donald's recollection at the time of his testimony, what stood out to him about Certicom's value was that Wormald thought Certicom's shares were worth $5.00 per share. Wormald told Donald that RIM had been in acquisition discussions with Certicom, and Donald testified that he made the assumption that RIM was still somewhat interested in acquiring Certicom. In his examination by Staff, Donald allowed that, although he did not remember a specific discussion of another company being interested in Certicom, there might have also been a comment that VeriSign, Inc. ("**VeriSign**") or IBM would have been a better partner for Certicom than RIM.

[45] Donald testified that he understood that Wormald was talking with Vanstone, but he did not know that RIM was in discussions with Vanstone.

[46] Donald estimated that his conversation with Wormald about Certicom lasted about four to five minutes, and that he did not discuss the details of the Certicom technology with which he was familiar from his work at PeerDirect:

> Because he's [Wormald's] knowledgeable or I assume that he was knowledgeable, I didn't go into the explanations of ECC or data replication. I just merely stated or talked about that we had used the technology, that we had helped to fine tune their ECC library based on our implementation, and that Certicom's security and their IP [intellectual property] was very valuable. And it was valuable in 1996 and is even more valuable today.
>
> (Hearing Transcript, March 28, 2011 at page 18, lines 8 to 15)

[47] Donald further described his conversation with Wormald regarding Certicom as follows:

> From my discussion with Mr. Wormald, I remember that he had mentioned that RIM had been interested in talking with Certicom about acquiring them. The Certicom board was not interested in acquisition talks. That Mr. Vanstone and Chris [Wormald] were still talking or had a dialogue. I don't know the details of that content.
>
> I had talked about my previous knowledge of Certicom. I had mentioned that I knew Phil Deck and that I would be more than happy to put him into contact with Mr. Wormald.
>
> And this is something that I regularly offered up. Any contacts that I had, I made them available to anybody inside of RIM if it could be of assistance. So I was known for having a hand in a lot of different matters and always opening up my contacts to help others. [Emphasis added.]
>
> (Hearing Transcript, March 28, 2011 at page 22, line 25 to page 23, line 16)

(c) Yersh's Version of the Certicom Discussion

[48] Yersh, who sat beside Donald and across the table from Wormald at the dinner on August 20, 2008, also testified with respect to his recollection of Donald and Wormald's discussion about Certicom that evening. He testified that the topic arose when Donald asked Wormald what he was working on. Wormald listed a number of projects that he was working on, including Certicom and another acquisition that RIM completed, namely, Alt-N Technologies. Yersh testified that, during this discussion, Wormald gave an overview of the history of "discussions of strategic partnerships or acquisition-type discussions" between RIM and Certicom, and described the status of discussions at that time being "quiet or stalled". Yersh understood that Certicom was already part of RIM's ISV program[2], and that a "strategic partnership" could occur with Certicom moving to a different status within the ISV program or with RIM signing an additional licence agreement with Certicom to use its technology. However, as of August 20, 2008, Yersh was not aware that Wormald's team was looking at additional licence arrangements with Certicom, and Yersh did not recall this topic coming up in discussions over dinner that evening.

[49] Yersh recalled that Wormald mentioned that he was speaking to Certicom's CEO at the time and mentioned Vanstone, Certicom's founder and a former CEO. Yersh also recalled that Donald mentioned another former Certicom CEO who could potentially help Wormald in the discussions.

[50] Yersh testified that Donald and Wormald also talked about the general trend in Certicom's share price, which Yersh characterized as being lower than it had been historically. Yersh also testified that this general trend in Certicom's share price was mentioned as one of the reasons RIM would be interested in pursuing an acquisition or strategic partnership at that time. Yersh recalled some discussion of the potential use of Certicom's ECC technology.

[51] Yersh estimated that the conversation regarding Certicom began about 20 to 30 minutes after they sat down at the table and lasted five to 10 minutes.

[52] In addition to their discussion about Certicom, Yersh recalled that Donald and Wormald discussed Donald's role within RIM, which included his responsibility for a portfolio of carriers based on CDMA technology, how long Donald had been at RIM and his portfolio of customers, including Sprint.

(d) Finding

[53] It is clear from the evidence that Wormald communicated to Donald that (i) RIM was interested in acquiring Certicom; (ii) Certicom was not at the time demonstrating any interest in dealing with RIM; (iii) Wormald had been speaking to Vanstone; and (iv) Wormald thought that Certicom's share price was undervalued based on its licence agreements. It is also clear from Donald's evidence that Wormald told him that Certicom's shares were worth approximately $5.00 per share, which we note was more than three times the price at which the shares were trading at the time.

B. Donald's Purchases of Certicom Shares

[54] Donald had an understanding of Certicom's ECC technology, and generally how it was implemented by RIM and other companies, prior to his conversation with Wormald at the 2008 RIM Golf Event. Donald had worked with Certicom closely in his previous capacity with PeerDirect and was familiar with ECC technology:

---

[2] Yersh described his understanding of the ISV (independent software venders) program in his testimony: "It's kind of where RIM affords resources to companies to integrate their products into the BlackBerry or BlackBerry solution" (Hearing Transcript, March 25, 2011 at page 139, lines 5 to 10).

> … we worked very closely, their engineers and my engineers, to hone their ECC library to fit our application.
>
> And Phil Deck and I had several discussions, who was the CEO of Certicom at the time – we had several discussions about how tough it was being a middleware company because your product is built into somebody else's product. And now, you're fully reliant upon their success of selling their whole product. It was a challenging environment.
>
> (Hearing Transcript, March 28, 2011 at page 16, line 24 to page 17, line 8)

[55] Donald also testified that he met Deck for lunch in 2006, at which time the two of them discussed Certicom and ECC technology:

> … we talked about Certicom and talked about the previous management in Certicom and how he certainly wasn't happy with the then CEO and his performance.
>
> And just talked about where ECC technology was going. It was interesting that nearly ten years later, he was still of the opinion, and I was still of the opinion that ECC was the future of security when it comes to computers and wireless. [Emphasis added.]
>
> (Hearing Transcript, March 28, 2011 at page 19, line 23 to page 20, line 14)

[56] According to Donald, his discussion with Wormald on August 20, 2008 reminded him of Certicom but did not form the basis for his decision to place an order to purchase Certicom shares the following day. However, during their cross-examination of Donald, Staff referred him to an answer that he gave during his compelled examination by Staff during their investigation, in which Donald stated:

> At the time I bought Certicom, I was sitting on a fair bit of cash, and I had been pressuring my broker to look for investments to invest in. The market had, I felt – had come down a fair ways. I know as much as it ended up coming down. And it looked like a good investment based on a discussion I had with a gentleman, Chris Wormald. [Emphasis added.]
>
> (Donald's Examination by Staff, June 22, 2009 in Hearing Transcript, March 28, 2011 at page 130, lines 16 to 22)

[57] Donald testified that, on August 21, 2008, the day following the 2008 RIM Golf Event, he got up as usual at 6:00 or 6:30 a.m. and caught up on the previous day's market activities. Donald looked through any news stories on the stocks he owned and looked at other stocks he was following at the time, and noted that the markets were quite volatile.

[58] Donald testified that, after his usual review of market activities, he researched Certicom on-line for one or one-and-a-half hours. Donald testified that he began by looking at Certicom's one and two-year trading histories and looked to see what drove Certicom's stock price:

> If the stock price was going up prior to the company's earnings announcement, then my assumption was this is just speculation, that people are saying its going to be a good earnings call, and I sort of wipe that out and draw a trend line, removing the anomalies.
>
> And from that trend line I drew, the price – current price was around $1.50, which it had been trading at that price the morning I looked, somewhere in the $1.50 range. And having knowledge of Certicom, it was sort of, wow, this company was trading at $100 back in 2000. Their technology is more relevant today than it was then. It was just a big surprise. And I had known it was cheap, but I didn't know it was $1.50.
>
> (Hearing Transcript, March 28, 2011 at page 28, lines 3 to 16).

[59] Donald testified that he then looked through Certicom's press releases, including the press release announcing Gupta as its new CEO. Donald noted that Gupta had come from Comverse, a company he knew well, and was an accomplished individual, well-suited to help monetize Certicom's technology.

[60] Donald further testified that he read Certicom's year-end financial report, which was published in June 2008. Donald noted that Certicom had $38 million in cash on hand and that its market capitalization was only $65 million. Donald expressed his surprise as follows:

> And I found it totally absurd that the company, its IP [intellectual property], and all of its people were only worth around [$]26, $27-million. That was absurd. In the acquisition world, a proper acquisition is probably around at least $1-million to $2-million per person when you have the IP and technology of a company like Certicom. And it was trading at a fraction of that. My assumption would be the company was worth $100-million at a minimum.
>
> (Hearing Transcript, March 28, 2011 at page 29, lines 9 to 17)

[61] Donald noted that, at the time, Certicom was making good progress on two key areas of interest to him. First, it was making excellent progress on its wireless base, an area Donald testified he knew "inside and out". Second, Donald testified that he noted that Certicom was making good progress in smart metering, which Donald explained was the use of wireless technology to transmit data from electrical meters to manage electrical consumption by using electricity in off-peak hours.

[62] Donald did not print copies of any of the materials that he testified to having reviewed on the morning of August 21, 2008 and, accordingly, no such materials were introduced in evidence. Donald did, however, introduce in evidence print-outs of the Yahoo! Finance web pages and the Certicom press releases that he testified to having reviewed on the morning of August 21, 2008, however, such pages were printed on much later dates.

[63] Donald testified that, following this research, he concluded that Certicom was a dramatically undervalued company. Donald called his broker, Hinsperger, at approximately 9:00 a.m. and instructed him to purchase $300,000 worth of Certicom shares at a price of no more than $1.50 per share. After a discussion about Certicom shares being thinly traded, Donald agreed to Hinsperger's suggestion that he move the upper purchase price limit to $1.55 per share. Donald estimated that the telephone conversation with Hinsperger lasted one or two minutes.

[64] Hinsperger testified that he placed a "good-'til-cancelled" order to purchase Certicom shares at prices no higher than $1.55 per share. Donald's purchase order for Certicom shares was filled by September 15, 2008, at which point Donald had purchased 200,000 Certicom shares at a total cost of $305,000.

IV. REVIEW OF THE RELATIONSHIP BETWEEN RIM AND CERTICOM

(a) Prior to August 20, 2008

[65] RIM began licensing Certicom's ECC technology in May 2000. Beginning in February 2002, RIM and Certicom signed a series of non-disclosure agreements in the ordinary course of RIM's business with Certicom.

[66] In February 2007, Balsillie and Mike Lazaridis ("**Lazaridis**"), RIM's President and Co-CEO, met with Vanstone and Ian McKinnon, Certicom's CEO at the time, who had requested the meeting for the purpose of proposing that RIM purchase Certicom. After the meeting, Wormald told the Senior Director, Corporate Operations, to whom he reported, that Balsillie and Lazaridis "have promised we'll go in and do some high level due diligence".

[67] In 2008, Balsillie instructed Wormald to conduct research relating to Certicom as a potential acquisition for RIM. Yach and Little were also present at the meeting and Wormald participated by telephone. It was Wormald's testimony that he was instructed to:

> … get up to speed and learn what [he] can and dig in and ... do some diligence on these guys, and I was referenced by Mr. Balsillie and Mr. Lazaridis as the – sort of the contact point within RIM for Mr. McKinnon to work through in terms of commencing diligence and getting a good look at the company.
>
> (Hearing Transcript, March 21, 2011 at page 136, lines 14 to 19)

[68] By early March 2007, RIM was in the process of preparing a valuation of Certicom's patents and licence agreements. On July 11, 2007, RIM and Certicom entered into a non-disclosure agreement (the "**2007 NDA**") that included a standstill provision that precluded RIM from making an offer to acquire Certicom for a period of 12 months without the approval of Certicom's board of directors.

[69] In September 2007, Certicom provided RIM with a large package of documents pursuant to the 2007 NDA, which included Certicom's then current business plan, a list of Certicom's patents pending and issued, certain patent licence agreements, a breakdown of Certicom's patent licence revenue information, certain limited patent infringement information and publicly available information concerning litigation that involved Certicom. The information provided was specifically deemed to be confidential information pursuant to the terms of the 2007 NDA.

[70] On November 27 or 28, 2007, Certicom informed RIM that there was going to be a change in its CEO and that substantive discussions about a proposed strategic transaction were terminated. Gupta became Certicom's CEO on January 21, 2008.

[71] Wormald testified that he had a discussion with Vanstone in late 2007 or early 2008 in which Vanstone asked Wormald why RIM had stopped their due diligence work with respect to Certicom. Wormald's response to Vanstone was that "we didn't stop our diligence, we were stopped" by Certicom. Wormald testified that Vanstone expressed surprise and then offered his assistance as follows:

> … Mr. Vanstone, I guess the easiest way to say it is, took matters into his own hands and asked us specifically what kind of information we were continuing to look for in order to continue our diligence process on Certicom. And upon us providing him with that information, the request list we had went away and came back … a couple of weeks later or so with a number of the licence agreements that we knew we were still looking for. It wasn't … all of them, but … I would call it a bigger subset than the initial subset we had received.
>
> (Hearing Transcript, March 21, 2011 at page 148, lines 12 to 23)

On February 6, 2008, Vanstone provided RIM with a summary of certain licences by e-mail, and in March 2008, he provided a memory stick containing some, but not all, of Certicom's licence agreements. The additional licence documents included agreements with Nokia/Intellisync, Motorola and Sony Ericson. RIM and Certicom agreed to treat this information from Vanstone as though it had been provided pursuant to the 2007 NDA.

[72] Balsillie telephoned Gupta on March 19, 2008 and expressed to him an interest in reinstating discussions regarding a potential acquisition of Certicom by RIM. In response, Gupta sent the following e-mail to Balsillie which included his suggestion that he would contact Wormald after a few quarters had passed to give him time to complete his initial mandate as CEO from the Certicom board:

> Further to our discussion, here is the status on the "due diligence" process that was initiated between RIM and Certicom.
>
> - NDA was signed with an effective date of July 11, 2007
> - Request for information from RIM was on August 21, 2007
> - A set of documents was sent from Certicom to RIM on Sep 20, 2007
> - Follow-up material request from RIM was on Nov 8, 2007.
> - The discussions were put on hold due to the permanent CEO search process as of Nov 27, 2007 by Bernie Crotty
>
> Subsequently, Scott [Vanstone] did speak with Chris Wormald (in Jan) enquiring on the status, Scott was unaware that the process had been put on hold following Bernie's memo to RIM.
>
> Since my coming on board (end of Jan 2008), my primary focus is to get the business fundamentals fixed and aligned within Certicom; to that end I have a set of deliverables I am working on for the Board.
>
> As I mentioned in my call to you, RIM is extremely important to Certicom and I want to ensure that we stay engaged to support RIM's business needs. This can include several scenarios: (1) continue as a strong business partner; (2) initiate a due diligence process which can lead to several options as to how RIM may want to proceed with respect to investment.
>
> Jim, you asked me what my recommendation is on this file. My suggestion would be that I will contact Chris Wormald after a few quarters; this will give me the time I need to complete my initial mandate from the Board in resolving the business challenges facing Certicom. As well, by then we will know more definitively where we stand on the current litigation process with Sony.
>
> Once the above issues are dealt with, I will also be able to provide the required attention that will be necessary for the "due diligence" process.

> Finally to keep the communication flow simple, I will be the focal point in Certicom to initiate the process – I will reach out to Chris [Wormald] and advise him on the spirit of our discussion and this note. I have also advised Scott [Vanstone] not to engage in any discussion on "due diligence" at this stage. [Emphasis added.]
>
> (E-mail from Gupta to Balsillie, March 26, 2008)

[73] Balsillie forwarded Gupta's e-mail to Wormald and instructed him to purchase some Certicom shares:

> Hey – let's acquire some shares – it's likely a good investment now.
>
> We'll decide next steps in a few months.
>
> (E-mail from Balsillie to Wormald, March 26, 2008)

[74] Wormald became involved with Certicom in his capacity as the Vice President of the Strategic Alliances Group. In his testimony, Wormald described the work done by the Strategic Alliances Group in the 2008 time period as follows:

> … it served a corporate development type of function for RIM. So mandate or responsibilities would include things like acquisitions, investments and inbound technology licensing and, you know, responsibilities would include things like looking for or investigating companies to acquire and going out and actually doing deals and overseeing some level of integration into RIM for third party technology that we would license into our products, actually negotiating those deals, and also occasionally but not very frequently making some corporate investments.
>
> There was another piece within the team that also oversaw some of our strategic relationships with companies like Google and Yahoo and Microsoft and AOL and all that.
>
> (Hearing Transcript, March 21, 2011 at page 100, line 23 to page 101, line 13)

[75] On May 21, 2008, Balsillie told Wormald that he wanted to know which investment houses traded Certicom shares and to obtain the biographies of Certicom's board members, a list of Certicom's major shareholders and which investment advisors it had used in the past.

[76] On June 17, 2008, Certicom approached RIM to pursue discussions regarding possible technology partnership agreements, and the two companies entered into a non-disclosure agreement for the purpose of facilitating technical discussions (the "**2008 NDA**"). Unlike the 2007 NDA, the 2008 NDA did not include a standstill provision that prevented RIM from making an offer to acquire Certicom without the approval of Certicom's board of directors.

[77] As requested by Balsillie at their meeting on May 21, 2008, Wormald got in touch with a contact he had at Merrill Lynch & Co. ("**Merrill Lynch**") in California and asked for his assistance in compiling information about Certicom. Wormald testified that he contacted the individual at Merrill Lynch because RIM had a good working relationship with him. Wormald felt that he was the most trustworthy of the investment bankers with whom he had spoken and that he would be willing to provide the requested information without being formally retained. Merrill Lynch provided Wormald with a slide deck entitled *Research in Motion Regarding Project Cypress* on July 1, 2008.[3] The slide deck included a public market overview of Certicom, a review of Certicom's stock price performance over the previous 12 months, a management and board overview and a shareholder profile which noted Certicom's main institutional holders and insiders.

[78] Although RIM was not in discussions with Certicom about an acquisition in July and August 2008, RIM's Strategic Alliances Group was gathering information regarding Certicom and looking at acquisition options once the standstill provisions of the 2007 NDA expired on July 11, 2008. Abdul Zindani ("**Zindani**"), RIM's Senior Manager, Patent Portfolio Development who was located in Texas, and others who were responsible for intellectual property matters at RIM, had also been involved in valuing Certicom's patent portfolio since RIM's original expression of interest in the Company in 2007. Wormald testified that Zindani reviewed Certicom's licence agreements and that Zindani had specialized skills in the area of assessing patent portfolios for their effective value, which by necessity needed to be combined with an assessment of the licence agreements that licensed the use of the patents by third parties.

[79] By July 24, 2008, Zindani had provided Belcher and McCallum with the information he had compiled through his analysis of Certicom's patents and licensing agreements, including the licence agreements that had been received from Certicom pursuant to the 2007 NDA.

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[3] Project Cypress was the code name for Certicom used in the slide deck.

[80] At the end of July 2008, Belcher also requested information from RIM's Legal Department about the terms of RIM's licensing agreements with Certicom and on July 28, 2008, Belcher sent an e-mail to Zindani asking if he was available to meet "to collectively go through the patent review information you provided to try to ascribe a value to the IP [intellectual property]". During July and August 2008, members of RIM's Strategic Alliances Group also met with members of other departments at RIM to discuss Certicom's technology, including McCallum and Belcher's meeting with Little on July 28, 2008 and Belcher's meeting with Mike Kirkup ("**Kirkup**"), RIM's Manager of Developer Relations, and Michael K. Brown, RIM's Director of Security Product Management, on August 15, 2008.

[81] By the end of July 2008, RIM's Strategic Alliances Group was aware that others at RIM were working on a potential proposal relating to the licensing of Certicom's technology for use by RIM's third party developer community:

> Mike Brown and myself have been working together on a potential proposal for Certicom based on our current platform challenges around their licensing of the public key crypto in our development platform.
>
> …
>
> My understanding is that we licensed access to their APIs [application programming interfaces] for all RIM development but did not purchase the license for the remainder of the development community. The best approach that I have today is to license the API for the development community as a whole with several benefits to RIM and Certicom in this approach:
>
> 1. It rounds out our platform support and allows people to leverage public key crypto for their applications at no additional cost.
>
> 2. Provides Certicom with a stable and reliable platform leveraging their ECC technology that they can use to spark the mobile market.
>
> 3. No additional testing or effort required by RIM once licensing deal is completed.
>
> (E-mail from Kirkup to Wormald, July 30, 2008)

[82] Throughout July and August 2008, individuals at RIM were in discussions with Certicom regarding the licensing of Certicom's ECC technology for use by RIM's third party developers. Little described his understanding of these discussions in his testimony as follows:

> … when applications developers wrote code for the BlackBerry, they could use the Certicom functionality for free. The problem is if you use a walkie-talkie at one end, you've really got to use -- have another walkie-talkie at the other end. If you are going to crypt on one side, you've got to decrypt it on the other. And a lot of the application developers were hesitant to spend money on their back end even though the device side was free.
>
> And so my understanding is that this initiative was Mike Kirkup who was involved in the, sort of, the third party developer and support organization, … was either trying to arrange access for people to use it on their back end, if they used it on the front end. Basically was trying to arrange on behalf of the third party developers access to the Certicom toolkit.
>
> (Hearing Transcript, March 23, 2011 at page 100, lines 3 to 19)

[83] Project Troy was the code name RIM's Strategic Alliances Group assigned to their work relating to the potential acquisition of Certicom. Belcher testified that they chose the code name Project Troy on or about August 18 or 19, 2008. He also testified that the name Project Troy was chosen given the fact that there had been discussions with Certicom management that had not gone anywhere and that there was a possibility that RIM would have to resort to a hostile bid.

[84] On August 19, 2008, Belcher and McCallum met to discuss what was described in the meeting notice as "Project Troy – Contract review/valuation review". McCallum testified that he and Belcher were looking at licensing contracts that RIM and other companies had with Certicom and at valuing Certicom at that time. McCallum and Belcher had been working on what McCallum referred to as a pitch book entitled *Acquisition opportunity for Project Troy* which was a slide deck that included information on Certicom as a possible acquisition by RIM (the "**Pitch Book**"). The Pitch Book was being prepared by the Strategic Alliances Group as the basis for what they expected would be a submission to RIM's senior management that RIM make a take-over bid for the shares of Certicom.

[85] In his testimony, Wormald characterized the status of RIM's interest in Certicom as of August 20, 2008 as "frustrated". RIM had expressed interest in Certicom, but they were not engaged in ongoing talks at that time, primarily because Certicom was not prepared to do so. RIM was interested, but did not see an immediate path forward to negotiate any kind of agreement with Certicom.

(b) After August 20, 2008

[86] The earliest version of the Pitch Book in evidence was e-mailed by Belcher to Sam Ip ("**Ip**"), another employee in RIM's Strategic Alliances Group, on August 21, 2008. It is dated August 2008 and is noted as being version 1.0. In this version of the Pitch Book, the slide entitled "Valuation" is blank, other than the comment "TBD", i.e., to be discussed or to be determined. McCallum testified that he and Belcher reviewed an earlier version of the Pitch Book at their August 19, 2008 meeting although no evidence with respect to its contents was provided and no copy of an earlier version was introduced in evidence.

[87] On August 22, 2008, Belcher e-mailed McCallum another version of the Pitch Book, also described as version 1.0, which included slides dealing with the valuation of Certicom. The "Valuation" slides suggest an opening bid range of $2.25 to $2.50 per share and ascribe the actual value of Certicom to RIM at $3.25 to $3.90 per share, based on the valuation of Certicom's intellectual property and the cash flow savings to RIM resulting from its acquisition of Certicom. This version of the Pitch Book also includes a number of slides of additional Certicom valuation information as an appendix.

[88] We were presented with evidence of a calendar entry for a meeting between Belcher and Zindani on August 25, 2008 entitled "Project Troy – IP Valuation Review". Belcher testified that he would have reviewed the information in the valuation slides and the appendix of the Pitch Book with Zindani to ensure that the approach and findings in the Pitch Book were, in Zindani's opinion, accurate and fair. From the evidence, it would appear that at least some of the information Belcher used in creating the valuation slides in the Pitch Book was previously provided to him by Zindani on or about July 24, 2008. It would also appear that the valuation of Certicom by RIM was on-going as of August 25, 2008.

[89] Wormald received a version of the Pitch Book at or around the time of his discussion with Belcher and McCallum pertaining to the Pitch Book on August 27, 2008. During his testimony, Wormald went through version 1.1 of the Pitch Book but was not certain whether it was the version he reviewed at the August 27, 2008 meeting. He testified that he had at some point seen an earlier version of the Pitch Book than version 1.1.

[90] At the August 27, 2008 meeting, Wormald suggested that either one or both of McCallum and Belcher sit in on a call that Kirkup was having with Certicom the next day regarding the licensing of Certicom's technology for use by third party developers. McCallum and Belcher were to listen in on the meeting and could be introduced as "new to RIM, here to listen & learn, etc.", with the idea being that they could gain exposure to or insight into the current status or plans of Certicom (E-mail from Belcher to Kirkup, August 27, 2008).

[91] Kirkup had the call with Certicom on August 28, 2008 without Belcher or McCallum as it had been determined that Kirkup would provide them with an update after the call:

> Hi Mike – we're fine with you providing us with an update from the call. We're obviously interested in any insights into how the business is doing, where it's going, how they're executing on their strategy, other customers/partners they're dealing with, etc. This, in addition to an idea as to how much a developer license would cost.
>
> (E-mail from Belcher to Kirkup, August 28, 2008)

[92] Following his August 28, 2008 telephone conversation with Certicom, Kirkup sent his notes from the call to Belcher and McCallum by e-mail.

[93] The first formal list of people who had been apprised of Project Troy (the "**In-the-Know List**") appears to have been created in late November 2008.[4] We have in evidence a copy of a November 20, 2008 e-mail to Wormald from RIM's Legal Counsel, Regulatory and Compliance, S. Grant Gardiner ("**Gardiner**"), that attaches an early draft of the In-the-Know List. In the e-mail, Gardiner asks that the Strategic Alliances Group populate the In-the-Know List and ensure that it remained current. This initial draft of the In-the-Know List names only eight of RIM's personnel, including Balsillie, Wormald, Belcher and Gardiner, and one person from RIM's external legal counsel, McCarthy Tétrault LLP.

[94] RIM's U.S. and Canadian securities lawyers, Skadden, Arps, Slate, Meagher & Flom LLP and Wildeboer Dellelce LLP, respectively, were listed in the In-the-Know List as having become aware of a proposed acquisition of Certicom as of August 28, 2008 when they were consulted about the possibility of purchasing Certicom shares. Wormald testified that he recalled consulting RIM's securities lawyers prior to this time, in the March to May 2008 timeframe, regarding the accumulation of

[4] McCallum testified that in-the-know lists were likely created in 2007, but were definitely in place at the time in 2008 when he began discussing Certicom with Little. Belcher testified that he recalled the In-the-Know List being created in the fall of 2008 and not the summer.

Certicom shares. Wormald testified that, at that time, RIM was advised that the 2007 NDA would prevent such share accumulation. The issue was explored once more, after the expiry of the standstill provision of the 2007 NDA, likely in late August 2008, at which time RIM came to the conclusion that accumulating Certicom shares would not be possible.

[95] On September 3, 2008, Belcher, McCallum and Ip met with Tracy Hoskins of RIM's Human Resources Department to discuss the issues relating to the integration of Certicom's employees in the event of its acquisition by RIM.

[96] In early September 2008, Gupta advised Don Morrison, RIM's Chief Operating Officer – BlackBerry, that Certicom wished to restart discussions with RIM about a proposed strategic transaction. On September 16, 2008, Gupta, Wormald and Belcher met to further discuss possible investment alternatives, including a strategic transaction or acquisition. On September 25, 2008, Belcher corresponded with Gupta concerning the due diligence RIM needed to undertake to properly evaluate Certicom.

[97] The In-the-Know List notes that a partner of PricewaterhouseCoopers was added as of October 1, 2008.

[98] On October 6, 2008, Certicom made a presentation to RIM regarding its intellectual property, including information prepared by Certicom's patent agent. The meeting was attended by Belcher, Robert Kucler, RIM's Senior Licensing Counsel ("**Kucler**"), and Zindani from RIM, and Vanstone and others from Certicom. On October 14, 2008, Belcher, Kucler and Zindani held a conference call with Certicom regarding RIM's due diligence requests. On October 21, 2008, Belcher and Kucler met with Vanstone and others from Certicom at RIM's Mississauga offices. Prior to this meeting, Certicom had provided RIM with extensive information respecting Certicom's patents that included detailed and comprehensive information not previously disclosed to other third parties.

[99] It appears from the evidence that, on October 28, 2008, Balsillie called Gupta to tell him that RIM's board of directors had approved the acquisition of Certicom and that RIM wanted to proceed with a negotiated transaction. Gupta discussed RIM's interest at the meeting of Certicom's board of directors held on the following day. We were not presented with any further evidence regarding Balsillie's communication with Gupta on October 28, 2008, nor with any evidence that RIM's board of directors had considered the acquisition of Certicom on, or at any time prior to, October 28, 2008.

[100] The In-the-Know List indicates that, on November 3, 2008, a member of the law firm McCarthy Tétrault LLP became aware of the Certicom transaction in connection with RIM's process of selecting financial and legal advisors. The same lawyer is one of a few people named in the first draft of the In-the-Know List sent by Gardiner on November 20, 2008. She was the only non-RIM employee to be shown on that version of the list. When questioned about this by Donald's counsel, Belcher did not recall speaking with the law firm McCarthy Tétrault LLP.

[101] Gupta met with Balsillie, Wormald and Belcher on November 7, 2008 and indicated that Certicom's board of directors wanted to further understand RIM's proposed next steps and was open to engaging with RIM in a fair process. Gupta also advised RIM that Certicom was unlikely to be in a position to grant any exclusivity period to RIM as it was in discussions with another third party that was also interested in a possible transaction with Certicom. Gupta confirmed that Certicom would not provide any exclusivity period to RIM during a telephone call with Balsillie on November 9, 2008.

[102] On November 10, 2008, after unsuccessful negotiations with Certicom to conclude an exclusivity agreement with a limited standstill provision, RIM retained Bennett Jones LLP as its Canadian legal advisor in connection with a potential acquisition of Certicom.

[103] On November 19, 2008, members of RIM's board of directors were added to the In-the-Know List in connection with a potential acquisition of Certicom.

[104] Balsillie provided an update to RIM's board of directors on November 24, 2008 relating to three potential acquisitions, including the acquisition of Certicom. At the meeting, RIM's board of directors authorized RIM to pursue the acquisition of Certicom and to make a public offer within a price range discussed by the board. The resolution of the board of directors authorizing the acquisition is recorded in the minutes of the meeting as follows:

> the Corporation is hereby authorized to pursue the acquisition of each of Troy, [REDACTED] and, in the case of Troy, the Corporation is further authorized, at the discretion of the Co-Chief Executive Officers and upon further advising the Board, to make a public offer within the price ranges discussed by the Board and any officer of the Corporation is hereby authorized to execute any preliminary documents necessary to effect such acquisitions, subject to the requirement that Board approval shall be required to execute any definitive agreements in respect of any such acquisitions and any take-over bid documentation.

[105] On November 26, 2008, RIM engaged BMO Capital Markets as its financial advisor in connection with the proposed acquisition of Certicom, and on November 28, 2008, engaged Skadden, Arps, Slate, Meagher & Flom LLP as its U.S. legal advisor.

[106] On November 28, 2008, RIM sent a non-binding expression of interest to Certicom's board of directors, proposing a cash offer of $1.50 per share, and requested a response from Certicom by December 1, 2008 at 5:00 p.m.

[107] On December 1, 2008, Certicom's Chairman, Jeffrey Chisholm ("**Chisholm**"), spoke with and sent a letter to Balsillie indicating that, given the short notice, Certicom's upcoming earnings call on December 4, 2008 and the upcoming meeting of Certicom's board of directors on December 3, 2008, it was not feasible to call a full meeting of the board of directors and adequately consider RIM's proposal by December 1, 2008. Chisholm reiterated that Certicom was not in a position to provide RIM with exclusivity given Certicom's ongoing discussions with a third party, but agreed to have RIM's proposal considered at the meeting of Certicom's board of directors on December 3, 2008 and to provide Balsillie with a detailed response by December 5, 2008.

[108] On December 2, 2008, Gardiner provided RIM's board of directors with an update on RIM's plan to issue a press release announcing its intention to make an offer to acquire Certicom. On December 3, 2008, RIM issued the press release headed "RIM to Offer CAD $1.50 Per Share in Cash for Certicom – Offer Price Represents a Substantial Premium of 76.5% over Certicom's December 2, 2008 Closing Price".

[109] Also on December 2, 2008, a member of the Strategic Alliances Group, Allyson Bly, circulated a draft of the In-the-Know List to all RIM employees who were aware of the offer. Donald was not named in this version of the In-the-Know List.

[110] On December 10, 2008, RIM launched a hostile take-over bid for Certicom, offering to pay $1.50 per common share for all of the common shares of Certicom. RIM issued a press release announcing its formal take-over bid for Certicom and sent its take-over bid circular (the "**December 10 Offer to Purchase**") to Certicom's shareholders. Yersh, who signed the December 10 Offer to Purchase on behalf of the board of directors, was added to the In-the-Know List as of this date.

[111] On December 19, 2008, the Certicom board issued a directors' circular recommending the rejection of RIM's December 10 Offer to Purchase (the "**Certicom Directors' Circular**").

[112] Certicom applied to the Ontario Superior Court of Justice for an injunction to enjoin RIM's hostile bid on the basis that Certicom had provided confidential information under the 2007 NDA and the 2008 NDA, and on January 19, 2009, the Court released its decision and granted an injunction preventing RIM from proceeding with its take-over bid for Certicom. On January 20, 2009, RIM withdrew its offer.

[113] After an intervening proposed plan of arrangement by VeriSign made on January 23, 2009 for $2.10 per share, RIM and Certicom entered into an arrangement agreement on February 2, 2009, under which RIM agreed to acquire all of Certicom's common shares at a price of $3.00 per share.

[114] On February 10, 2009, Certicom issued a press release announcing that it had entered into an arrangement with RIM pursuant to which RIM would acquire all of Certicom's outstanding shares.

[115] On March 23, 2009, Certicom received final court approval for and completed the plan of arrangement with RIM pursuant to which RIM acquired all of Certicom's common shares at a price of $3.00 per share. Certicom's shares were delisted from the TSX on March 25, 2009.

(c) Summary of the Work Undertaken by the Strategic Alliances Group prior to August 20, 2008

[116] We heard testimony from three members of RIM's Strategic Alliances Group who undertook the research pertaining to Certicom as a potential acquisition by RIM in 2008, namely, Wormald, Belcher and McCallum.

[117] Wormald became involved in considering Certicom as an acquisition opportunity in February 2007 when Certicom approached RIM about the possibility of such an acquisition. Wormald asked McCallum to look at public information relating to Certicom such as the number of Certicom employees and where they were located and Certicom's SEDAR filings. McCallum worked on the matter in February 2007, handed the information over to Tina Lorentz, another member of the Strategic Alliances Group, and did not become re-engaged in the matter until July 2008.

[118] After McCallum transferred his work on Certicom in February 2007, others in the Strategic Alliances Group assumed responsibility for the matter, including Tina Lorentz, as noted above, and Raymond Reddy ("**Reddy**"), at the time, a relatively junior member of the Strategic Alliances Group. Certicom had provided information to RIM pursuant to the 2007 NDA, including the information provided by Vanstone, and by March 2008, Reddy had reviewed some of these agreements and provided a

report on the agreements to Wormald. At the same time, Zindani was in contact with Reddy regarding the valuation of Certicom's licences and patents.

[119] In early July 2008, Wormald instructed McCallum to gather and update the information RIM had collected relating to Certicom once again, and to begin looking at options for a potential acquisition. McCallum testified that they discussed all types of acquisitions at that time, from friendly to possibly hostile, in to the context of the expiry of the standstill provisions of the 2007 NDA.

[120] One of Belcher's initial tasks at RIM when he started working there in July 2008 was to replace Reddy who had been involved in the assessment of Certicom prior to his departure from RIM a few weeks after Belcher started working. During July and August 2008, both Belcher and McCallum worked on the assessment of Certicom. Wormald testified with respect to his instructions to Belcher when Belcher joined RIM as follows:

> … Mr. Reddy was leaving or had left or was about to leave employment with RIM and so there was nobody actively managing the Certicom file, and Mr. Belcher was new to RIM, and with any new employee in our team, there's a lot of collaborative effort required. And so I do recall asking him – you know, giving him a history about Certicom in terms of RIM's relations and relationship and sort of the frustrated status of things and asking him to dig into – you know, basically assume control of the file, dig into understanding the company, you know, meet the people who were all, like Mr. Zindani, who were actively working on the, you know, different aspects of Certicom or understanding them. You know, at least partly as an exercise for him to get to know his way within RIM and, you know also because we had a hole with Mr. Reddy leaving and nobody to immediately – well Mr. McCallum, I think, was taking – my recollection was taking sort of a transitory-type of role because of his continuity with the team but needed somebody to be full-time on it.
>
> (Hearing Transcript, March 22, 2011 at page 74, line 20 to page 75, line 15)

Belcher testified that McCallum and Reddy explained the background of RIM's dealings with Certicom, the standstill provisions of the 2007 NDA and that there was continued interest in Certicom. They instructed Belcher to "get up to speed" on what Certicom was and how it could fit within RIM.

[121] McCallum testified that he discussed the information in the Merrill Lynch Project Cypress slide deck with Wormald in mid-July 2008, including Certicom's share performance, and how Certicom's shareholder profile would affect a possible hostile acquisition.

[122] In late July 2008, Belcher and McCallum met with other departments at RIM in relation to their work on Certicom. For example, they met with Little, who had a detailed understanding of the Certicom technology and how RIM had used that technology in the past.

[123] In late July 2008, they also communicated with Zindani and requested his assistance with ascribing a value to Certicom's patent portfolio. Zindani provided Belcher and McCallum with summaries of Certicom's patents and the technologies to which those patents applied on July 24, 2008. Belcher's understanding from this information was that Certicom had strong patent protection with respect to its ECC technology. Belcher testified that Zindani also provided them with an analysis of the value of Certicom's patents. Although the evidence as to the date on which Zindani provided Certicom valuations is not clear, it appears that some, but possibly not all, of the intellectual property valuation undertaken by Zindani was provided to Belcher on or about July 24, 2008. This information was included in a later version of the Pitch Book which Belcher would have reviewed with Zindani on or about August 24, 2008.

[124] Around this time, Belcher requested copies of RIM's licence agreements with Certicom from RIM's legal department. Rather than release the agreements, RIM's legal department provided the Strategic Alliances Group with a summary of the licence agreements. Belcher testified that his objective in obtaining Certicom's licence agreements with RIM was twofold. First, in valuing Certicom, the Strategic Alliances Group wanted to know the amount of the royalty payments that RIM could save by acquiring Certicom, and second, they wanted "to try to get an understanding overall of whether there would be any risk to … RIM in them being able to withhold or cancel those agreements as a result of us … entering into negotiations with them" (Hearing Transcript, March 24, 2011 at page 61, lines 20 to 24).

[125] Belcher also met with Kirkup and Michael K. Brown ("**Brown**"), who worked with Little, on or about August 12, 2008 to discuss background information on the ECC technology and to discuss a different approach to Certicom on which Kirkup was working that was unrelated to the Strategic Alliances Group's acquisition work and that would provide additional benefit to RIM's ISV developer community. By August 1, 2008, RIM's legal department had provided Belcher with a summary of the licence agreements with Certicom and information regarding termination rights.

[126] During this period of time, Belcher was also tracking Certicom's share price information fairly regularly.

[127] On August 18 or 19, 2008, the code name Project Troy was assigned to the Certicom matter. On August 19, 2008, Belcher and McCallum had a meeting regarding "Project Troy – Contract review/valuation review", at which they discussed the summaries of the RIM-Certicom contracts prepared by RIM's legal department and the work Belcher had completed on the valuation of Certicom. Belcher could not recall the state of the Pitch Book at the time of this meeting, but testified that, to the extent that there was something there, he would have reviewed it with McCallum at that time. Belcher testified that some version of the Pitch Book would have existed before the version sent to Ip on August 21, 2008, and that he would have discussed it with McCallum.

[128] The version of the Pitch Book provided to Ip on August 21, 2008 included slides describing Certicom's relationship with RIM, the background to ECC, Certicom's value proposition to RIM, information on Certicom's financial performance, a list of Certicom customers and contracts, Certicom's intellectual property portfolio, Certicom's trading and market performance over the past year and shareholder information. The Pitch Book also included a number of slides outlining the acquisition strategy and risks, the first of which entitled "Acquisition Strategy" listed the following five strategic options that a take-over bid for Certicom could entail:

1. Acquire minority stake on open market prior to bid
2. Seek block trades with several of Certicom's institutional holders
3. Approach institutional holders prior to tender offer to gain acceptance
4. Approach Certicom BOD [board of directors] with take-over bid
5. Issue take-over bid directly to Certicom shareholders.

For each of the five options, the potential implications and the likelihood of success were listed, with Option 1 having a low likelihood of success, Options 2, 3 and 5 having moderate likelihoods of success and Option 4 having a high likelihood of success.

[129] The second Acquisition Strategy slide outlined a recommended approach which began with an approach to Certicom's largest institutional shareholders to arrange a block trade, and ended with one of (i) a friendly bid; (ii) a hostile bid; or (iii) no bid, if that was determined to be the best course once the risks were re-evaluated. Included at the end of the Pitch Book was a slide entitled "Next Steps", which set out the following:

- Engage Investment bank and legal advice
- Begin preparation of take-over circular
- Begin approaching institutional holders re: block trade
- Complete detailed integration plan
- Approach Certicom BOD

(Pitch Book, v.1.0, e-mailed by Belcher to Ip on August 21, 2008)

[130] As noted above, the "Valuation" slides were blank or missing in the version of the Pitch Book provided to Ip on August 21, 2008. Belcher testified that it is possible that he removed this information from the Pitch Book before sending it to Ip because it was more sensitive in nature.

[131] The version of the Pitch Book sent by Belcher to McCallum on August 22, 2008 included additional valuation information. The Valuation slides in this version included charts describing per share value ranges and equity value ranges and notes the following:

- Opening bid range of $2.25 to $2.50 per share, provides a premium to the 20-day average trading price of 45.1% and 61.3%, respectively. Large premium used to attract support of shareholders.
- Opening bid provides room to increase bid by up to $0.50-$0.75 per share in the case of a bidding war.
- Based on valuation of IP and cash flow savings to RIM, actual value to RIM ranges from $3.25 per share to $3.90 per share.

- Valuation ranges shown below based on:
  - IP and employees – value of market penetration of Certicom IP and acquired employees.
  - Discounted cash flow of savings on license fees no longer payable to Certicom and additional cash flows from Certicom license and royalty revenues acquired.
  - Comparable transactions and public company trading multiples based on revenues.
  - Current trading values of Certicom shares.

(Pitch Book, v.1.0, e-mailed by Belcher to McCallum on August 22, 2008)

[132] Belcher testified that he was drafting the Pitch Book in August 2008 with input from McCallum. When asked whether he recalled portions of the Pitch Book being reviewed with Wormald prior to August 21 or 22, 2008, Belcher testified that "It would be reasonable that certain portions would be shared verbally as far as general updates, as far as what I was looking into, and getting his insight into, you know, what kind of things should go into it, but otherwise, no" (Hearing Transcript, March 24, 2011 at page 81, lines 12 to 17). At the time, they had weekly meetings with Wormald as a group to update him on their activities. Belcher did not recall reviewing the Pitch Book, or specifically reviewing a slide entitled "Value proposition", with Wormald prior to August 21 or 22, 2008. However, McCallum testified that all of the information in the version of the Pitch Book that Belcher sent to him by e-mail on August 22, 2008 would have been discussed with Wormald prior to Belcher and McCallum's August 19, 2008 meeting. He testified that he and Belcher would have had discussions with Wormald about the information that they were gathering and brought him up to date on what they had discovered. According to McCallum, Wormald would have seen an earlier version of the Pitch Book and would have provided them with his comments before they presented the final version to Wormald later in August. Belcher's and McCallum's testimony was consistent with that of Wormald who testified that the valuation range on the Valuation slide would have been prepared primarily by Belcher, possibly with the assistance of McCallum. Wormald noted that there were two components to the valuation, namely, intellectual property and cash flow savings. Wormald assumed that the valuation of the intellectual property component, which would have been the significant component, would have come from Zindani.

[133] Belcher, under what he described as the mentorship of McCallum, and with his input, was the primary person in RIM's Strategic Alliances Group working on the Certicom matter. Belcher and Wormald testified that Belcher and McCallum were working under Wormald's direction and that Wormald was not directly involved in gathering information on Certicom in July and August 2008, and did not necessarily see the information they had collected until he was sent a finalized version of the Pitch Book on or about August 27, 2008. McCallum testified that all of the information that was included in the Pitch Book would have been discussed with Wormald prior to August 19, 2008 and Wormald would have seen an earlier version of the Pitch Book.

[134] A substantial amount of work had been undertaken by the Strategic Alliances Group by August 20, 2008 in preparation for the possible launch of a take-over bid for Certicom. As outlined in the Pitch Book, they had gathered information on the value of Certicom's patents and licence agreements, had completed an analysis of Certicom's value to RIM and had developed a proposed acquisition strategy.

[135] Although the version of the Pitch Book reviewed by Wormald on or about August 27, 2008 included Zindani's valuation of Certicom's intellectual property, the evidence indicates that, on September 25, 2008, Belcher corresponded with Gupta concerning the due diligence RIM needed to undertake to properly evaluate Certicom. This was followed by a presentation by Certicom to Belcher, Zindani and Kucler on October 6, 2008 regarding Certicom's intellectual property.

(d) The Importance of Certicom's ECC Technology to RIM

[136] A substantial part of Certicom's value to RIM was its technology, primarily its patent portfolio and the agreements that licensed the use of the patents by third parties. More specifically, Certicom held patents for the ECC technology which was extremely important to the security of RIM's BlackBerry devices.

[137] We heard testimony from Little, who was responsible for encryption at RIM as Director of BlackBerry Security and as Director of Handheld Application Prototypes. As part of maintaining encryption, RIM utilized ECC technology which Little explained as follows:

> … elliptic curve cryptography uses a branch of mathematics and its primary advantages over the other algorithms that are available are the amount of computation that it takes to arrive at an answer as well as the level of assurance that it provides.
>
> So basically if you want to keep something secret and you really really want to keep it a secret, you want to use bigger keys. The bigger keys you use, the harder it is for an attacker to attack the

> cryptography. It just means sort of like trying to find a needle in a haystack. If you have a bigger haystack, it's harder to find that one needle.
>
> And so elliptic curve cryptography had benefits to us in that it would work in the small processors that we were using as well as it would meet the assurances of the security conscious customers like the department of defence types.
>
> (Hearing Transcript, March 23, 2011 at page 62, lines 4 to 20)

[138] Little explained the advantages of ECC technology over alternative algorithms, including its speed, its ability to fit well in small processors, such as BlackBerry devices, and that it was beneficial for security conscious customers such as the U.S. government, banks and financial institutions, which Little described as RIM's "marquee customers". Little testified that RIM definitely saw security as a differentiating or special factor.

[139] RIM began using ECC technology in the early 2000s after purchasing a toolkit from Certicom that implemented ECC functions. Little explained that the Certicom toolkit was a piece of software that could be bundled with RIM's software and that RIM could rely on to provide the cryptography. Little testified that the naïve ECC algorithms were not encumbered with patents, but could be utilized freely. Little explained that ECC is just math, but that Certicom had found a number of shortcuts in the math "to get to the answer more quickly". What RIM purchased from Certicom was its patented method of speeding up the ECC algorithm. Little explained the advantage of the Certicom ECC toolkit to RIM:

> The big thing was that they had an efficient implementation of elliptic curve cryptography. That was their secret sauce. So that they had the fastest implementation of elliptic curve crypto. And also I think theirs worked, so that was certainly a big plus. But it was basically because the processors were so constrained at the time, when you were choosing the technology partner, basically we had to go with them. There was no other [game] in town.
>
> It's sort of safe to say that when we chose them because they would work in a small constrained environment or we chose elliptic curve because we work in a small constrained environment, and what's interesting is elliptic curves work very well with small computers but also with very high assurance levels. So we are sticking with elliptical curves because now it meets the needs of the high assurance – people that were in the high assurance level.
>
> (Hearing Transcript, March 23, 2011 at page 65, line 20 to page 66, line 12)

[140] Little testified that around the time of RIM's hostile bid for Certicom, Wormald contacted him to ask whether RIM could work without Certicom technology, and Little's response was that it would have been very, very hard to use anybody else's. Little described it as being "… what I call an "oh shit" moment. It would have been – from my point of view, it would have been catastrophic" (Hearing Transcript, March 23, 2011 at page 69, lines 8 to 10). Little explained his thinking at that time regarding RIM's use of Certicom's ECC technology as follows:

> … if you stayed with Certicom, great, nothing changes. If you go all the way over here at the other end of the spectrum, it would be, well, you can't use Certicom and you can't use any of their IP. That case is – that's certainly a catastrophic thing, if we lose access to their IP. There's certainly one point in the protocol that we used their IP. If we don't have access to their IP, we would have to essentially change the world, change all the implementations and that would be a huge undertaking.
>
> (Hearing Transcript, March 23, 2011 at page 104, lines 9 to 18)

[141] Although Donald testified that he had not considered the importance, or lack of importance, of Certicom to RIM as of August 20, 2008, he testified that he would not have thought there was ever any risk that RIM would lose access to Certicom's technology:

> … in my humble opinion, there were many organizations like Certicom – for example, our CDMA business was predicated on us maintaining licenses with Qualcomm. Our GSM business was predicated on maintaining our licenses with Motorola, Erickson, Nokia, and a host of other companies.
>
> And I never felt that at any time there was any risk of losing these. Yes, there's patent disputes. They get settled out in court. But I would never have thought that there was any risk, no matter what happened to Certicom, that they would lose access to that technology.

> Because in the industry, there's always cross-licensing, and it's never valuable to any technology organization to isolate themselves, and that's what they would be doing. Certicom held license agreements with hundreds of companies. And for them to isolate RIM in any way just wouldn't make sense.
>
> I didn't see that as – I don't see that as a risk. And again, this is me looking back. In my professional opinion, I didn't see that. The risk of losing access to technology was not staying current with their license agreements, as in paying the fees and paying the maintenance fees to make sure the technology was always there.
>
> (Hearing Transcript, March 28, 2011 at page 50, line 15 to page 51, line 14)

[142] In the early 2000s, RIM made a royalty-free buyout of its licensing agreement with Certicom, which provided them with a perpetual licence to implement version 3.2 of Certicom's toolkit. RIM continued to use version 3.2 of Certicom's toolkit in 2007 and 2008 and Little testified that although it did not have everything that RIM wanted, that version of the toolkit had everything that RIM needed.

[143] Little testified that, in March 2008, it would have been evident to a knowledgeable person in the industry that ECC technology was going to become the standard to remain compatible with other encryption devices in the market. However, the adoption of ECC technology had not been as widespread as would have been anticipated in 2008.

V. THE ISSUES

[144] The issues in this matter are as follows:

(a) Was Donald a person in a special relationship with Certicom when he purchased Certicom shares in August and September 2008?

(b) If the answer to the question set out in paragraph [144](a) above is yes, was Donald in possession of a material fact regarding Certicom when he purchased Certicom shares in August and September 2008?

(c) If the answer to the question set out in paragraph [144](b) above is yes, was the material fact generally disclosed?

(d) If the answers to the questions set out in paragraphs [144](a), (b) and (c) above are yes, did Donald engage in insider trading, contrary to subsection 76(1) of the Act?

(e) Whether or not Donald breached subsection 76(1) of the Act, did his purchases of Certicom shares constitute conduct contrary to the public interest?

VI. ANALYSIS OF THE ALLEGATION OF INSIDER TRADING

A. Submissions of the Parties

1. Staff's Submissions

[145] As outlined above, Staff alleges that, through his conversation with Wormald at the 2008 RIM Golf Event, Donald became aware of the Four Facts as follows:

(a) RIM had been in confidential discussions with Certicom relating to a potential acquisition of Certicom by RIM;

(b) RIM was in talks with Vanstone;

(c) RIM had a continuing interest in the acquisition of Certicom; and

(d) Certicom's then current share price was dramatically undervalued based on Certicom's licensing agreements.

(a) Special Relationship with Certicom

[146] Staff submits that Donald falls under the definition of a person in a special relationship with Certicom in three possible ways.

[147] First, and Staff submits, most compellingly, Donald was in a special relationship pursuant to subsection 76(5)(e) of the Act because he learned of material facts with respect to Certicom from Wormald who was himself in a special relationship with Certicom in circumstances where Donald knew or ought reasonably to have known that Wormald was a person in such a relationship. Staff submits that RIM possessed confidential information about Certicom that was provided to it for the very purpose of assessing the desirability of an acquisition, and that Wormald was the officer in charge of RIM's assessment of Certicom as an acquisition opportunity.

[148] Second, Staff submits that it is also arguable that Donald was in a special relationship under subsection 76(5)(c) of the Act because he learned of material facts with respect to Certicom while he was an insider, officer and employee of RIM when RIM was proposing to make a take-over bid for Certicom (i.e. while RIM was a company described in subsection 76(5)(a)(ii) of the Act). Staff submits that contemplating a hostile bid would be sufficient to constitute "proposing" since to find otherwise would exempt such transactions from the application of subsection 76(5) of the Act which Staff contends is clearly not its intention.

[149] Staff acknowledges there is little guidance as to the boundaries of "proposing"; however, Staff submits that it is clear that we should place a wide and purposive interpretation on the word "proposing" in order to meet the public interest mandate of the Commission. Staff submits that it would be inappropriate to impose a restrictive definition of what proposing means considering the Supreme Court's ruling in *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 ("***Asbestos***") on the Commission's jurisdiction in hearings under section 127 of the Act:

> However, the public interest jurisdiction of the OSC is not unlimited. Its precise nature and scope should be assessed considering s. 127 in context. Two aspects of the public interest jurisdiction are of particular importance in this regard. First, it is important to keep in mind that the OSC's public interest jurisdiction is animated in part by both of the purposes of the Act described in s. 1.1, namely "to provide protection to investors from unfair, improper or fraudulent practices" and "to foster fair and efficient capital markets and confidence in capital markets". …
>
> (*Asbestos*, *supra* at para. 41)

Staff submits that when interpreting the word "proposing", we must have regard to these two fundamental purposes of the Act.

[150] Staff also refers to the U.S. Supreme Court's decision in *TSC Industries Inc. v. Northway Inc.* 426 U.S. 438 (U.S. Ill. 1976) ("***TSC v. Northway***"), which discusses the boundaries of the definition of the term "materiality" in the U.S. Rules:

> In formulating a standard of materiality under Rule 14a-9, we are guided, of course, by the recognition in *Borak* and *Mills* of the Rule's broad remedial purpose. That purpose is not merely to ensure by judicial means that the transaction, when judged by its real terms, is fair and otherwise adequate, but to ensure disclosures by corporate management in order to enable the shareholders to make an informed choice. … As an abstract proposition, the most desirable role for a court in a suit of this sort, coming after the consummation of the proposed transaction, would perhaps be to determine whether in fact the proposal would have been favored by the shareholders and consummated in the absence of any misstatement or omission. But as we recognized in *Mills*, *supra*, at 382 n. 5, such matters are not subject to determination with certainty. Doubts as to the critical nature of information misstated or omitted will be commonplace. And particularly in view of the prophylactic purpose of the Rule and the fact that the content of the proxy statement is within management's control, it is appropriate that these doubts be resolved in favor of those the statute is designed to protect. …
>
> (*TSC v. Northway*, *supra* at 448)

Staff submits that the U.S. Supreme Court's proposition with respect to materiality in *TSC v. Northway* applies with equal force in this case in terms of how we should interpret the boundaries of what "proposing" means, such that any doubt should be resolved in favour of protection of investors and confidence in the capital markets.

[151] Staff encourages a purposive reading of "proposing" given the facts of this case, and submits that it is clear that, on August 20, 2008, RIM and Wormald were in possession of highly confidential Certicom licensing agreements given to RIM by Certicom pursuant to the 2007 NDA for the express purpose of permitting RIM to evaluate Certicom's business and propose a take-over or other business combination with Certicom. It is Staff's submission that the foregoing alone provides sufficient grounds to place RIM, and therefore Wormald, within the definition of "proposing".

[152] Although no decision had been made by RIM to acquire Certicom as of August 20, 2008, Staff submits that RIM was still in a special relationship with Certicom. According to Staff's submissions, it was clear that RIM was focused on Certicom as a real target, and a decision does not have to be made for a company to be in a special relationship. Staff points to the facts that

RIM was working internally and had various staff members, including lawyers, working on assisting RIM's Strategic Alliances Group with its analysis and that no other company was provided with access to Certicom's highly confidential information that RIM had received for the express purpose of evaluating a transaction. Staff submits that RIM was in a special position vis-à-vis Certicom and vis-à-vis its competitors, which Staff submits is sufficient to establish a special relationship.

[153] Staff compares the facts of this case to those in *Re Donnini* (2002), 25 O.S.C.B. 6225 ("***Donnini***") in which the Commission states at para. 109: "In the case before us, [Kasten Chase Applied Research Limited ("**KCA**")] was a reporting issuer at the material time. As soon as Paterson proposed to Milligan in the morning phone call to do a second financing, [Yorkton Securities Inc. ("**Yorkton**")] was in a special relationship with KCA". Staff notes that, in *Donnini*, when Paterson mentioned the second financing to Milligan, who was the Chief Financial Officer of KCA, he had not discussed it with KCA and had no idea whether KCA was amenable to the idea. It was the suggestion of the possibility that created the special relationship, and Staff submits that, similarly in this case, the notion that RIM and Certicom shared of a potential transaction is sufficient for a special relationship to exist. Therefore, in Staff's submission, the analysis is not whether the transaction was likely, which was unknown in the case of *Donnini*, but once the possibility of the transaction arose, the analysis was how Donnini fit into the definition of a special relationship as an employee of Yorkton.

[154] Finally, Staff submits that Donald may also have been in a special relationship under subsection 76(5)(c) of the Act because he learned of material facts with respect to Certicom while he was an insider, officer and employee of RIM at a time when RIM was a company that was engaging in or proposing to engage in a business or professional activity with or on behalf of the reporting issuer (i.e. while RIM was a company described in subsection 76(5)(b) of the Act). Staff submits that there is no requirement that the business activity referred to in subsection 76(5)(b) relates directly to a potential transaction. Staff also submits that it was sufficient that RIM was engaging in business with Certicom and licensing Certicom's ECC technology for use in the BlackBerry since 2000, which Donald knew. Staff characterizes the relationship between RIM and Certicom as very important, and given the fact that RIM thought it would be of great benefit to acquire Certicom's technology which represents the core marketing niche of the BlackBerry device, the business relationship was sufficient for subsection 76(5)(b) of the Act to apply.

(b) Undisclosed Material Facts

[155] Staff alleges that the Four Facts communicated to Donald by Wormald on August 20, 2008 were material and were not generally disclosed as of that date. Staff submits that, as Donald admitted that he had knowledge of the Four Facts, the only question that remains is whether the Four Facts were material.

[156] Staff proposes a two-stage analysis of materiality because the Four Facts may be seen as either an expression of present facts or as contingent facts.

[157] Staff refers to the specific circumstances in which Donald learned of the Four Facts. Staff submits that the Four Facts were likely communicated by Wormald in the context of RIM business in the discussion about what he was working on, but even if Donald's version of how the topic of Certicom arose is accepted, a less sophisticated business person than Donald would have been alerted to the fact that the discussion was not casual or social, but involved RIM's business affairs. Donald knew that this information was being provided to him by the RIM officer in charge of corporate acquisitions. Staff refers to Wormald's testimony that his conversation with Donald was by its very nature confidential and contends that the nature of the Four Facts provided by Wormald was manifestly RIM business.

[158] With reference to National Policy 51-201 – *Disclosure Standards* (2002), 25 O.S.C.B. 4492 ("**NP 51-201**"), Staff submits that a number of factors must be considered in making materiality judgments, including the nature of the information itself, the volatility of the company's securities and prevailing market conditions. Staff submits that Certicom's share price at the relevant time was volatile with low trading volumes in the weeks preceding August 21, 2008. Accordingly, Staff argues that information related to Certicom did not need to include a high degree of magnitude or probability to affect its share price significantly, and the low volume indicates that the market was relatively disinterested in Certicom's shares. Staff alleges that news of Wormald's opinion that Certicom was dramatically undervalued based on its patents and confidential licensing agreements would have caused Certicom's share price to significantly increase. Staff refers to the Commission's decision in *Re AiT Advanced Information Technologies Corp.* (2008), 31 O.S.C.B. 712 ("***AiT***") as support for the proposition that materiality often occurs at a much earlier stage for smaller issuers, such as Certicom.

[159] Staff encourages the use of "common sense judgment" in making a determination as to materiality, and submits that a common sense interpretation of the Four Facts in the context of Certicom's low liquidity and share price was that its probable future was being the subject of an acquisition. Staff also submits that it is helpful to consider the American reasonable investor test when assessing materiality and argues that, under this test, disclosure of the fact that Wormald held the view that Certicom was dramatically undervalued based on RIM's internal analysis of Certicom's patents and licence agreements would reasonably be expected to have a significant effect on the market price or value of Certicom's securities, and the Four Facts had assumed actual significance for a reasonable investor in deciding whether to buy, sell or hold Certicom shares.

[160] Staff argues that, even if none of the Four Facts was material, taken together, the cumulative effect of the Four Facts can be material. Staff submits that the significance of the Four Facts can be assessed even without analyzing the likelihood of a future transaction because of the context, namely, that Wormald held a view of Certicom's value in the context of past discussions with Certicom about an acquisition that made their way to Certicom's board of directors and/or CEO.

[161] Staff further submits that evidence that information was material can be drawn from the source of the information. Staff submits that Donald's actions in placing an order for Certicom shares with his broker at 9:00 a.m. the next day and the number of Certicom shares that Donald purchased, which was disproportionately large when compared to market purchases, show the importance he ascribed to the Four Facts and illustrate the fact that Donald was acting differently than the market. Staff argues that the Four Facts provided to him by Wormald assumed actual significance to Donald and, consequently, it is reasonable to conclude that they would have had a similar effect on a reasonable investor in deciding whether to buy, sell or hold Certicom's shares.

[162] Setting aside whether a reasonable investor would have thought Wormald's valuation of Certicom was material, Staff submits that, when assessing materiality, we may also consider whether a reasonable investor would infer that there was some likelihood that RIM would make a bid for Certicom or that Certicom was a likely acquisition in the future. Staff refers to the Commission's decision in *AiT* and the Divisional Court's decision in *Re Donnini* (2003), 177 O.A.C. 59 (Div. Ct.) ("***Donnini (Div. Ct.)***") regarding contingent events as material facts or changes. Staff argues that the American probability/magnitude test from *Securities & Exchange Commission v. Texas Gulf Sulphur Co.* (1968), 401 F.2d 833 (U.S. 2nd Cir. N.Y.) ("***Texas Gulf Sulphur***"), cited by the Commission in *Donnini* and *Re YBM Magnex International Inc.* (2003), 26 O.S.C.B. 5285 ("***YBM***"), is authority for the proposition that the existence of materiality in cases of contingent or speculative developments depends on a balancing of the probability that the event will occur and the anticipated magnitude of the event (*Texas Gulf Sulphur*, *supra* at 849). Staff submits that a transaction to acquire Certicom would be of great magnitude, which would require a lower probability in order to constitute a material fact. In written submissions, Staff points to 23 facts, which Staff submits constituted significant indicia of a likely future acquisition of Certicom by RIM as of August 20, 2008.

[163] Further, Staff submits that interest in a potential transaction at the highest corporate levels of both RIM and Certicom can be considered in assessing the materiality of the information communicated to Donald by Wormald on August 20, 2008.

2. Donald's Submissions

(a) The Four Facts

[164] Donald disputes Staff's allegations that, through his conversation with Wormald on August 20, 2008, he became aware of materials facts, namely, the Four Facts. Donald submits that the information communicated to Donald by Wormald was so general that, as noted in the U.S. insider trading decision *Securities Exchange Commission v. Monarch Fund*, 608 F.2d 938, 942 (2d Cir. U.S. C.A., 1979) ("***Monarch***"), there was still a risk to Donald that Certicom would prove to be a 'white elephant':

> Then there is the question whether the disclosed information is of a specific or general nature. This determination is important because it directly bears upon the level of risk taken by an investor, certainly the ability of a court to find a violation of the securities laws diminishes in proportion to the extent that the disclosed information is so general that the recipient thereof is still "undertaking a substantial economic risk that his tempting target will prove to be a 'white elephant.' " … Here the information disclosed to Paul, by any standard, lacked the basis elements of specificity. No revelation was made of any underlying facts concerning the contemplated financing. No specific terms were divulged. Nor were the lenders identified. Nor was the date of the financing indicated, but only that the company "expect(ed) it to be done shortly." ...
>
> (*Monarch*, *supra* at 942)

[165] With respect to the allegation that RIM was in confidential discussions with Certicom regarding a potential acquisition, Donald submits that we must look at when these discussions took place and whether any discussions were ongoing. He submits that, as of November 2007, Certicom had told RIM to "go pound salt" and questions the then current validity or meaning of a statement from Wormald that Certicom and RIM were in confidential discussions regarding an acquisition.

[166] Donald disputes the fact that RIM was actually in discussions with Vanstone in August 2008. He submits that there is no evidence that discussions continued after Gupta told Vanstone to stop talking to RIM in March 2008. Donald contends that, if Wormald said anything to Donald, the most he could have said was that he might have been in some discussions with Vanstone, without saying what those discussions were about.

[167] Donald argues that the expression in the Statement of Allegations that "RIM had a continuing interest in an acquisition of Certicom" meant that Certicom was an interesting possibility, based on some facts unknown at the time. Donald submits that this is too speculative and too uncertain.

[168] With respect to the allegation that Donald understood from Wormald that Certicom's share price was dramatically undervalued based on Certicom's licensing agreements, Donald contends that, whatever Wormald's personal view was, this was never RIM's view. In support of his submissions, Donald refers to RIM's offer for Certicom in December 2008 of $1.50 per share and a valuation by RIM in late August 2008 which placed Certicom's actual value to RIM at $3.25 to $3.90 per share.

(b) No Special Relationship

[169] Donald submits that Wormald and Donald were never insiders of Certicom, nor were they in a special relationship with Certicom.

[170] Donald contends that his conversation with Wormald on August 20, 2008 had none of the hallmarks of a "tip"; it did not happen in secret, it was not in a business setting and it was not hushed or hurried. He submits that the information provided was non-specific, conjectural, full of opinion and publicly available.

[171] Donald submits that it is only through a tortured, and over-reaching, interpretation of the Act that one could come to the conclusion that he was in a special relationship with Certicom. He refers to the discussion of "insiders" in *Monarch*, in which the U.S. Court of Appeals stated:

> It is important at the outset to distinguish the roles played by various types of market traders. There are the insiders, who almost by definition have a degree of knowledge that makes them culpable if they trade on inside information. As officers, directors, or employees of a company, they are presumed to know when the information is undisclosed. Because of their positions, insiders know when they have the kind of knowledge that is likely to affect the value of stock. …
>
> We may not make the same assumptions with regards to outsiders, however, since the kinds of factual situations in which they acquire their information are innumerable. For example, there is the tippee who knows or ought to know that he is trading on inside information, as against the outsider who has no reason to know he is trading on the basis of such knowledge. … Here, the record is silent as to whether Paul has reason to believe that either of his contacts Waldron or Carton has acted inappropriately. Indeed, if any inference may be drawn, it is the contrary one since neither Waldron nor Carton, when they discussed the possible refinancing with Paul, indicated that there was anything confidential about the information. ...
>
> In addition, some outsiders, because of a special relationship with an issuing corporation, are privy to its internal affairs, whereas other outsiders have no ready access to the inner workings of a company. … It is not evident from the record, and plaintiff does not claim, that Paul had any special relationship with Bio-Medical.
>
> . . .
>
> Carrying the district court holding to its logical conclusion would mean that all investors, brokers, and investment advisers who are attracted to a particular security on the over-the-counter market and seek to obtain further information about it act at their peril. Indeed, they would have the affirmative duty to verify whether or not their information could be deemed public information, and if failure to do so could subject them to civil and, possibly, criminal proceedings.
>
> (*Monarch*, *supra* at 941 to 943)

[172] Donald argues that the conversation between Wormald and himself on August 20, 2008 had far below the level of specificity required in *Monarch*.

[173] Donald submits that, whatever RIM may have been *thinking*, it was not *proposing* to make a take-over bid or *proposing* to become party to an arrangement in August or September 2008. Accordingly, Donald was not, therefore, a person in a special relationship with Certicom on August 20, 2008 pursuant to subsections 76(5)(a)(ii) or (iii) of the Act. Donald relies on the finding in *Donnini* that the special relationship in that case began when Yorkton proposed a special warrants financing to the Chief Financial Officer of KCA. In this case, Donald argues that the special relationship began when Balsillie proposed the acquisition of Certicom by RIM to Gupta on October 28, 2008. Donald submits that the evidence falls far short of establishing that RIM had made or even decided on any proposal to make a take-over bid or become a party to a reorganization, amalgamation, merger or arrangement with Certicom as of August 2008.

[174] Donald agrees that the Act makes it abundantly clear that it would be material if RIM were proposing a take-over. However, Donald argues that, until the RIM decision-makers are engaged, i.e., those people at RIM who are in a position to spend $60 million, and have made a decision to propose a bid, the special relationship requirement is not met. Donald submits that evidence that Belcher or Wormald was proposing a take-over bid is of some interest but does not help us decide what RIM was doing, what RIM was considering and what RIM was proposing, if anything.

[175] Donald further submits that the effect of Staff's allegation that RIM was in a special relationship with Certicom as a result of engaging in business with Certicom (see subsection 76(5)(b) of the Act), and that Donald was also in a special relationship with Certicom as an officer or employee of RIM (see subsection 76(5)(c) of the Act) would be that *any* person or company who or which does business with a reporting issuer would be in a special relationship, which cannot be the case. Donald submits that adopting this interpretation of the meaning of "special relationship" would also prevent any company which proposed to make a take-over from ever acquiring a toe-hold in the reporting issuer if it engaged in any business with the reporting issuer. Donald argues that there must be some clear connection between the business engaged in, or proposed to be engaged in, and the alleged material facts before subsection 76(5)(b) of the Act would result in a person or company being in a special relationship. In this case, Donald submits, there is no such connection.

[176] Donald further submits that, for the same reasons that RIM was not in a special relationship with Certicom, Wormald was not in a special relationship with Certicom, and therefore, subsection 76(5)(e) of the Act cannot be relied on to provide the basis for Donald's special relationship with Certicom.

(c) Materiality

[177] Citing *YBM* as authority, Donald submits that the definition of "material fact" has been considered by the Commission to be a "market impact" test.

[178] Donald submits that materiality must be determined on a case-by-case basis and that the present matter must be considered on the particular facts and proved by clear and cogent evidence.

[179] He further submits that while the American probability/magnitude test is easy to state, its application is difficult as the standard is ambiguous and open to wide variations of interpretation. Donald points to the fact that neither RIM's board of directors nor Certicom's board of directors issued a press release until after RIM's bid was made, which he submits strongly suggests that neither company considered their non-discussions in the Summer of 2008 and the revived discussions in the Fall of 2008 to be material.

[180] Donald refers to the American case of *Basic Inc. v. Levinson* (1988), 485 U.S. 224, 108 S.Ct. 978 (U.S. Ohio) ("***Basic v. Levinson***") which suggests that the probability that an event will occur can be assessed by looking at "indicia of interest in the transaction at the highest corporate levels" (*Basic v. Levinson*, *supra* at 239), which may include board resolutions, instructions to investment bankers and actual negotiations between principals or their intermediaries. Donald submits that he did not know that RIM was going to acquire Certicom. Rather, the alleged material facts were that discussions had taken place and that RIM was still interested but that Certicom was not interested.

[181] Donald further submits that the evidence demonstrates that, as of August 20, 2008, the probability of an acquisition of Certicom by RIM was practically non-existent because none of the indicia suggested above were present at that time. Donald submits that there was no evidence of Balsillie being involved in any discussions with Certicom in the Summer of 2008 and that Gupta, Certicom's CEO at the time, testified that there were no discussions with RIM about an acquisition of Certicom in the Summer of 2008. Donald submits that, even when discussions between Certicom and RIM were renewed in mid-September 2008, they involved three potential events, namely, a potential licensing arrangement, a potential investment by RIM in Certicom and a potential acquisition, all of which were still being discussed at the end of September 2008.

[182] Donald points to the facts that there were no board resolutions, no formation of special committees by the boards of directors of RIM or Certicom and RIM had not retained legal counsel or financial advisors for the purpose of an acquisition in August 2008, all of which support the conclusion that a RIM acquisition of Certicom was not probable or likely in August 2008. Donald further submits that RIM did not have any serious internal controls with respect to the discussions with Certicom until November 2008, there was no In-the-Know List in place in August 2008 and the "Project Troy" code name was assigned by McCallum and Belcher in August 2008 without instructions to do so from their superiors.

[183] Donald submits that, at the time of the 2008 RIM Golf Event, the probability that an acquisition of Certicom by RIM would occur was very low to non-existent, based on what was actually happening.

[184] Donald further submits that the magnitude of a possible transaction between Certicom and RIM in or around August 2008 cannot be determined with any real level of confidence or accuracy. Donald takes the position that the market reaction to RIM's announcement of its bid for Certicom on December 3, 2008 has no bearing on the materiality of the information conveyed to Donald on August 20, 2008 because RIM had no intention to make an offer at that time, and, moreover, RIM considered that

its offer of $1.50 reflected the full value of Certicom, taking into account the growth prospects and potential synergies that would be made possible by a transaction.

[185] Donald contends that, in August 2008, there had been no decision as to what type of transaction with Certicom would be proposed, if one was proposed, and there was no decision as to what RIM would pay Certicom's shareholders in the event of a potential offer as the bid price was first considered by Balsillie and Wormald some time in September or October 2008. Donald submits that, even if the magnitude of a potential RIM-Certicom transaction deserved consideration, it would be outweighed by the negligible probability that an acquisition would occur in August 2008.

[186] Donald submits that he had no actual knowledge of material facts that a reasonable investor would view as important in deciding whether to buy, sell or hold Certicom securities. Although he knew Wormald's position at RIM, Donald submits that it would be unreasonable to conclude that, in the circumstances of this case, the information conveyed by Wormald to Donald was based on undisclosed or confidential information. Donald characterizes these circumstances as follows: (i) a conversation between Donald and Wormald that took place in a casual "public" setting; (ii) the information conveyed was communicated in an informal manner; (iii) the information lacked any real detail to support Wormald's statements; and (iv) the information was conveyed without any indication from Wormald that it was confidential. Donald submits that his discussion with Wormald was a three or four minute conversation out of a three or four hour dinner after much alcohol had been consumed and after golf had been played and the day was essentially at the point of winding down. Donald argues that anybody having drinks and then wine and dinner is not going to think that they are about to get material undisclosed information, and cites *Monarch* for the proposition that Donald should not have been put to the task of cross-examining Wormald to determine whether the information was somehow confidential. Donald submits that any fault lies with Wormald who had no business talking about confidential information at dinner, and who, if he did discuss confidential information, had an obligation to tell Donald that they were working on a transaction and he should keep it confidential. Further, Donald points out that he was not on the In-the-Know List until March 2009, and Yersh, who heard Wormald and Donald's conversation at dinner on August 20, 2008, was not on the In-the-Know List until November 10, 2008.

[187] Donald submits that Certicom's directors had knowledge of more information about discussions with RIM and Certicom than Donald had but were granted options by Certicom's board in June 2008 and Gupta purchased Certicom shares in July 2008. Donald submits that Staff alleges that the confidential discussions were material to Certicom and yet Gupta, who was on the other end of the telephone call with Balsillie about a RIM acquisition of Certicom in March 2008, felt comfortable buying Certicom shares. Similarly, Donald submits that Gupta was aware of Vanstone's prior discussions with Wormald because he put an end to them and he knew of RIM's continuing interest in Certicom because he told RIM that he would get back to them after a few quarters.

[188] Finally, Donald submits that the information about the possibility of the reengagement of the parties in discussions about a potential acquisition and Certicom's possible value was speculative and surrounded by uncertainties to the degree that Donald was undertaking a substantial risk in making an investment in Certicom based on the information conveyed to him by Wormald on August 20, 2008.

(d) Donald's Trading

[189] Donald submits that there was nothing secretive about his purchases of Certicom shares and that he traded in his own name and in his own account in Kitchener through his usual broker. Donald acquired securities equal in value to 3% of his portfolio, which was consistent with past instances in which he traded 2% to 3% of such value in similar types of investments. Donald submits that it is counterintuitive that he would trade in his own name and with his own broker and in the usual fashion if he was trading based on highly confidential material information.

[190] Similarly, Donald submits that placing an order for Certicom shares below the market price and leaving the order open for almost a month before acquiring 200,000 shares is not behaviour that indicates wrongful trading. Donald notes that the average price that he paid for Certicom shares was $1.52, which was above RIM's initial bid price of $1.50 per share.

[191] Donald submits that his conduct was that of a person who made an honest investment decision and traded in a manner that was entirely consistent with his past trading activity. Donald submits that his behaviour is in contrast with that of the subjects of past insider trading cases which show a pattern of people who are trading unethically and dishonestly and in a rapacious manner.

B. Overview of the Law

1. Insider Trading

[192] Subsection 76(1) of the Act prohibits trading in securities of an issuer by persons or companies in a special relationship with that issuer. Subsection 76(1) of the Act states:

> No person or company in a special relationship with a reporting issuer shall purchase or sell securities of the reporting issuer with the knowledge of a material fact or material change with respect to the reporting issuer that has not been generally disclosed.

[193] In this case, Staff alleges that Donald was a person in a special relationship with Certicom when he purchased Certicom shares between August 21 and September 15, 2008. "Person or company in a special relationship with a reporting issuer" is defined in subsection 76(5) of the Act as follows:

> For the purposes of this section, "person or company in a special relationship with a reporting issuer" means,
>
> (a) a person or company that is an insider, affiliate or associate of,
>
> (i) the reporting issuer,
>
> (ii) a person or company that is proposing to make a take-over bid, as defined in Part XX, for the securities of the reporting issuer, or
>
> (iii) a person or company that is proposing to become a party to a reorganization, amalgamation, merger or arrangement or similar business combination with the reporting issuer or to acquire a substantial portion of its property;
>
> (b) a person or company that is engaging in or proposes to engage in any business or professional activity with or on behalf of the reporting issuer or with or on behalf of a person or company described in subclause (a)(ii) or (iii);
>
> (c) a person who is a director, officer or employee of the reporting issuer or of a person or company described in subclause (a)(ii) or (iii) or clause (b);
>
> (d) a person or company that learned of the material fact or material change with respect to the reporting issuer while the person or company was a person or company described in clause (a), (b) or (c);
>
> (e) a person or company that learns of a material fact or material change with respect to the issuer from any other person or company described in this subsection, including a person or company described in this clause, and knows or ought reasonably to have known that the other person or company is a person or company in such a relationship.

[194] The core issue to be determined is therefore whether RIM was a company in a special relationship with Certicom because it was proposing to make a take-over bid for Certicom's shares, was proposing some other business combination with Certicom or was engaging in any business activity with Certicom.

2. Materiality

(a) Material Fact and Assessments of Materiality

[195] Staff alleges that Donald was in possession of a material fact with respect to Certicom, which was not generally disclosed. The term material fact is defined in subsection 1(1) of the Act as follows:

> "material fact", where used in relation to securities issued or proposed to be issued, means a fact that significantly affects, or would reasonably be expected to have a significant effect on, the market price or value of such securities

[196] The Commission noted in *Donnini* that an assessment of materiality is fact-specific and will vary with every issuer according to multiple factors (*Donnini*, *supra* at para. 135).

[197] The Commission confirmed the fact-specific nature of materiality assessments in its decision in *Biovail*:

> In general, the concept of "materiality" in the Act is a broad one that varies with the characteristics of the reporting issuer and the particular circumstances involved. In National Policy 51-201 of the Canadian Securities Administrators, it is stated that:

> In making materiality judgements, it is necessary to take into account a number of factors that cannot be captured in a simple bright-line standard or test. These include the nature of the information itself, the volatility of the company's securities and prevailing market conditions. The materiality of a particular event or piece of information may vary between companies according to their size, the nature of the operations and many other factors.
>
> …
>
> Accordingly, the assessment of the materiality of a statement is a question of mixed fact and law that requires a contextual determination that takes into account all of the circumstances including the size and nature of the issuer and its business, the nature of the statement and the specific circumstances in which the statement was made.
>
> (*Biovail*, *supra* at paras. 65 and 69)

[198] The Commission has also stated previously that materiality often occurs at a much earlier stage for smaller issuers than larger issuers (*AiT*, *supra* at para. 207).

[199] A determination of materiality is not a science, but is a common-sense judgment, made in light of all of the specific circumstances (*Biovail*, *supra* at para. 81; *YBM*, *supra* at para. 90). NP 51-201 provides guidance as to what information may be considered material. The policy states at section 4.2:

> In making materiality judgments it is necessary to take into account a number of factors that cannot be captured in a simple bright-line standard or test. These include the nature of the information itself, the volatility of the company's securities and prevailing market conditions. The materiality of a particular event or piece of information may vary between companies according to their size, the nature of their operations and many other factors. An event that is "significant" or "major" for a smaller company may not be material to a larger company. Companies should avoid taking an overly technical approach to determining materiality. …

[200] NP 51-201 also includes a list of examples of potentially material information at section 4.3. They include:

- changes in share ownership that may affect control of the company
- major reorganizations, amalgamations, or mergers
- take-over bids, issuer bids, or insider bids
- any development that affects the company's resources, technology, products or markets
- significant new contracts, products, patents, or services or significant losses of contracts or business
- the commencement of, or developments in, material legal proceedings or regulatory matters
- significant acquisitions or dispositions of assets, property or joint venture interests

[201] The test to be applied in this case when determining whether any fact is a material fact is an objective market impact test, i.e. would any of the Four Facts be reasonably expected to significantly affect the market price or value of Certicom's securities? As stated in the Commission's decision in *YBM*:

> The test for materiality in the Act is objective and is one of market impact. An investor wants to know facts that would reasonably be expected to significantly affect the market price or value of the securities. The investor is an economic being and materiality must be viewed from the perspective of the trading markets, that is, the buying, selling or holding of securities. Price in an open market normally reflects all available information. …
>
> (*YBM*, *supra* at para. 91)

[202] Subsequent to the hearing in this matter, the Commission released its decision in *Re Coventree Inc.* (2011), 34 O.S.C.B 10209, which includes a discussion of the law on materiality. The panel in *Re Coventree Inc.* made findings with respect to allegations of failures to disclose a material fact in a prospectus and of failure to comply with continuous disclosure obligations with respect to the disclosure of material changes. While we do not discuss that decision in these Reasons, we note that our conclusions as to the law on material fact and materiality are consistent with those in *Re Coventree Inc.*

(b) Cumulative Effect of Facts

[203] Staff submits that we may consider the cumulative effect of the Four Facts, taken together, in determining whether Donald was in possession of a material fact when he purchased Certicom securities. The Commission has previously found that a number of facts may be material when taken together:

> Materiality is a question of mixed law and fact, i.e. do the facts satisfy the legal test? Some facts are material on their own. When one or more facts do not appear to be material on their own, materiality must also be considered in light of all the facts available to the persons responsible for the assessment.
>
> (*YBM*, *supra* at para. 94)

[204] Similarly, in *AiT*, the Commission considered whether specific events either individually or collectively constituted a material change for AiT:

> The first discussions with Harrold in February 2009, through the signing of a non-disclosure agreement, the first due diligence session, the pricing discussions in St. Paul and the April 23 and 24, 2002 telephone calls from 3M to Ashe constituted the early stages of negotiation towards a potential share purchase transaction that collectively constituted a material fact in relation to AiT within the definition of that term in the Act. However, considering that the negotiation was still in its early stages, we do not find that any of these events individually, or all of them collectively, constituted a material change for AiT.
>
> (*AiT*, *supra* at para. 229)

We note that *AiT* was addressing whether a material change had occurred and not whether certain events constituted material facts.

(c) Materiality of a Contingent Event

[205] The Commission has found that material facts can include contingent or speculative events. The Divisional Court upheld the Commission's decision in *Donnini* and found that:

> … The definition of "material change" includes "a decision to implement such a change made by the board of directors of the issuer or by senior management of the issuer who believe that the confirmation of the decision by the board of directors is probable."… Both definitions refer to events in the future. Some might argue that until a deal has been fully agreed upon, it is not a fact. It is not possible to delineate with precision the line that divides intention from accomplished fact and each case will undoubtedly have to depend upon its own circumstances and facts. …
>
> (*Donnini (Div. Ct.)*, *supra* at para. 17)

[206] The Commission has previously referred to the American test for the materiality of contingent events, the probability/magnitude test. In *Donnini*, the Commission made reference to the probability/magnitude test from the U.S. cases *Basic v. Levinson* and *Texas Gulf Sulphur*. The Commission found as follows in *Donnini*:

> Since the potential magnitude of the second special warrants financing was highly significant for the value of KCA shares, a lower probability of occurrence than we determined was actually present would still have led us to conclude that each of the financing, the negotiations and the potential price and size of the financing was a material fact.
>
> In *Basic*, in the context of preliminary corporate merger discussions, the United States Supreme Court at 239 explicitly adopted the probability/magnitude test from *Texas Gulf Sulphur*, and endorsed the following approach to the application of that standard:
>
> Whether merger discussions in any particular case are material therefore depends on the facts. Generally, in order to assess the probability that the event will occur, a factfinder will need to look to indicia of interest in the transaction at the highest corporate levels. Without attempting to catalog all such possible factors, we note by way of example that board resolutions, instructions to investment bankers, and actual negotiations between principals or their intermediaries may serve as indicia of interest …. No particular event or factor short of closing the transaction need be either necessary or sufficient by itself to render merger discussions material. [Emphasis added.]
>
> (*Donnini*, *supra* at paras. 132-133 citing *Basic v. Levinson*, *supra* at 239)

[207] As stated above, one of the factors we may consider in assessing the probability of a contingent or speculative transaction as noted in *Basic v. Levinson* is whether there are indicia of interest in the transaction at the highest corporate levels. The Court in *Basic v. Levinson* went on to further state:

> Materiality in the merger context depends on the probability that the transaction will be consummated, and its significance to the issuer of the securities. Materiality depends on the facts and thus is to be determined on a case-by-case basis.
>
> (*Basic v. Levinson*, *supra* at para. 250)

This case does not, however, turn on the probability that, as of August 21, 2008, RIM would acquire Certicom.

C. Was Donald a person in a special relationship with Certicom when he purchased Certicom securities in August 2008?

[208] Staff alleges that Donald was a person in a special relationship with Certicom because he:

(a) learned of material facts with respect to Certicom while he was an insider, officer and employee of RIM, when RIM was a company:

  (i) proposing to make a take-over bid for Certicom;

  (ii) proposing to become a party to a reorganization, amalgamation, merger or arrangement or similar business combination with Certicom; and/or

  (iii) engaging in business with Certicom; and

(b) learned of material facts with respect to Certicom from Wormald who was in a special relationship with Certicom in circumstances where Donald knew or ought reasonably to have known that Wormald was a person in such a relationship.

[209] A determination of whether Donald was a person in a special relationship with Certicom requires a detailed consideration of the definition of "person or company in a special relationship with a reporting issuer" found in subsection 76(5) of the Act and its application to Donald's circumstances in August 2008.

[210] Staff alleges that Donald was a person in a special relationship with Certicom when he purchased Certicom securities in August 2008 and September 2008 for the following reasons:

(a) Donald was an officer and employee of RIM at the time RIM was a company proposing to make a take-over bid for Certicom's shares (subsections 76(5)(c) and 76(5)(a)(ii) of the Act);

(b) Donald was an officer and employee of RIM at the time RIM was a company proposing to become a party to a reorganization, amalgamation, merger or arrangement or similar business combination with Certicom or to acquire a substantial portion of its property (subsections 76(5)(c) and 76(5)(a)(iii) of the Act);

(c) Donald was an officer and employee of RIM and RIM was engaging in or proposing to engage in any business or professional activity with Certicom (subsections 76(5)(c) and 76(5)(b) of the Act);

(d) Donald learned of a material fact with respect to Certicom from Wormald, who was an officer and employee of RIM at the time RIM was a company proposing to make a take-over bid for Certicom (subsections 76(5)(e), 76(5)(c) and 76(5)(a)(ii) of the Act); and

(e) Donald learned of a material fact with respect to Certicom from Wormald, who was an officer and employee of RIM at the time RIM was a company proposing to become a party to a reorganization, amalgamation, merger or arrangement or similar business combination with the reporting issuer or to acquire a substantial portion of its property (subsections 76(5)(e), 76(5)(c) and 76(5)(a)(iii) of the Act).

1. Was RIM proposing to make a take-over bid for the securities of Certicom in August 2008 (subsection 76(5)(a)(ii) of the Act)?

(a) Indicia of Interest at the Highest Corporate Levels of RIM

[211] Although subsection 76(5) of the Act is precise in setting out the circumstances in which a person or company is considered to be in a special relationship with a reporting issuer, we have little guidance as to when or in what circumstances a person or company is proposing to make a take-over bid or enter into a business combination within the meaning of subsections 76(5)(a)(ii) or (iii) of the Act, respectively.

[212] In the Divisional Court's decision on the appeal of Donnini, the Court noted:

> … It is not possible to delineate with precision the line that divides intention from accomplished fact and each case will undoubtedly have to depend upon its own circumstances and facts. In the case at bar, the evidence suggests that the discussions had gone well beyond expressions of mutual interest and had got down to negotiating the very finest of points. The OSC held that the information Donnini held was factual and that his subsequent actions proved it.
>
> (*Donnini (Div. Ct.)*, *supra* at para. 17)

[213] The U.S. Supreme Court in *Basic v. Levinson*, when assessing the materiality of merger discussions, stated the following:

> Whether merger discussions in any particular case are material therefore depends on the facts. Generally, in order to assess the probability that the event will occur, a factfinder will need to look to indicia of interest in the transaction at the highest corporate levels. Without attempting to catalog all such possible factors, we note by way of example that board resolutions, instructions to investment bankers, and actual negotiations between principals or their intermediaries may serve as indicia of interest …. No particular event or factor short of closing the transaction need be either necessary or sufficient by itself to render merger discussions material. [Emphasis added.]
>
> (*Basic v. Levinson*, *supra* at 239)

[214] Although the foregoing comments in *Basic v. Levinson* relate to a determination of the materiality of merger discussions, we nonetheless find them helpful in our analysis of whether RIM was proposing to make a take-over bid for Certicom in August 2008. In our view, for RIM to be "proposing" to make a take-over bid for Certicom, there must have been some significant level of involvement and approval of the process at the highest corporate levels at RIM.

[215] Balsillie was involved in discussions with Certicom on a limited number of occasions, the first of which took place when Certicom initially proposed that RIM acquire Certicom in February 2007. After the initial meeting, most of the communication with Certicom was undertaken by Wormald or by other members of the Strategic Alliances Group. Wormald testified that he had regular dialogues with Balsillie, and probably also with Lazaridis, about what his team was working on and what opportunities they were considering. In a March 16, 2008 e-mail to Balsillie with the subject line "Further things that I'm working on", Wormald stated with respect to acquisitions: "We are focused on Certicom and Alt-N (email server) as real targets we are working on. Both should be ready to give you a full briefing on in about 2 weeks".

[216] On March 18, 2008, Reddy e-mailed Balsillie in preparation for a call that Balsillie, Reddy and Wormald were to have with Gupta the following day. In the e-mail, Reddy provided Balsillie with background information on Certicom's patent licenses, its OEM [original equipment manufacturer] licence agreements, ECC's uses and on Gupta, as Certicom's new CEO. Reddy noted specifically:

> Karna [Gupta] is aware that discussions were started a year ago but does NOT know that RIM was provided with specific deal documents from Scott [Vanstone].
>
> We want to re-iterate our potential interest and ask for them to provide the information we need to conduct due diligence.

[217] As previously noted, following the March 19, 2008 call, Gupta advised Balsillie that he would follow-up with Wormald after a few quarters. Upon receiving Gupta's response, Balsillie instructed Wormald in a March 26, 2008 e-mail as follows:

> Hey – let's acquire some shares – it's likely a good investment now.
>
> We'll decide next steps in a few months.

[218] RIM did not purchase any Certicom shares at that time as the result of advice that it received from its Canadian and U.S. legal advisors. RIM's first purchase of Certicom shares took place when it acquired Certicom in 2009.

[219] On May 21, 2008, Wormald advised Reddy by e-mail that he had spoken with Balsillie who wanted additional information regarding Certicom:

> Talked with Jim today. He wants to know:
>
> which investment house trades their stock the bios of their board members distribution of shareholders – who are the major shareholders who they have used for banking in the past.

[220] The information Balsillie requested be obtained by the Strategic Alliances Group was included in the Pitch Book, the first drafts of which were all dated August 2008. Wormald, RIM's Vice President of Strategic Alliances, did not receive a finalized version of the Pitch Book until on or about August 27, 2012. Belcher testified that, although he could not recall exactly when it took place, he had a meeting with Wormald and Balsillie at some time in September or October 2008, at which he presented the valuation portions of the Pitch Book to Balsillie and discussed with him the Certicom share price at the time. It does not appear from the evidence that Balsillie was presented with the information in the Pitch Book until some time after August 20, 2008.

[221] The Certicom Directors' Circular, issued in response to RIM's December 10 Offer to Purchase, notes that Balsillie contacted Gupta on October 28, 2008 to inform him that RIM's board of directors had approved the acquisition of Certicom and that RIM wanted to proceed in a friendly manner.

[222] The members of RIM's board of directors were only added to the In-the-Know List regarding the potential acquisition of Certicom on November 19, 2008 when they were provided with a briefing memorandum entitled "Proposed Acquisition of Certicom Corp. – Briefing Memo" prior to the scheduled meeting of the board of directors on November 24, 2008. Balsillie provided RIM's board of directors with an update relating to three potential acquisitions, including Certicom, at the November 24, 2008 board meeting. At the meeting, RIM's board discussed the proposed acquisition and authorized RIM's officers to pursue the acquisition. On November 28, 2008, RIM sent a non-binding expression of interest to Certicom's board of directors, proposing a cash offer of $1.50 per Certicom share which, as noted above, was rejected by Certicom's board of directors.

(b) RIM's Options with respect to Certicom in August 2008

[223] It would appear from the evidence that, as of August 20, 2008, RIM could have pursued the following three options for the purpose of gaining greater access to Certicom's ECC technology:

(a) RIM could have made a take-over bid to acquire Certicom's shares;

(b) RIM could have acquired all or a portion of Certicom's business on some basis other than a take-over bid, e.g., a negotiated business combination or transaction which Certicom had suggested in 2007; or

(c) RIM could have negotiated a more extensive licensing agreement with Certicom along the lines that Kirkup and Brown had been discussing with Certicom in July and August 2008.

[224] In July and August 2008, work with respect to all of these options was being undertaken by two groups within RIM, namely, those in the Strategic Alliances Group, and those who were dealing with RIM's licensing arrangements for the use of Certicom technology, including Kirkup and Brown.

(c) Findings with respect to Proposing to Make a Take-Over Bid

[225] We agree with Staff's submission that, in reading subsection 76(5)(a)(ii) of the Act, we should do so in light of the purposes of the Act and the public interest mandate of the Commission. However, we must also consider the specific language chosen by the legislature in drafting the provision.

[226] Staff directs us to the U.S. Supreme Court's decision in *TSX v. Northway* for the proposition that any uncertainty regarding the boundaries of "proposing" should be resolved in favour of the Act's purposes of protecting investors and ensuring confidence in the capital markets. Donald refers us to another American decision, *Monarch*, which considers the different positions of "insiders" and "outsiders". Although we may find guidance in some of the American case law on insider trading, we must nevertheless consider the differences between the U.S. laws relating to insider trading and our insider trading legislation. The language of subsection 76(5) of the Act is specific and is limited to prescribed circumstances. We must presume that the drafters of the provision intended the definition of "person or company in a special relationship with a reporting issuer" to be limited to those individuals or companies who or which are specifically caught by the wording.

[227] In August 2008, the Strategic Alliances Group was clearly considering whether to recommend a take-over bid for Certicom and, in the absence of any willingness on the part of Certicom to engage in negotiations relating to such an acquisition, was in the process of preparing the Pitch Book which was essentially a proposal to RIM's senior management that RIM make a take-over bid for the shares of Certicom. At that time, Wormald was the only officer of RIM with any meaningful involvement in the process, however, his involvement in the due diligence process and the subsequent preparation of the Pitch Book was periodic and supervisory in nature. The evidence indicates that, while Balsillie had clearly expressed an interest in Certicom, he only received reports from Wormald about the due diligence process as part of Wormald's routine meetings with Balsillie to update him on the activities of the Strategic Alliances Group. Wormald testified that:

> Regardless of whether I formally reported to him, I would have – I would have regular dialogues, I would say, at least once a month with Mr. Balsillie, and probably it's fair to say with Mr. Lazaridis, who is his other co-CEO, about things that, you know, things we were working on, looking at opportunities that were percolating up or we were working through.
>
> (Hearing Transcript, March 22, 2011 at page 20, lines 5 to 12)

[228] Wormald testified that Balsillie's instructions to him with respect to Certicom were: "… to keep working on it, but … as Mr. Balsillie had indicated back I think a few months before, … he wanted to continue to be consulted and approve on any sort of concrete steps we took before passing any milestones or crossing any lines", which they had not done at the time the Pitch Book was being prepared (Hearing Transcript, March 22, 2011 at page 117, lines 12 to 17). Balsillie did not, at any time prior to August 21, 2008, advise Wormald that RIM would or should acquire Certicom. Moreover, as the subsequent events made quite clear, Balsillie sought and obtained the approval of RIM's board of directors before he initiated both the failed attempt to negotiate a friendly acquisition of Certicom and the subsequent hostile take-over bid which eventually led to the successful acquisition of Certicom.

[229] In our view, the evidence is clear that, as of the date of the 2008 RIM Golf Event and the day thereafter when Donald placed his order to purchase shares of Certicom, and notwithstanding the considerable amount of due diligence that had been undertaken by the Strategic Alliances Group, RIM's interest in acquiring Certicom had not evolved into a proposal to do so. The evidence does not establish that RIM had made a decision that it should be or would be proposing to make a take-over bid to acquire Certicom within the meaning of subsection 76(5)(a)(ii) of the Act.

[230] In coming to the foregoing conclusion, we take into account the following factors:

(a) Balsillie, the Co-CEO of RIM with the greatest knowledge of and involvement with the matter, had not made a decision to proceed with the acquisition of Certicom or any portion of its business and had made it clear to Wormald that he wished to be consulted and to approve any "concrete steps we took before passing any milestones or crossing any lines" (Hearing Transcript, March 22, 2011 at page 117, lines 13 to 17).

(b) Although the members of the Strategic Alliances Group appear to have been close to completing an analysis of Certicom's patents and licence agreements and a valuation of Certicom based on Certicom's intellectual property and the cash flow savings to RIM in the event of a successful acquisition of Certicom, as of August 21, 2008, neither this information nor the report on the due diligence process, including a recommended bid range, had been seen or reviewed by either Balsillie or RIM's board of directors. In short, as of August 21, 2008, neither RIM's senior management nor its board of directors had expressed an interest in acquiring Certicom or made a decision to do so.

(c) There was no direct communication between Balsillie and Gupta between March 9, 2008 when Balsillie telephoned Gupta to suggest the reinstatement of discussions relating to a potential acquisition of Certicom by RIM and Balsillie's telephone call to Gupta on October 28, 2008 to inform him that RIM's board of directors had approved the acquisition of Certicom and that RIM wanted to proceed in a friendly manner.

(d) As the evidence disclosed that RIM had never previously made a take-over bid for an issuer, it would be reasonable to expect that RIM would seek advice about the process, the legal requirements and the associated risks before agreeing or committing to initiate such a bid. The need to undertake these steps was clearly reflected in the Pitch Book as noted in paragraph [129] above. Speaking about the likelihood of a hostile bid at the time the Pitch Book was created, Wormald testified: "We just were unaware of all the mechanics behind a hostile offer and, you know, what the requirements were. So, you know, to say – today we were firm in our desire to do it is a little premature because we hadn't really spun up the discussion with investment bankers or lawyers to be sure that it was a path we could take" (Hearing Transcript, March 22, 2011 at page 116, lines 1 to 7).

(e) RIM had not retained external financial or legal advisors, which is typically one of the first steps taken when the acquisition of a publicly-traded company is contemplated, and had not addressed the manner in which any proposed acquisition would be financed.

(f) No trading ban relating to Certicom shares was implemented and no formal In-the-Know List was created until the Strategic Alliances Group was provided with an initial draft by Gardiner, RIM's internal legal counsel, on November 20, 2008. While it might be argued that RIM was unfamiliar with the need for such a List given the lack of prior experience with a take-over bid, the absence of an In-the-Know List suggests that RIM had not received legal advice about the steps that it needed to undertake if a decision was made to proceed with a bid.

We are not saying that each of the factors described above is necessary for the Commission to conclude that a person is proposing to make a take-over bid but rather to give some indication of the factors or developments that the Commission would take into account in coming to such a conclusion.

[231] We note that Donald's order to purchase Certicom shares was filled through purchases made over a period of 13 days, beginning on August 21, 2008 and ending on September 19, 2008. We do not consider the time between Donald's first and last purchases of Certicom shares to be relevant to our analysis as it was not alleged by Staff and we heard no evidence to suggest that Donald received any additional information pertaining to Certicom from RIM personnel after August 20, 2008.

2. Was RIM proposing to become a party to a reorganization, amalgamation, merger or arrangement or similar business combination with Certicom or proposing to acquire a substantial portion of Certicom's property in August 2008 (subsection 76(5)(a)(iii) of the Act)?

[232] On August 20, 2008, there were no active discussions underway between Certicom and RIM with respect to a reorganization, amalgamation, merger or arrangement or similar business combination. Certicom had originally initiated discussions about the possibility of RIM acquiring Certicom in February 2007 and the due diligence process was commenced by Wormald as described above. In March 2008, discussions were "put on hold" after Gupta became Certicom's CEO and he e-mailed Balsillie indicating that he would contact RIM after a few quarters to give him time to complete the initial mandate given to him by Certicom's board of directors. In his March 26, 2008 e-mail to Balsillie, Gupta wrote:

> Since my coming on board (end of Jan 2008), my primary focus is to get the business fundamentals fixed and aligned within Certicom; to that end I have a set of deliverables I am working on for the Board.
>
> As I mentioned in my call, RIM is extremely important to Certicom and I want to ensure that we say engaged to support RIM's business needs. This can include several scenarios: (1) continue as a strong business partner; (2) initiate a due diligence process which can lead to several options as to how RIM may want to proceed with respect to investment.
>
> Jim, you asked me what my recommendation is on this file. My suggestion would be that I will contact Chris Wormald after a few quarters; this will give me the time I need to complete my initial mandate from the Board in resolving the business challenges facing Certicom. As well, by then we will know more definitively where we stand on the current litigation process with Sony. [Emphasis added.]

[233] It was not until early September 2008 that Gupta advised RIM that Certicom wanted to restart discussions about a proposed strategic transaction, and on September 16, 2008, Wormald and Belcher met with Gupta to discuss possible strategic investment alternatives, including a strategic transaction or an acquisition.

[234] Subsections 76(5)(a)(ii) and (iii) of the Act both include the requirement that a person or company be "proposing" a take-over bid or business combination. As a result, and based on the same analysis as set out in paragraph [229] above, we are of the view that RIM must have made a decision to propose a take-over bid or business combination with Certicom for subsection 76(5)(a)(iii) to apply. As of August 20, 2008, neither the senior management nor the board of directors of RIM had made such a decision.

[235] RIM was not at the stage of proposing a reorganization, amalgamation, merger or arrangement of similar business combination with Certicom at the time of the 2008 RIM Golf Event, and was not, therefore, in a special relationship with Certicom by virtue of subsection 76(5)(a)(iii) of the Act.

3. Was RIM engaging in business or proposing to engage in any business or professional activity with Certicom in August 2008 (subsection 76(5)(b) of the Act)?

[236] RIM had an ongoing business relationship with Certicom since May 2000 when RIM first began licensing Certicom's toolkits.

[237] Although RIM and Certicom had engaged in business when discussing the possibility of an acquisition in the period following the initial meeting between Gupta and Balsillie in February 2007, the discussions had been terminated well before the date of the 2008 RIM Golf Event. Prior to August 2008, Certicom had provided RIM with confidential licensing and other information that RIM's Strategic Alliances Group subsequently used in assessing Certicom as a potential acquisition.

[238] We have also addressed the business relationship between RIM's ISV Alliances group and Certicom in July and August 2008 regarding potential licensing arrangements for RIM's third-party software developers. Although Wormald's team was in contact with Kirkup and Brown regarding their work on this initiative, the ISV Alliances group's work was not related to the work the Strategic Alliances Group was doing at that time.

[239] Staff submits that there is no requirement that the business activity referred to in subsection 76(5)(b) of the Act relate directly to a potential transaction. In our view, the fact that RIM had been licensing Certicom's ECC technology since 2000 is not a sufficient basis on which to conclude that Donald was in a special relationship with Certicom. We agree with Donald's submission that there must be a more clear connection than exists in this case between the business engaged in or proposed to be engaged in and the alleged material facts in order for a person or company to be in a special relationship with an issuer for the purposes of subsection 76(5)(b) of the Act. The core of Staff's allegations in this case is that RIM was proposing a take-over bid for Certicom or proposing to enter into a business combination with Certicom and its submissions relating to subsection 76(5)(b) of the Act are of secondary importance.

4. Was Donald in a special relationship with Certicom as a result of his position as an officer or employee of RIM in August 2008 (subsection 76(5)(c) of the Act)?

[240] Donald was a Vice President of RIM when he discussed Certicom with Wormald at the 2008 RIM Golf Event. As such, he was an officer or employee of RIM within the meaning of subsection 76(5)(c) of the Act. Had we found that RIM was proposing to make a take-over bid for Certicom or proposing to enter into some other business relationship with Certicom, we would have concluded that Donald, as an officer and employee of RIM, was in a special relationship with Certicom. As we have concluded that RIM was not in a special relationship with Certicom, we cannot conclude that Donald was in a special relationship with Certicom in his capacity as an officer or employee of RIM.

5. Did Donald learn of a material fact from a person in a special relationship with Certicom (subsection 76(5)(e) of the Act)?

[241] Our analysis of the materiality of what Wormald communicated to Donald at the 2008 RIM Golf Event is addressed below.

[242] For the same reasons that we could not find that Donald was in a special relationship with Certicom, we cannot find that Wormald was in a special relationship with Certicom.

[243] Wormald was the most senior RIM officer directly involved in considering Certicom as a potential acquisition. As discussed below, we find that Donald learned of material facts with respect to Certicom from Wormald during their discussion at the 2008 RIM Golf Event. Had we found that RIM or Wormald was in a special relationship with Certicom, we would have concluded that Donald was also in a special relationship with Certicom by reason of the application of subsection 76(5)(e) of the Act.

D. Was Donald in possession of a material fact with respect to Certicom when he purchased Certicom securities in August 2008?

(a) Did Donald learn of the Four Facts from Wormald on August 20, 2008?

[244] The Four Facts that Staff alleges Donald learned of from Wormald during the 2008 RIM Golf event are, once again, that:

(a) RIM had been in confidential discussions with Certicom relating to a potential acquisition of Certicom by RIM;

(b) RIM was in talks with Vanstone, Certicom's founder and a former CEO and a member of Certicom's board of directors;

(c) RIM had a continuing interest in the acquisition of Certicom; and

(d) Donald understood from Wormald that Certicom's current share price was dramatically undervalued based on Certicom's licensing agreements.

[245] With respect to paragraph [244](a), it is clear from the evidence that RIM was not engaged in confidential discussions with Certicom as of August 20, 2008, although it had been in the past.

[246] With respect to paragraph [244](b), we find that the statement was not true as of August 20, 2008. The evidence shows that RIM had been in contact with Vanstone in 2007 and earlier in 2008, but that, by the Summer of 2008, this was no longer the case. We were presented with e-mails between Vanstone and Wormald and Reddy in early to mid-March 2008 in which they discussed information about Certicom that RIM was attempting to obtain. We do not have evidence of any communications between Vanstone and RIM subsequent to Gupta's March 26, 2008 e-mail to Balsillie, in which Gupta indicated that the "due diligence" process with RIM would be put on hold for a few quarters, stating specifically that: "I have also advised Scott [Vanstone] not to engage in any discussion on "due diligence" at this stage". Wormald testified that Gupta effectively shut down any discussions with Vanstone in March 2008, stating that there were "[n]o further substantive discussions around an acquisition between us [RIM] and Certicom" from March 2008 until mid-September 2008 (Hearing Transcript, March 22, 2011 at page 146, lines 17 to 22). Although Vanstone provided RIM with information relating to Certicom's licence agreements that RIM had not previously received at the time of the 2008 RIM Golf Event, communication between RIM and Vanstone had ceased.

[247] With respect to paragraph [244](c), it is clear from the evidence and as noted in paragraph [229] above that, as of August 20, 2008, RIM had a continuing interest in acquiring Certicom. However, as concluded in paragraphs [229] and [234] above, we have found that, at that time, RIM was not proposing to make a take-over bid for Certicom or enter into a business combination with Certicom.

[248] With respect to paragraph [244](d), the evidence of Donald and Wormald as to how the topic of Certicom arose at the 2008 RIM Golf Event is not consistent. Wormald testified that Certicom came up in a "what are you working on" type of discussion, while Donald testified that Certicom came up in the context of a discussion about undervalued companies. However the topic did arise, the conversation included a discussion about Wormald's work relating to Certicom as a potential acquisition by RIM.

[249] Wormald told Donald that RIM had been in acquisition talks with Certicom, but that Certicom's board of directors was not interested in such discussions at the time. At the time of the hearing, Wormald remembered mentioning the frustration around the status of discussions with Certicom, but did not recall much additional detail about what he had said concerning RIM's work relating to Certicom. Donald testified that he understood that Wormald was in discussions with Vanstone, but that he did not know that any one else at RIM was in discussions with Vanstone.

[250] At the time of the hearing, Donald seemed to recall that Wormald placed Certicom's value at about $5.00 per share in their discussion at the 2008 RIM Golf Event. Donald did not recall in testimony, as he had in his compelled examination by Staff during its investigation of this matter, that Wormald believed Certicom was undervalued based on its patents, licensing agreements and its importance to technology providers which required security. In his examination by Staff, Donald stated the following:

> … The discussion came up. I can't remember how the discussion came up. But we were talking about undervalued companies.
>
> …
>
> Chris [Wormald] offered up that he felt that Certicom was an undervalued company, that he felt that, you know, it would be worth $5 based on their patent [sic], based on their licensing agreements and, you know, based on how important the company was …
>
> (Hearing Transcript, March 28, 2011 at page 118, line 19 to page 119, line 3)

[251] Donald's position is that Certicom was brought up in a general discussion about undervalued companies. Donald was aware of Wormald's position as Vice President, Strategic Alliances when they spoke, and he became aware through the conversation that RIM was interested in Certicom as an acquisition, however frustrated it was at the time with the progress of discussions with Certicom. Our conclusion that Donald understood that their discussion related to the work at RIM respecting the acquisition of Certicom is supported by Donald's offer to assist Wormald by putting him in contact with Deck, a former CEO of Certicom.

[252] Based on the evidence, we find that Donald learned of the following facts from Wormald during their dinner conversation at the 2008 RIM Golf Event:

(a) RIM had been, but was not then currently, engaged in confidential discussions with Certicom relating to a potential acquisition of Certicom by RIM;

(b) RIM had an ongoing interest in acquiring Certicom; and

(c) Certicom's then current share price was undervalued based on Certicom's licensing agreements;

(collectively, the "**Three Facts**").

[253] In light of the foregoing conclusions, we turn to the materiality of the Three Facts at the time Donald purchased Certicom shares.

(b) RIM's Interest in Certicom

[254] The Commission noted in *AiT* that specifics with respect to a merger transaction may be material for the purposes of insider trading before disclosure of a material change is required:

> … For example, in a negotiation for a merger transaction, such negotiations may be material at a very early stage and for the purpose of insider trading laws, persons aware of such "material facts" should be prohibited from trading on this information. However, this may be well before the negotiations have reached a point of commitment to be characterized as a change in the issuer's business, operations or capital, and therefore, before public disclosure of the information would be appropriate.
>
> (*AiT*, *supra* at para. 210)

[255] As of August 21, 2008, RIM personnel were actively engaged in considering Certicom as a potential acquisition even though Certicom was not engaged in discussions with RIM about an acquisition at that time. RIM had received confidential documents pursuant to the 2007 NDA and the Strategic Alliances Group had obtained RIM's internal valuations of Certicom's intellectual property from Zindani.

(c) Source of Information and Importance Attached to Information

[256] Donnini refers to the case of *Securities and Exchange Commission v. Mayhew*, 121 F.3d 44 (2d Cir. 1997) ("***Mayhew***") in connection with the importance of the information relied on as a factor in determining materiality:

> … the court [in *Mayhew*] noted, at 52, that "a major factor in determining whether information was material is the importance attached to it by those who knew about it." *Mayhew* concerned a securities trader who had received inside information in respective [*sic*] of a potential merger and traded on the basis of that information. Based on the facts, the court employed a contextual approach and held, at 52, that, "Although Mayhew was not given the specific details of the merger, a lesser level of specificity is required because he knew the information came from an insider and that the merger discussions were actual and serious." Accordingly, the Court concluded that the information at issue was material. In our case, Donnini may not have been aware of all the specifics of the negotiation but he knew it was being undertaken at the highest level at Yorkton and KCA and that Paterson was keen, while KCA was in need of further financing and interested: he knew that the negotiations were actual and serious.
>
> (*Donnini*, *supra* at para. 152)

[257] Although Donald may not have known the specifics of the work being undertaken with respect to Certicom by the Strategic Alliances Group, the fact that he learned the Three Facts from Wormald, who was responsible for the Group, is an important factor to be considered. What Donald did after learning of the Three Facts, namely, placing an order to purchase Certicom shares prior to the opening of the markets the next day, provides a further indication of the importance he ascribed to those facts, notwithstanding his protestations to the contrary.

[258] In *Re Danuke* (1981), 2 O.S.C.B. 31C ("***Danuke***"), one of the respondents, a Ms. Danuke, became aware that The Toronto-Dominion Bank was about to announce its intention to offer to purchase TD Realty Investments at $24.00 per unit. On the same day, she and others purchased units in the target company at prices at and below $21.00 per unit (*Danuke*, *supra* at 32C-33C). In its decision, the Commission stated:

> … The evidence of Danuke and the former T.D. officer was not clear as to what he told Danuke but the fact is that immediately following that conversation she informed the other members of the

> sales group of her belief that that afternoon T.D. would announce its intention to purchase the TDRI trust units for $24.00 per unit. Danuke gave the other members of the sales group to understand that this information had come from an officer of T.D.
>
> (*Danuke*, *supra* at 34C)

[259] The Panel in *Danuke* concluded that the conduct of the respondents refuted their suggestion that the information they had was only "rumour":

> The information possessed by the T.D. officer that his employer intended to announce its intention to offer to purchase all of the outstanding units of TDRI at $24.00 per unit following the close of trading that day was a "material fact" …. While, as we have noted, the other sales persons were not told specifically that specific information had been obtained from a T.D. officer nonetheless Danuke led them correctly to believe that she had been talking to a T.D. officer. Scott and MacDonald acted upon what they were led to believe was inside information and what Danuke knew to be inside information. While they and their counsel insist on styling the information to be a "rumour" their subsequent conduct refutes this suggestion. [Emphasis added.]
>
> (*Danuke*, *supra* at 39C)

[260] We also considered the U.S. case of *Texas Gulf Sulphur*, in which the court found that the importance of the information to those who had received it could be taken into account in determining materiality:

> … a major factor in determining whether the K-55-1 discovery was a material fact is the importance attached to the drilling results by those who knew about it. In view of other unrelated recent developments favorably affecting TGS, participation by an informed person in a regular stock-purchase program, or even sporadic trading by an informed person, might lend only nominal support to the inference of the materiality of the K-55-1 discovery; nevertheless, the timing by those who knew of it of their stock purchases in some cases by individuals who had never before purchased calls or even TGS stock – virtually compels the inference that the insiders were influenced by the drilling results. This insider trading activity, which surely constitutes highly pertinent evidence and the only truly objective evidence of the materiality of the K-55-1 discovery, was apparently disregarded by the court below in favor of the testimony of defendants' expert witnesses, all of whom 'agreed that one drill core does not establish an ore body, much less a mine. [Emphasis added.]
>
> (*Texas Gulf Sulphur*, *supra* at 851)

[261] Although Donald had been familiar with Certicom for years, he had never before purchased Certicom securities. Within hours of becoming aware of the Three Facts, Donald placed an order with his broker to purchase $300,000 worth of Certicom shares. Donald submits that the discussion of Certicom reminded him of Certicom, and that he did his own internet-based research relating to Certicom, looking at its trading history, the trends of its share price and reading its press releases, the following morning prior to placing his purchase order. We were not presented with any additional evidence in support of Donald's testimony that he researched Certicom on the morning of August 21, 2008 before placing a call to his broker, Hinsperger, at about 9:00 a.m. Notwithstanding Donald's testimony, the timing of his purchases of Certicom shares, in the words of the court in *Texas Gulf Sulphur*, virtually compels the inference that he was motivated to purchase the shares, at least in part, on learning of the Three Facts from Wormald the previous evening. We note, however, that there is no legal requirement that Staff prove that Donald made use of that information in purchasing the shares of Certicom. The legal requirement is that Donald had knowledge of that information when he traded.

(d) Dr. Comment's Expert Evidence with respect to Materiality

[262] Dr. Comment provided his opinion as to the effect that the Four Facts, as alleged by Staff, would have had on the price of Certicom securities had they been generally disclosed. Based on his analysis, Dr. Comment concluded that the information conveyed to Donald at the 2008 RIM Golf Event was not material non-public information. In his analysis, Dr. Comment considered whether the Four Facts "would reasonably be expected" to have a significant effect on Certicom's share price had they been made public in a hypothetical disclosure to the market by RIM at around the time of the 2008 RIM Golf Event.

[263] Dr. Comment provided the following four bases for his conclusion:

(a) RIM did not include Donald on an In-the-Know List at the relevant time.

(b) Merger-related discussions between RIM and Certicom before the 2008 RIM Golf Event were negligible, and would have been immaterial to the investing public.

(c) The fact of RIM's continuing interest in Certicom was not news in the sense that it was already in the mix of public information at the time of the 2008 RIM Golf Event, and would not therefore have moved the stock price had it been disclosed at that time.

(d) Wormald's "valuation opinion" that Certicom was worth $5.00 per share was not delivered at the 2008 RIM Golf Event with a specificity sufficient to make it material. This was Wormald's opinion and not necessarily a fact. For this information to be material, there would need to be a level of specificity or detail as to why Wormald believed what he did, which was not provided at the 2008 RIM Golf Event. Wormald's naked opinion that Certicom was worth $5.00 per share was not, therefore, material.

[264] Dr. Comment's opinion is that if RIM had issued a press release that included the information Donald learned from Wormald at the 2008 RIM Golf Event, it would not have significantly changed Certicom's stock price, i.e. a hypothetical press release from RIM on August 21, 2008 would essentially be a nullity conveying no material information.

[265] Dr. Comment concluded that insufficient information was communicated to Donald with regard to the likelihood of a transaction between RIM and Certicom to make Wormald's communications to Donald at the 2008 RIM Golf Event material. Dr. Comment stated in his expert report:

> … note the lack of specificity of the information conveyed during the golf dinner, where a lack of specificity weighs against any finding that information regarding an uncertain future transaction is material. At the time of the golf dinner, the missing markers of a likely future transaction included: (1) current interest in the transaction at the highest corporate levels, (2) a board resolution or the formation of a special committee, (3) retention of investment bankers, (4) retention of outside counsel, (5) serious merger talks between principals or their intermediaries, (6) due diligence visits, (7) plans to solicit additional bidders, (8) integration planning and (9) internal controls such as a blackout list.
>
> In my opinion, any finding of materiality here would have to be based on the sheer identity of the source, Chris Wormald, on the theory that his job description made any mention by him of a possible transaction inherently authoritative to the point of materiality. This is too speculative to support an expert opinion favoring materiality, however, and I see no additional supporting basis.
>
> (Affidavit of Dr. Comment, sworn December 15, 2010 at paras. 35-36)

[266] Dr. Comment noted that he had a low opinion of Wormald's valuation of Certicom at $5.00 per share because it was not "conveyed with a basis other than perhaps some implied-in basis, but no express basis" (Hearing Transcript, March 30, 2011 at page 142, lines 4 to 6). Dr. Comment testified that any opinion about the value of Certicom was necessarily an opinion about the value of its patents, so he did not see any substantive basis for Wormald's opinion that would have led him to conclude that it was material. Dr. Comment noted that "[t]he quality, the weight one would attach to the opinion really flows from the basis, not from the opinion" (Hearing Transcript, March 30, 2011 at page 142, lines 1 to 3).

[267] In our view, Dr. Comment has overstated the importance of the matter described in paragraph [263](a) above and understated the importance of the matters described in paragraphs [263](b), (c) and (d) above. We do not agree that the fact of RIM's continuing interest in Certicom was already in the mix of public information at the time of the 2008 RIM Golf Event. In addition, Donald would have considered Wormald's analysis of Certicom's value and the possibility of a transaction to be, in the words of Dr. Comment in his evidence, "inherently authoritative to the point of materiality" given Wormald's responsibilities at RIM, RIM's internal valuation of Certicom's licensing agreements and Donald's knowledge of the importance of Certicom's ECC technology to RIM and to the industry and, therefore, to other potential buyers. Accordingly, we do not accept the opinion of Dr. Comment. Ultimately, as noted earlier in our Decision, materiality is an issue for the Panel to determine.

(e) Were the Three Facts Material?

[268] Donald submits that there was nothing in Wormald's conversation with Donald to "tip". He submits that no decision to proceed with a Certicom acquisition had yet been made by RIM, and RIM had not taken the step of engaging investment bankers or lawyers to work on the transaction as of the date of the 2008 RIM Golf Event.

[269] Although we found above that RIM was not proposing to make a take-over bid for Certicom in August 2008, that is not to say that the information provided to Donald regarding the status of RIM's consideration of a potential acquisition of Certicom was not material. Assessing the materiality of information is a separate analysis from the analysis of subsection 76(5)(a)(ii) of the Act.

[270] In determining whether Donald was in possession of any material facts after his August 20, 2008 conversation with Wormald, we apply an objective market impact test, as set out in the Act and applied previously by the Commission. The question to be asked is whether Donald was in possession of a fact that, at the time he placed his order to purchase Certicom shares on August 21, 2008, would reasonably be expected to have had a significant effect on the market price or value of Certicom securities if generally disclosed.

[271] Given that the Three Facts were communicated by Wormald to Donald as part of the same conversation, we do not consider it useful to undertake a separate analysis of each of the Three Facts to determine if each of them was material. In addition, it has been established in previous cases that the cumulative effect of a number of facts may be considered together in determining materiality. In our view, the Three Facts, taken together, would, if generally disclosed on the day following the 2008 RIM Golf Event, reasonably be expected to have significantly affected the market price or value of Certicom's securities, and would therefore be a material fact.

[272] We reiterate a statement that has been made in past Commission decisions; a determination of materiality is not a bright-line test, but is a common-sense judgment that must take into account the specific circumstances. NP 51-201 provides that materiality will vary between companies based on many factors, including the nature of the information communicated, the volatility of the securities, the size of the company and the nature of the company's operations (NP 51-201, *supra* at s. 4.2).

[273] Taking into account that (i) Certicom had provided RIM with confidential information pursuant to the 2007 NDA; (ii) RIM had used the confidential information in connection with its valuation of Certicom; (iii) Wormald was the officer overseeing RIM's analysis with respect to Certicom and was the person who communicated the Three Facts to Donald; and (iv) none of the Three Facts had been generally disclosed, we are of the view that the Three Facts communicated to Donald together constituted material facts.

[274] Our finding is also supported by the application, by analogy, of the American reasonable investor test. Given the substance of the Three Facts and the context in which they were communicated to Donald, we find it substantially likely that a reasonable investor would consider the Three Facts important in deciding whether to purchase or sell Certicom securities. Certicom's ECC technology was valuable to RIM and others in an industry in which RIM was a large participant with the resources to acquire Certicom. A reasonable investor, knowing that the officer at RIM who was overseeing the analysis of Certicom as a potential acquisition thought the company was undervalued, would be expected to take this information into account when making investment decisions with respect to Certicom.

[275] We have found that, at the time of the 2008 RIM Golf Event, RIM was not proposing to make a take-over bid for Certicom, nor was it proposing any other form of business combination. We heard arguments from the parties with respect to the application of the American probability/magnitude test in this case. In our view, the question is not whether in applying the American probability/magnitude test there was a substantial likelihood that RIM would acquire Certicom. The question is whether the Three Facts, if disclosed, would have significantly affected the market price or value of Certicom's shares.

[276] We find that the Three Facts taken together would reasonably be expected to have had a significant effect on the market price or value of Certicom shares if generally disclosed on August 21, 2008, the date on which Donald placed his order to purchase Certicom shares. Accordingly, the Three Facts taken together constitute material facts within the meaning of the Act.

E. Was Donald in possession of a material fact that was not generally disclosed when he purchased Certicom securities in August 2008?

[277] Donald submits that the information provided by Wormald at the 2008 RIM Golf Event was non-specific, conjectural, full of opinion and publicly available. Donald refers to the fact that the conversation did not take place in secret and that it was not hushed or hurried, and submits that it took place in a public setting.

[278] It does not appear that Wormald discussed the specifics of the work being done in the Strategic Alliances Group in any great detail when he spoke with Donald. However, the Three Facts had not been generally disclosed and were of sufficient specificity for us to conclude that they were material. The conversation may not have taken place "in secret", as Donald submits, but that is not to say that it was not confidential in nature.

[279] Although there were some Redtail staff present during the dinner, the 2008 RIM Golf Event was a private event, attended exclusively by RIM's officers. Donald's conversation with Wormald, at a table of RIM Vice Presidents and at a private venue, was not comparable to a conversation in a public restaurant and, in any event, would not have constituted general disclosure.

[280] Section 3.5 of NP 51-201 provides further guidance on the term "generally disclosed":

> Securities legislation does not define the term "generally disclosed". Insider trading court decisions state that information has been generally disclosed if:
>
> (a) the information has been disseminated in a manner calculated to effectively reach the marketplace; and
>
> (b) public investors have been given a reasonable amount of time to analyze the information.
>
> (NP 51-201, *supra* at s. 3.5(2))

[281] The Three Facts communicated by Wormald to Donald at the 2008 RIM Golf Event had not been generally disclosed and the valuation information, which was a confidential internal RIM valuation, was based, in part, on confidential information relating to Certicom's licence agreements provided by Certicom pursuant to the 2007 NDA.

[282] Dr. Comment's opinion was that RIM's interest in Certicom was already reflected in Certicom's share price at the time of the 2008 RIM Golf Event:

> The upshot of my review of RIM's acquisition policy and practice is that the mix of public information regarding Certicom would have included the fact that it would be unexceptional for RIM to acquire Certicom.
>
> (Affidavit of Dr. Comment, sworn December 15, 2010 at para. 24)

[283] Dr. Comment further stated:

> … the mix of public information included the fact that no other Canadian company could have (justifiably) outbid RIM in a contest to acquire Certicom. RIM was an obvious buyer of Certicom and probably the dominant candidate, worldwide, for that role.
>
> …
>
> … Certicom was an obvious acquisition candidate due to a large bonus payout for shareholders if Certicom were to be acquired by a profitable Canadian company. RIM was an obvious acquirer for Certicom because Certicom's skills and intellectual property were more relevant to RIM's business than to that of all but a few companies worldwide. In my opinion, the existing mix of information at the time of the golf dinner included the fact that RIM would have to be crazy not to have a continuing interest in acquiring Certicom. Accordingly, the third piece of information … delivered to Paul Donald and alleged by the staff of the OSC to be material was not actually material because it was not new information when conveyed.
>
> (Affidavit of Dr. Comment, sworn December 15, 2010 at paras. 27 and 29)

[284] At the time of the 2008 RIM Golf Event, RIM had information about Certicom that was not generally disclosed. Although the patent information was publicly available, the valuation work RIM was undertaking with respect to Certicom was not. The work being done by the Strategic Alliances Group in preparing valuations for Certicom in 2008 was confidential, as were the discussions RIM and Certicom had had earlier in 2008 and Balsillie's instructions to Wormald to look into Certicom. Mention of the Three Facts at the 2008 RIM Golf Event did not constitute general disclosure.

[285] Given RIM's reliance on Certicom's technology, it would follow that Certicom would be a likely acquisition for RIM. However, the information provided to Donald by Wormald on August 20, 2008 went further than the information that was publicly available and to which Certicom shareholders had access on August 20, 2008.

F. Findings

[286] We find that (i) Donald was in possession of material facts that were not generally disclosed when he purchased Certicom shares in August and September 2008; (ii) RIM had been interested in acquiring Certicom, but Certicom was not interested in pursuing a transaction at that time; (iii) RIM personnel were in the process of recommending to RIM's senior management that RIM take steps to acquire Certicom; and (iv) Certicom was undervalued based on RIM's valuation of its patents and licensing agreements and how important Certicom's ECC technology was to technology providers that required security for their electronic devices, including RIM.

[287] We cannot, however, find that Donald was a person in a special relationship with Certicom at the time that he purchased Certicom shares. To reach such a conclusion, RIM would have to have been proposing to make a take-over bid for Certicom, or proposing some other arrangement or business combination with Certicom as of August 21, 2008. Although RIM's acquisition of Certicom was a serious possibility as of August 21, 2008, RIM had not at that time reached the stage of proposing to make a bid to acquire Certicom securities.

[288] We must therefore conclude that Donald did not breach subsection 76(1) of the Act when he purchased Certicom shares in August and September 2008.

VII. ANALYSIS OF THE ALLEGATION OF CONDUCT CONTRARY TO THE PUBLIC INTEREST

A. Submissions of the Parties

1. Staff's Submissions

[289] Staff submits that the Commission's public interest jurisdiction allows us to make an order under section 127 of the Act regardless of whether there has been a breach of the Act, citing *Re Canadian Tire Corp.* (1987), 10 O.S.C.B. 857 ("***Canadian Tire***") and *Biovail* as authority. Staff bases its submission on this point on the principle that market participants should conduct themselves ethically and honestly. Staff refers to National Policy 58-201 – *Corporate Governance Guidelines* (2005), 28 O.S.C.B. 5383 ("**NP 58-201**") which requires high standards of business conduct to ensure honest and responsible conduct by market participants.

[290] Staff refers to the case of *Danuke* in which the Commission held that insider trading that did not fall within the scope of the predecessor to section 76 of the Act, was contrary to the public interest. In *Danuke*, the Commission imposed sanctions pursuant to its public interest mandate. Staff also notes *Re Seto*, 2003 LNABASC 81 ("***Seto***"), a case in which the Alberta Securities Commission concluded that conduct contrary to the public interest was amply established despite the fact that there was no liability under the insider trading provision.

[291] In this case, Staff submits that Donald's behaviour was contrary to the public interest.

[292] Staff submits that, as an officer of RIM, and therefore a "market participant" as defined in subsection 1(1) of the Act, the standard of behaviour expected of Donald was high. Staff submits that Donald failed to adhere to this high standard by using confidential information obtained while employed by RIM to make purchases of Certicom shares.

[293] Staff further submits that Donald did not comply with RIM's *Business Standards and Principles*, which prohibit unethical behaviour and, in particular, profiting from the unauthorized use of confidential information. Staff submits that "confidential information" is defined very broadly in RIM's *Code of Ethics* and *Employee/Consultant Confidentiality and Intellectual Property Agreement*, and would include the Four Facts communicated to Donald by Wormald. Staff submits that Donald's use of this confidential information for profit is evident in that, at a minimum, it caused him to consider investing in Certicom. Staff submits that the provisions of the *Code of Ethics* are not just RIM's requirement but are also a requirement of the Commission. Staff refers to section 3.8 of NP 58-201 which sets out the following requirement:

> The board should adopt a written code of business conduct and ethics (a code). The code should be applicable to directors, officers, and employees of the issuer. The code should constitute written standards that are reasonably designed to promote integrity and to deter wrongdoing. In particular, it should address the following issues:
>
> (a) Conflicts of interest, including transactions and agreements in respect of which a director or executive officer has a material interest;
>
> (b) Protection and proper use of corporate assets and opportunities;
>
> (c) Confidentiality of corporate information;
>
> (d) Fair dealing with the issuer's security holders, customers, suppliers, competitors and employees;
>
> (e) Compliance with laws, rules and regulations; and
>
> (f) Reporting of any illegal or unethical behaviour.

[294] Staff contends that, in using RIM's confidential information to make the purchases of Certicom shares, Donald, in addition to enriching himself, caused potential harm to RIM, including the risk of a breach of RIM's confidentiality agreement(s)

with Certicom, the risk of prejudicing a transaction with Certicom and the risk of harm to RIM's reputation and integrity and the market integrity of RIM's securities and investor confidence in that market.

[295] Staff further submits that Donald's purchases of Certicom shares caused harm to the integrity of the Ontario capital markets in general because he was an officer of a reporting issuer and a market participant who knew or should have known not to purchase Certicom shares in the circumstances.

[296] Staff submits that Donald's purchases of Certicom shares was also in breach of RIM's *Insider Trading Policy*, which stipulates that a RIM insider (which includes officers and employees of RIM):

> [M]ay not buy or sell securities of another public company while in possession of material, non-public information regarding that company, which knowledge was gained in the course of the Insider's work at, or affiliation with, RIM.

[297] Staff submits Donald's behaviour violated the very principles he promised to uphold and was far below the standard of ethical behaviour required of market participants.

[298] Staff argues that Donald's trading, whether with knowledge of material facts or not, appears to be unfair to the public for the very reason that Donald was an insider of RIM, and, but for his discussion with Wormald, he would not have purchased Certicom shares. Staff submits that Donald made these purchases when he had information that the market did not have and his conduct accordingly lessened the confidence of the investing public in the marketplace, and is therefore a matter of public concern.

2. Donald's Submissions

[299] Donald submits that this case is distinguishable from other public interest cases because Donald was not aware that the information conveyed to him by Wormald, during what he asserts was a casual conversation, was or could have been confidential.

[300] Donald acknowledges that the integrity of the capital markets requires insiders to adhere to the highest ethical and professional standards of conduct when dealing with confidential information, and submits that he understood and always complied with RIM's corporate policies on confidentiality and insider trading and its *Code of Ethics*.

[301] Donald submits that he did not use the information conveyed to him by Wormald to make his purchases and did not breach RIM's policies. Donald contends that it can be safely concluded that, if RIM believed Donald had used RIM's confidential information for his own advantage or profit in breach of RIM's policies, it would not have paid him $3.00 per share for his Certicom securities in March 2009 when RIM successfully completed its acquisition of Certicom. Further, Donald submits that we are now being asked to second-guess RIM's conclusion and enter into the fray of potential employment-related matters between an employer and an employee. He takes the position that an alleged breach of a company's internal policies by an employee does not engage a fundamental principle recognized in the Act.

[302] Donald points out that NP 58-201, which recommends that boards adopt a code of ethics, is a suggested guideline, not a mandatory requirement. Further, Donald submits that a finding that his conduct was contrary to the public interest predicated on a breach of a RIM policy with respect to confidential information would be a movement away from the Act's requirements with respect to insider trading, and towards policing the employment contract between Donald and RIM.

[303] Donald submits that it would be contrary to the free flow of public discussion and discourse and damaging to the capital markets to find that Donald acted contrary to the public interest in circumstances where he contends that (i) it is unclear whether he was ever in a special relationship with Certicom; (ii) the information provided had no hallmarks of a "tip"; (iii) the trades had no suspicious elements to them; and (iv) he had clearly stated his rationale for the trades.

B. The Law relating to the Commission's Public Interest Jurisdiction

[304] The Supreme Court clarified the scope of the Commission's public interest jurisdiction under section 127 of the Act in the *Asbestos* case, cited earlier in these Reasons:

> … the public interest jurisdiction of the OSC is not unlimited. Its precise nature and scope should be assessed considering s. 127 in context. Two aspects of the public interest jurisdiction are of particular importance in this regard. First, it is important to keep in mind that the OSC's public interest jurisdiction is animated in part by both of the purposes of the Act described in s. 1.1, namely "to provide protection to investors from unfair, improper or fraudulent practices" and "to foster fair and efficient capital markets and confidence in capital markets". …
>
> (*Asbestos*, *supra* at para. 41)

[305] Although a Panel may not find a technical breach of the provisions of the Act, it may still consider whether the conduct of a respondent warrants a finding that such conduct was contrary to the public interest. The Commission has stated in *Canadian Tire*, *supra* at 28 (QL):

> Equally clearly in our view, the Commission should act to restrain a transaction that is clearly abusive of investors and of the capital markets, whether or not that transaction constitutes a breach of the Act, regulations or a policy statement.

[306] As stated in *Biovail*, another decision in which the Commission found that the respondent's conduct was contrary to the public interest even though it did not contravene Ontario securities law:

> … where market conduct engages the animating principles of the Act, the Commission does not have to conclude that an abuse has occurred in order to exercise its public interest jurisdiction.
>
> (*Biovail*, *supra* at para. 382)

In *Biovail*, the Commission considered its public interest jurisdiction in the context of allegations regarding inaccurate or misleading disclosure and concluded that:

> We should not interpret or constrain our public interest jurisdiction in a manner that condones inaccurate, misleading or untrue public disclosure regardless of whether that disclosure contravenes Ontario securities law. The issues raised by this matter directly engage the fundamental principle recognised in the Act for timely, accurate and efficient disclosure.
>
> (*Biovail*, *supra* at para. 382)

[307] In dealing with cases involving allegations of trading while in possession of undisclosed information in the past, the Commission has also found that, although the conduct of a respondent was not in breach of a particular provision of Ontario's securities law, the respondent's conduct was nonetheless contrary to the public interest. In *Seto*, the Alberta Securities Commission considered whether the conduct of Mr. Seto with respect to the granting of options was in breach of the insider trading prohibition in the *Securities Act* (Alberta), R.S.A. 2000, c. S-4. The panel concluded that a "technical gap in the legislation" prevented them from making a finding that his conduct was in breach of the insider trading provisions, but found that the facts amply established conduct contrary to the public interest, noting that "the Respondent used his position as CEO and a director of Inter-Tech to exploit material information that had not been generally disclosed" (*Seto*, *supra* at para. 52). The panel in *Seto* also stated that:

> Public confidence in the fairness of securities markets is damaged when directors and officers of reporting issuers are seen to benefit from securities trading using information obtained as a result of their position or relationship with a reporting issuer that has not been made available to the market as a whole. The Respondent's conduct, if not addressed, is bound to undermine public confidence in those who lead public companies and to call into immediate question the very integrity of our capital markets.
>
> (*Seto*, *supra* at para. 53)

[308] In *Danuke*, one of the respondents, a Ms. Danuke, became aware through a conversation with an officer of The Toronto-Dominion Bank that it was about to announce its intention to purchase all of the assets of TD Realty Investments. Ms. Danuke communicated this information to the other respondents, and the respondents subsequently purchased securities in TD Realty Investments for their own accounts. The Commission found that the conduct of the respondents was contrary to the public interest and stated:

> It is the Commission's view that all registrants ought to understand that they have a duty not to attempt to profit, directly or indirectly, through the use of insider information that they believe is confidential and know or should know came from a person having a special relationship with the source of the information.
>
> (*Danuke*, *supra* at 40C)

C. Did Donald's purchases of Certicom shares constitute conduct contrary to the public interest?

[309] We now consider whether Donald's conduct, in light of the facts set out above, was contrary to the public interest.

(a) Donald's Knowledge

[310] Donald refers us to the statement in *Re ATI Technologies Inc.* (2005), 28 O.S.C.B. 8558 at para. 73:

> To establish, for the purposes of subsection 76(1) of the Act, that a respondent knew an undisclosed material fact at the time of the disposition of shares, it must be shown that the respondent had subjective or actual knowledge of that alleged fact at the time.

[311] As we concluded above, Donald was in possession of undisclosed material facts when he placed his order to purchase Certicom shares on August 21, 2008. He had subjective and actual knowledge of the material facts communicated to him by Wormald the previous evening when he placed an order to purchase Certicom shares at approximately 9:00 a.m. on the day following the 2008 RIM Golf Event. Given the evidence that Donald and his colleagues returned to RIM's offices from the 2008 RIM Golf Event at approximately 11:30 p.m., it is simply not credible for Donald to suggest that his decision to purchase Certicom shares was based solely on his independent analysis of Certicom undertaken immediately prior to placing his purchase order. In our view, Donald should not have traded in Certicom shares with knowledge of those material facts.

(b) Donald's Purchases of Certicom Shares

[312] It is true that Donald did not attempt to hide his purchases of Certicom shares, but traded in his customary manner, including placing the order for his Certicom purchases through his usual investment advisor. He placed a purchase order for $300,000 worth of Certicom shares at prices no higher than $1.55 per share. It took until September 15, 2008 for his share purchases to be completed, at which point he had acquired 200,000 Certicom shares at a total cost of $305,000. Donald did not attempt to conceal the purchases from RIM later in 2008 and disclosed them when RIM announced its intention to make an offer for Certicom in December 2009.

[313] The value of Certicom shares purchased by Donald, although high at $305,000, was not inconsistent with his previous trading patterns. It was by no means an insignificant investment, but we do note that the value of Donald's portfolio at the time exceeded $10 million. It may be that Donald did not consider that his trading was improper, however, we have come to a different conclusion.

D. Findings

[314] Donald was an officer of RIM at the time he learned from Wormald, another RIM Vice President who, to his knowledge, was responsible for assessing possible acquisitions by RIM, of RIM's interest in acquiring Certicom and the other elements of the Three Facts. In our view, Donald had to have known that (i) the information he received from Wormald was confidential and had not been made public; (ii) if the information had been generally disclosed, it would have had a significant effect on the market price or value of Certicom shares; and (iii) the information was provided to him on a confidential basis in the expectation that he would not use the information for personal gain.

[315] The 2008 RIM Golf Event was a private event attended only by RIM officers. Donald's discussion with Wormald about Certicom that evening was clearly about RIM's business, was clearly about information that had not been generally disclosed and that information was clearly confidential. We do not agree with Donald's assertion that Wormald should have informed him that the discussion concerning Certicom should be treated as confidential.

[316] We should note that our conclusion that Donald did not breach subsection 76(1) of the Act is based on our determination that, on August 21, 2008, RIM had not yet reached the stage of proposing to acquire Certicom. RIM was, however, actively considering a potential transaction and that consideration gave rise to a proposal a relatively short time after Donald's purchases.

[317] The facts of this matter are very unusual. We concluded that RIM was not, on the day following the 2008 RIM Golf Event, proposing to make a take-over bid or other business combination or arrangement involving Certicom, however, RIM, and more specifically, the Strategic Alliances Group, was in possession of information about Certicom only acquired by RIM through its due diligence activities relating to Certicom. We heard evidence that RIM determined it should not purchase Certicom shares, both before and after the expiry of the 2007 NDA (along with the standstill provision contained therein). Wormald testified in this respect:

> … my recollection is there was a discussion with securities lawyers, and I don't remember who and which, there was a discussion with securities lawyers back in, you know, I'll call it March, April, May-type time frame about accumulating shares that, you know, where we were given the advice that the standstill that was in place at the time prevented us from effectively doing that.

> I recall a conversation after that standstill-based NDA expired with some securities lawyers, it may not have been all of them, it might have been a subset of them, that, you know, explored the issue a little bit more and left us with the conclusion that it just wouldn't really be very workable.
>
> (Hearing Transcript, March 22, 2011 at page 122, line 22 to page 123, line 11)

[318] Donald, who was an officer and employee of RIM, learned of material facts about Certicom in the context of a confidential discussion with another RIM Vice President. Not only did Donald learn the Three Facts on August 20, 2008, but he learned of them directly from Wormald, the RIM officer who was the head of the Strategic Alliances Group. Donald was an experienced investor who had sophisticated knowledge of the wireless industry.

[319] Market participants and the officers of public companies, such as Donald, are expected to adhere to a high standard of behaviour. In our view, by purchasing securities with knowledge of material facts which had not been generally disclosed, Donald clearly failed to meet that standard and did so in a manner that impugns the integrity of Ontario's capital markets.

[320] We share the view of the Alberta Securities Commission expressed in *Seto* that the failure of the Commission to address trades that are based on information obtained as a result of a person's position or relationship that has not been made available to the market calls into question the very integrity of our capital markets.

[321] The Commission stated in *Donnini* that:

> … we did not need to find that Donnini used undisclosed material facts, or that he benefited personally from the misuse of inside information. We needed only to find that he traded while in possession of undisclosed material facts.
>
> (*Donnini*, *supra* at para. 113)

[322] In this case, Donald had knowledge of confidential material facts about Certicom that were communicated to him as an officer of RIM when he purchased Certicom shares. Donald benefited personally from these purchases of Certicom shares, receiving proceeds of $600,000 from RIM when RIM acquired all of the shares of Certicom in March 2009. His gross profit was $295,000.

[323] Although we do not find any technical breach of subsection 76(1) of the Act, we find that Donald's purchases of Certicom shares directly engage the fundamental principles of securities regulation and the purposes of the Act. The unusual circumstances of this matter warrant a finding that Donald's conduct was contrary to the public interest.

[324] We find that Donald's purchases of Certicom shares in August and September 2008, while he was in possession of undisclosed material facts regarding RIM's interest in Certicom, constituted conduct contrary to the public interest. We find that Donald's conduct was abusive of the capital markets and to confidence in the capital markets.

VIII. CONCLUSION

[325] For the reasons set out above, we find that Donald did not breach subsection 76(1) of the Act but that his conduct was contrary to the public interest.

[326] We have also issued an order dated August 1, 2012 which sets down the date for the hearing with respect to sanctions and costs in this matter.

Dated at Toronto this 1st day of August, 2012.

"Christopher Portner"

"Paulette L. Kennedy"

3.1.4 Sanjiv Sawh and Vlad Trkulja – s. 8

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

AND

IN THE MATTER OF
AN APPLICATION FOR A HEARING AND REVIEW OF
THE DECISION OF DIRECTOR BRIDGE OF THE
ONTARIO SECURITIES COMMISSION, PURSUANT TO
SUBSECTION 8(2) OF THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
SANJIV SAWH AND VLAD TRKULJA

REASONS FOR DECISION
(Section 8 of the Securities Act)

Hearing:	September 9, 12, 14, 15 and 16, 2011 November 7, 2011		
Decision:	August 1, 2012		
Panel:	Mary G. Condon	–	Vice-Chair and Chair of the Panel
	Judith N. Robertson	–	Commissioner
Appearances:	Robert Goldstein Mark Skuce	–	For Staff of the Commission
	Ari Kulidjian	–	For Sanjiv Sawh and Vlad Trkulja

TABLE OF CONTENTS

REASONS FOR DECISION

I. OVERVIEW

A. Introduction

[1] This is an application (the "**Application**") by Sanjiv Sawh ("**Sawh**") and Vlad Trkulja ("**Trkulja**"), pursuant to subsection 8(2) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**"), for the Ontario Securities Commission (the "Commission") to review a decision of a Director of the Commission dated January 25, 2011 ((2011), 34 O.S.C.B. 1059 (the "**Director's Decision**")).

[2] The Director's Decision denied the reinstatement of the Applicants' registrations as dealing representatives of a mutual fund dealer ("**MFD**"). The Director found that neither of the Applicants demonstrated the required integrity or proficiency of securities professionals and that the reinstatement of the Applicants' registrations was objectionable.

[3] A hearing before a Panel of the Commission to consider the Application commenced on September 9, 2011 (the "**Hearing and Review**"). The Applicants were represented by counsel and also appeared in person. Staff of the Commission ("**Staff**") appeared to oppose the Application. The Application was heard as a hearing *de novo*, at which ten witnesses, including the two Applicants, five witnesses for the Applicants and three witnesses for Staff, testified on September 9, 12, 14, 15 and 16, 2011. The parties made closing submissions on November 7, 2011.

B. The Applicants

[4] Sawh was registered as a salesperson (and later dealing representative) from December 27, 1995 to May 10, 2010. Trkulja was registered as a salesperson (and later dealing representative) from April 25, 1994 to May 10, 2010.

[5] The Applicants were the founders, owners, directors and officers of the Investment House of Canada ("**IHOC**"). IHOC was registered under the Act as an MFD and a limited market dealer ("**LMD**") (now exempt market dealer ("**EMD**")). From September 2003 to May 2010, IHOC was a member of the Mutual Fund Dealers Association of Canada (the "**MFDA**"). Sawh

held positions as Chief Compliance Officer, Executive Vice President and Managing Director. Trkulja held positions as President and Chief Executive Officer. The Applicants collectively held all of the shares of IHOC at the time IHOC and the Applicants entered into a settlement with the MFDA (In these reasons, the settlement will be referred to as the "**MFDA Settlement**", and the settlement agreement (*Re Investment House of Canada*, 2010 CanLII 93086 (CA MFDAC)) will be referred to as the "**MFDA Settlement Agreement**").

C. History of Proceedings

1. The MFDA Proceeding

[6] The MFDA issued a Notice of Hearing dated November 30, 2009, announcing that it proposed to hold a hearing concerning a disciplinary proceeding commenced by the MFDA against IHOC and the Applicants in relation to 13 alleged violations of MFDA Rules, By-laws or Policies (the "**MFDA Proceeding**"). On April 8, 2010, IHOC and the Applicants entered into the MFDA Settlement Agreement with the MFDA in relation to the MFDA Proceeding, in which IHOC and the Applicants admitted to 11 contraventions of MFDA Rules, By-laws or Policies. The MFDA Settlement Agreement was approved by order of a hearing panel of the MFDA dated April 9, 2010 (*Re Investment House of Canada*, 2010 CanLII 85828 (CA MFDAC)). The reasons for approving the MFDA Settlement were issued on June 29, 2010 (*Re Investment House of Canada Inc.*, 2010 CanLII 86173 (CA MFDAC)) (the "**MFDA Settlement Reasons**").

[7] The terms of the MFDA Settlement are that IHOC was required to resign its membership in the MFDA and, in the interim, its membership was suspended until the MFDA approved its resignation (MFDA Settlement Agreement, *supra*, at para. 79). As section 6.4 of National Instrument 31-103 – *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("**NI 31-103**") stipulates, "[i]f a registered firm's registration in a category is suspended, the registration of each registered dealing, advising or associate advising representative acting on behalf of the firm in that category is suspended until reinstated or revoked under securities legislation". Accordingly, the Applicants' individual registrations as dealing representatives were suspended as a result of the suspension and resignation of IHOC's membership in the MFDA.

2. The Commission Proceedings

[8] On May 18, 2010, Staff received the Applicants' requests to reinstate their registrations as dealing representatives in the categories of MFD and EMD. Staff refused the Applicants' requests by letters dated September 20, 2010. The letters state that Staff had "significant concerns in respect of [the Applicants'] integrity and proficiency" because of the Applicants' admissions in the MFDA Settlement Agreement and the pattern of behaviour of the Applicants as disclosed in the complaints from former IHOC clients.

[9] By email dated September 22, 2010, the Applicants gave notice to the Commission that they wished to exercise their right for an Opportunity to be Heard pursuant to section 31 of the Act ("**OTBH**"). On November 2, 2010, a joint OTBH was held on consent of the parties. At the OTBH, both Applicants clarified that they were only seeking reinstatement of their registrations as dealing representatives in the category of MFD. They were not seeking reinstatement of their registrations as dealing representatives in the category of EMD.

[10] On January 25, 2011, the Director issued a written decision and reasons refusing the reinstatement of the Applicants' registrations.

D. Reasons for the Director's Decision to Refuse Registration

[11] As referenced at paragraphs [2] and [10] above, the Director refused the reinstatement of the Applicants' registrations as dealing representatives. Based on the Applicants' admissions in the MFDA Settlement Agreement, the affidavits of several clients of IHOC about the Applicants' conduct and the Applicants' failure to disclose a conflict of interest to clients of IHOC, the Director made the following decision:

> My decision is to deny the reinstatement of registration of both Applicants. In my view, the past conduct of both Applicants (based on the test set out in *Re Mithras*) leads me to conclude that their conduct in the future may well be detrimental to the integrity of the capital markets. As well, in my view, neither Applicant has demonstrated the required integrity or proficiency of securities professionals. I also find that the reinstatement of registration of each Applicant would be objectionable.
>
> (Director's Decision, *supra*, at para. 29)

E. Application for Hearing and Review pursuant to Subsection 8(2) of the Act

[12] On February 18, 2011, the Applicants filed an Application for a hearing and review of the Director's Decision pursuant to subsection 8(2) of the Act. The Application was filed in accordance with Rule 14 of the Commission's *Rules of Procedure* (2010), 33 O.S.C.B. 8017.

[13] The Applicants argue that the Director made important findings of fact based on a misapprehension of the evidence and on an incomplete record. They submit that she made findings of fact relying solely on the MFDA Settlement Agreement and uncontested affidavits of former investor clients while disregarding the evidence of the Applicants which was under oath and subject to cross-examination. The Applicants further submit that the Director's Decision fails to deliver proper reasons, because the Director's Decision provides little to no evidence of her reasoning, or why she reached the conclusion that she did. It is the Applicants' position that, by rendering the Director's Decision in this fashion, the Director mischaracterized the facts and issues before her, prejudicing the Applicants' right to a fair hearing.

[14] Staff takes the position that the Applicants are unsuitable for registration and that the reinstatement of their registrations is "objectionable". Staff's submissions are set out in more detail at paragraphs [28] to [33] below.

II. HEARING AND REVIEW PURSUANT TO SECTION 8 OF THE ACT

[15] Section 8 of the Act governs a hearing and review of a decision of the Director. It provides that:

> **8. (1) Review of decision** – Within 30 days after a decision of the Director, the Commission may notify the Director and any person or company directly affected of its intention to convene a hearing to review the decision.
>
> (**2) Review of Director's decisions** – Any person or company directly affected by a decision of the Director may, by notice in writing sent by registered mail to the Commission within thirty days after the mailing of the notice of the decision, request and be entitled to a hearing and review thereof by the Commission.
>
> **(3) Power on review** – 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.
>
> **(4) Stay** – Despite the fact that a person or company requests a hearing and review under subsection (2), the decision under review takes effect immediately, but the Commission may grant a stay until disposition of the hearing and review.

[16] Subsection 8(3) of the Act gives the Commission the power in a hearing and review to confirm the decision under review or make such other decision as the Commission considers proper. The case law interpreting this subsection has established that, in a hearing and review of a Director's decision, a panel of the Commission may substitute its own decision for that of the Director. In *Re Triax Growth Fund Inc.* (2005), 28 O.S.C.B. 10139 at para. 25, for example, the Commission stated that "when conducting a review of the Director's decision pursuant to section 8 of the Act, [the Commission is] not bound in any way by the Director's determination" (see also *Re Istanbul* (2008), 31 O.S.C.B. 3799 ("***Istanbul***") at para. 14).

[17] In addition, it is well established in the Commission's jurisprudence that a review of a Director's decision pursuant to section 8 of the Act is a hearing *de novo*. As such, this is a fresh consideration of the matter, as if it had not been heard before and no decision had been previously issued. An applicant does not have the onus of demonstrating that the Director was in error in making the decision (*Istanbul*, *supra*, at para. 15; and *Re Biocapital Biotechnology* (2001), 24 O.S.C.B. 2843 ("***Biocapital***") at p. 2846).

III. ISSUE

[18] The issue is whether the registrations of the Applicants as dealing representatives should be reinstated. The legal framework for consideration of this issue is outlined at paragraphs [141] to [154] below.

IV. POSITIONS OF THE PARTIES

[19] Both counsel for the Applicants and counsel for Staff made oral and written submissions.

A. The Applicants

[20] The Applicants are seeking to be reinstated as dealing representatives in the category of MFD to continue their gainful employment in the securities industry. The Applicants emphasize that the Application is related to their individual registrations.

IHOC, the subject of the MFDA Proceeding, is not part of the Application. This is not an attempt, according to the Applicants, to minimize or ignore the issues related to the dealer, but the question before the Panel is their proficiency and integrity to be registered as individual dealing representatives.

[21] The Applicants submit that they both have an extensive education and have worked in the financial services industry for over eighteen years. They submit that there is no evidence of a lack of proficiency in the sense that they appear less than qualified.

[22] The Applicants further submit that there is no evidence that their integrity is at issue. They submit that, in their operation of IHOC, they recognized certain shortcomings, took proactive steps to address them and were responsive, responsible and diligent in addressing regulatory issues presented to them during MFDA compliance examinations. They argue that the issues relating to the sale of certain limited partnership securities were isolated. They submit that, while not error-free, they did not lack good faith, honesty and integrity at any time and generally operated their dealer honestly, professionally and mindful of their clients' best interests.

[23] The Applicants put forward a number of cases decided by the Commission, the MFDA and the Investment Industry Regulatory Organization of Canada ("**IIROC**"), including *Re Farm Mutual Financial Services Inc.*, 2009 CanLII 89376 (CA MFDAC), *Re Irwin*, 2010 CanLII 85836 (CA MFDAC), *Re Lambros*, 2011 CanLII 30213 (CA MFDAC) and *Re Nivet*, 2010 CanLII 86169 (CA MFDAC), as cases that are instructive concerning the manner in which re-registration applications should be considered. The Applicants argue that the conduct found to exist in these cases was dishonest, egregious, motivated by financial gain or involved willful blindness. They argue that their conduct is distinguishable from these prior cases.

[24] The Applicants note that they had not been involved in any regulatory proceedings prior to the MFDA Proceeding. They submit that they only became subject to regulatory attention arising from the sale of certain exempt products when the particular investments failed due to the "mismanagement and fraud" of its principal in the case of Golden Gate or because of "a severe U.S. real estate market decline" in the case of Alterra.

[25] The Applicants take the position that the MFDA Settlement Agreement explicitly contemplates the Applicants' continuing employment in the securities industry. In the Applicants' submission, this is evidenced by the approval provided by the MFDA Settlement hearing panel to implement the minimum suggested fine for this type of conduct, $10,000, against each of the Applicants, to prohibit the Applicants from acting only in the capacity of branch manager, compliance officer or ultimate designated person for three (3) years, and to place no restriction on the Applicants in acting as dealing representatives.

[26] At the time of the Hearing and Review, the Applicants pointed out that they had not been registered as dealing representatives for 18 months. In the Applicants' submission, "[t]he further sanction of the Applicants through a denial by the Ontario Securities Commission ("OSC") of their re-registration will be wholly incommensurate with the magnitude of their misconduct". As well, it is the Applicants' position that "[a] denial to the Applicants of an opportunity to rehabilitate their reputations will magnify their punishment beyond the scope intended by the Applicants, the MFDA Hearing Panel, and the MFDA Staff".

[27] The Applicants acknowledge that there were mistakes or potential mistakes in their operation of IHOC. However, they submit that the standard to be applied is not whether they were perfect, but whether they pose any risk to the investing public. They submit that there is no such evidence that would warrant the exercise of the Commission's jurisdiction to prevent likely future harm to Ontario's capital markets.

B. Staff

[28] Staff takes the position that the Application should be dismissed because the Applicants are wholly unsuitable for registration.

[29] Staff submits that the best evidence of the unsuitability of the Applicants to be registered is the admissions made in the MFDA Settlement Agreement. According to Staff, the Applicants' own admissions of their failures with regard to the sale of certain exempt products, their failures with regard to undisclosed conflicts of interest and their compliance failures demonstrate that the Applicants lack the requisite proficiency and integrity for registration.

[30] Staff takes the position that the evidence given by the Applicants during the Hearing and Review further supports the claim that they remain unsuitable for registration. Staff submits that the Applicants demonstrated by their own words that they have learned nothing from the MFDA Proceeding. In their evidence, according to Staff, the Applicants blamed others for problems of their own making, refused to accept responsibility for things that they previously agreed to in the MFDA Settlement Agreement, minimized their compliance failures and were not even slightly remorseful.

[31] It is Staff's submission that even if the Commission found that the Applicants had the requisite integrity and proficiency for registration, the Commission should dismiss the Application on the grounds that the reinstatement of the Applicants' registrations is "objectionable".

[32] In response to the disciplinary cases relied upon by the Applicants, Staff submits that none of the IIROC or MFDA cases, save one, is relevant. According to Staff, this is because the suspension of the dealer itself, which is "the most serious penalty [the MFDA] can impose" and, in the case of IHOC, "may be the first time in Canadian securities history that a going concern [was] wound down as a result of breaches of securities legislation", was not a sanction sought in those cases (MFDA Reasons, *supra*, at paras. 20 and 27). The one case that involves the re-registration of the dealer, *Re Trafalgar Associates Ltd.* (2010), 32 O.S.C.B. 1197 ("***Trafalgar***"), is in Staff's view distinguishable from this case. In Trafalgar, the applicant recognized its misconduct and compensated the investors for their losses. Further, seven years had passed since the misconduct. Staff submits that these mitigating factors are absent in this case.

[33] In response to the Applicants' argument that "[a] denial to the Applicants of an opportunity to rehabilitate their reputations will magnify their punishment beyond the scope intended by the Applicants, the MFDA Hearing Panel, and the MFDA Staff", Staff submits that the Applicants have misconstrued the nature of the registration process and the Hearing and Review. Staff takes the position that a Hearing and Review pursuant to section 8 of the Act is not about sanctioning the Applicants. Nor is it about giving effect to what they think the MFDA intended. In Staff's submission, the Commission has not delegated to the MFDA all of its regulatory jurisdiction. Accordingly, the responsibility remains with the Commission to independently determine whether the Applicants are suitable for registration in accordance with section 27 of the Act.

V. EVIDENCE

A. Overview

[34] The Applicants testified at the Hearing and Review and called five witnesses, four of whom were IHOC clients (W.T., N.R., J.S. and C.D.) and one investment advisor with IHOC (A.C.). Staff called three witnesses who were all IHOC clients (J.T., K.M., and I.D.). The names of the witnesses who are not the Applicants are anonymized to protect the privacy of those witnesses.

[35] Fourteen (14) exhibits were introduced into evidence.

[36] Both the Applicants and Staff referred to hearsay evidence which is admissible in Commission proceedings pursuant to subsection 15(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended. For example, the Applicants referred to the Affidavit of A.V., sworn September 3, 2011. A.V. was a client of Trkulja. In his affidavit, he indicated that he was prepared to testify on Trkulja's behalf, however, he was scheduled to be out of the country. As a result, he did not appear before us.

[37] As well, in closing, Staff referred to a memorandum by Staff to the Director of the Compliance and Registrant Regulation Branch of the Commission recommending the refusal of the reinstatement of the Applicants' registrations. Staff referred to this memorandum for the proposition that a number of IHOC clients who were not called to testify at the Hearing and Review were not accredited investors but were sold products pursuant to the accredited investor exemption.

[38] We were also presented with evidence relating to the negotiation of the MFDA Settlement.

[39] In this case, we did not find it necessary to rely on the hearsay evidence or the evidence relating to the negotiation of the MFDA Settlement. We find that we have sufficient direct evidence to determine whether the registrations of the Applicants should be reinstated.

B. Background Facts

[40] To provide a framework for our analysis, we find it helpful to set out the background facts that are not in dispute.

1. Sale of Exempt Products

[41] The Applicants, along with one other director, founded IHOC in 2003. Initially, IHOC operated as an MFD and sold products such as Guaranteed Investment Certificates, high-interest saving accounts, mutual funds and principal protected notes. IHOC became registered as an LMD on or around November 1, 2004. In 2005, IHOC expanded its product offerings to include certain exempt products.

[42] More specifically, IHOC entered into two distribution agreements which later gave rise to significant regulatory concerns. According to the MFDA Settlement Agreement, they are: (i) the distribution agreement with Alterra Asset Management Inc., dated October 1, 2005, to distribute units of Alterra Preferred Equity Real Estate Limited Partnership (we note

that IHOC also distributed units of another Alterra entity, Alterra Preferred Equity Fund Real Estate Limited Partnership. The Alterra entities will collectively be referred to as "**Alterra**" in these reasons); and (ii) the distribution agreement with GP Golden Gate Ltd., dated December 20, 2005, to distribute units of Golden Gate Funds Limited Partnership (the Golden Gate entities will collectively be referred to as "**Golden Gate**" in these reasons)(MFDA Settlement Agreement, *supra*, at paras. 16 and 20). Limited partnership units of Alterra and Golden Gate together will be referred to as the "**Exempt Products**" in these reasons.

[43] From October 2005 to February 2007, IHOC sold $1,635,000 of Alterra limited partnership units and $2,960,000 of Golden Gate limited partnership units to its clients (MFDA Settlement Agreement, *supra*, at paras. 19 and 23).

[44] Staff commenced regulatory proceedings against Golden Gate and its principal, Ernest Anderson ("**Anderson**"), by way of a Statement of Allegations dated September 21, 2009. Golden Gate and Anderson settled with Staff and the settlement was approved by the Commission on October 2, 2009 (*Re Anderson* (2009), 32 O.S.C.B. 9253). In the settlement agreement, Anderson and Golden Gate admitted to trading securities without registration and engaging in an illegal distribution of Golden Gate securities, contrary to sections 25 and 53 of the Act. They admitted that money raised in the scheme was used to pay operating costs for Golden Gate and monthly interest payments to other investors. They also admitted that investor money was used to repay investors from a previous investment scheme operated by Anderson (*Re Anderson*, *supra*, at para. 9). Investors in Golden Gate, including those who were IHOC clients, received few or no interest payments, nor were their principal investments repaid.

[45] With respect to Alterra, Trkulja gave evidence that the money raised by Alterra would be invested in condominium projects in various states in the U.S. through an entity called Tidewater Capital. Trkulja testified that he understood Tidewater Capital had projects in various southern U.S. states, including Florida and Arizona. Investors in Alterra received few or no interest payments nor were their principal investments repaid.

2. Consolidation Discussions with Other Entities

[46] From 2006 to 2008, the Applicants engaged in discussions with various other entities with the intention of consolidating IHOC with another entity. During their testimony, the Applicants named six (6) entities with which they were in such discussions. Amongst these entities were Golden Gate and Alterra.

[47] According to the MFDA Settlement Agreement, IHOC provided notice to the MFDA in February 2006 that it proposed to sell a significant equity interest in IHOC to Alterra (MFDA Settlement Agreement, *supra*, at para. 40). However, a timeline provided to us by the Applicants at the Hearing and Review indicates that IHOC's consolidation discussions with Alterra commenced on March 31, 2006. Those discussions did not come to fruition and were terminated on or around June 1, 2006.

[48] Subsequent to the discussions with Alterra, on June 5, 2006, the Applicants began consolidation discussions with Golden Gate and gave notice to the MFDA requesting regulatory approval for the sale of 51% of IHOC to Golden Gate. On June 23, 2006, the MFDA approved the proposed acquisition. However, the transaction did not close and the discussions between IHOC and Golden Gate were terminated on or around July 19, 2006 (MFDA Settlement Agreement, *supra*, at paras. 43-44).

[49] On April 16, 2007, the Applicants were once again in discussions with Golden Gate, and met with Staff of the MFDA ("**MFDA Staff**") to request approval for the share purchase of IHOC by Golden Gate. The MFDA gave conditional approval to the proposed transaction by letter dated November 19, 2007. However, the transaction did not close and the discussions were terminated on or around December 19, 2007. On January 11, 2008, the MFDA withdrew approval for the transaction because IHOC failed to fulfill the terms and conditions set out in the letter dated November 19, 2007 (MFDA Settlement Agreement, *supra*, at paras. 45-47).

3. MFDA Compliance Examinations

[50] During the time IHOC was a member of the MFDA, the MFDA conducted various compliance reviews of IHOC, in 2003, 2006 and 2009 (respectively, the **"2003 MFDA Compliance Examination**", the "**2006 MFDA Compliance Examination**" and the "**2009 MFDA Compliance Examination**" and collectively, the "**MFDA Compliance Examinations**").

[51] The 2006 MFDA Compliance Examination identified a number of deficiencies in the following areas: (a) approval of new accounts; (b) timeliness of branch trade supervision; (c) suitability of investments; (d) adequacy of know-your-client and suitability information; (e) branch review program; and (f) review for excessive trading (MFDA Settlement Agreement, *supra*, at para. 52). As the MFDA Settlement Agreement indicates, the Applicants made representations to MFDA Staff on various occasions after the 2006 MFDA Compliance Examination that new policies and procedures as well as hiring of additional staff would be implemented (MFDA Settlement Agreement, *supra*, at para. 53).

[52] During the 2006 MFDA Compliance Examination, MFDA Staff also advised that it considered the Exempt Products to be high risk investments. The Exempt Products were originally given a medium risk rating by IHOC. IHOC changed the risk

rating of the Exempt Products from medium risk to high risk and continued selling these Exempt Products until February 2007 (MFDA Settlement Agreement, *supra*, at paras. 27-28 and 30).

[53] The 2009 MFDA Compliance Examination determined that the deficiencies identified in the 2006 MFDA Compliance Examination had not been addressed. Some of the repeated deficiencies were: (a) inadequate head office supervision; (b) suitability of trades; (c) failure to maintain complete know-your-client and New Account Application Form ("**NAAF**") information; (d) branch review program; and (e) failure by the Applicants as directors and officers to maintain an adequate compliance program (MFDA Settlement Agreement, *supra*, at paras. 56-77).

4. Transfer of IHOC's business to MGI

[54] In the MFDA Settlement Reasons, the MFDA Panel "viewed as significant that [the Applicants] agreed to an orderly wind down of their business and the transfer of client files and accounts to another MFDA Member" (MFDA Settlement Reasons, *supra*, at para. 26). The evidence presented at the Hearing and Review is that IHOC's client files and accounts were transferred to MGI Financial ("**MGI**"). The evidence of Trkulja further suggests that approximately 12 advisors from IHOC transferred to MGI after IHOC was wound down.

C. The Witnesses

[55] Given that a number of witnesses, including the Applicants, testified at the Hearing and Review, we find it helpful to provide some background information about each witness. Further, the Applicants and some of the witnesses who were clients of IHOC gave conflicting evidence about the events leading to the Applicants' sale of Exempt Products to those client witnesses. To provide a fair account of the evidence given by the witnesses, we therefore set out the evidence provided by each of the client witnesses and the Applicants about the relevant interactions between them.

1. Witnesses for the Applicants

(a) Trkulja

[56] Trkulja holds a Bachelor of Arts degree from York University and testified that he completed various "industry-related courses" while he was a university student (Hearing Transcript dated September 9, 2011 at p. 43). As set out at paragraph [4] above, Trkulja was registered as a salesperson (and later dealing representative) from April 25, 1994 to May 10, 2010.

[57] Prior to founding IHOC in 2003, Trkulja was employed at various financial institutions, including the Toronto Dominion Bank ("**TD**"), Canadian Imperial Bank of Commerce ("**CIBC**") and Royal Bank of Canada ("**RBC**"), where he held various positions as registered representative, options specialist, WRAP portfolio manager, investment specialist and investment and retirement planner. He testified that he was "the top salesperson for [TD Securities'] managed program across Canada", "a member of CIBC's President's Club for one or two straight years" and "the top salesperson [for RBC] in the country for two or three years" (Hearing Transcript dated September 9, 2011 at p. 47).

[58] At the time of the Hearing and Review, Trkulja was registered as a life insurance agent and a mortgage agent with the Financial Services Commission of Ontario ("**FSCO**"). He informed us that, at the time, he was involved in selling insurance and mortgage related products through 2193176 Ontario Inc., an Ontario corporation jointly owned by him and Sawh with the registered name TS Wealth Inc. ("**TS Wealth**").

[59] As indicated at paragraph [55] above, we now proceed to describe Trkulja's evidence concerning his interactions with the three client witnesses called by Staff relating to the events leading up to the client witnesses' purchases of the Exempt Products.

(i) Interaction with J.T.

[60] In his testimony, Trkulja summarized his interaction with J.T. prior to executing J.T.'s purchase of Alterra securities. He stated:

> The only time I remember dealing with Mr. [J.T.] is he had already received the information with regards to the Alterra product. So I don't remember if I talked to him first or whether Sanjiv [Sawh]...someone in our office that actually talked to Mr. [J.T.] prior to sending him out the information on the Alterra product, but when Mr. [J.T.] received the information, that's when he called our office and that's when he started communicating with me. So I never had the opportunity to meet Mr. [J.T.]. I simply sent him out the forms as he wanted to. After he received the information from Alterra, he wanted to make an investment into the Alterra product. So I simply sent him the – via the mail, I sent him the new account application form as well as the subscription

> agreement, offering memorandum for the Alterra product. Those were my dealings with Mr. [J.T.]. It was a one product purchase. He wanted to purchase it.
>
> …
>
> I believe he specified he had a million dollars of investable assets but I'm not the individual that actually sent him out the information package, I don't think. He completed the offering memorandum himself. We didn't direct him on how to complete it. We didn't meet with him. We simply sent it out to him and told him he had to send back the document over. I did tell him with regards to the know your client form, how to complete that because on numerous times, you would get back the know your client forms and people would forget that they would have to initial it in certain spots. So I told him that on the – I believe that's in the e-mail correspondence. I did specify in my e-mail to Mr. [J.T.] that I'm going to put arrows basically, like, I'm going to indicate where you need to sign on the know your client form but nowhere did we indicate where he needs to sign on the offering memorandum or subscription agreement. That was simply sent to him for him to read and complete as needed.
>
> (Hearing Transcript dated September 9, 2011 at pp. 94-96)

[61] In cross-examination, Trkulja was asked to provide further details about his interaction with J.T. Trkulja said that someone from IHOC would have "screened" J.T. as to whether he was an accredited investor. According to Trkulja, this was a pre-requisite for sending out an information package about the Alterra investment.

[62] Trkulja confirmed that he filled out a NAAF for J.T. over the telephone (the "**First J.T. NAAF**"), made a decision about whether J.T. was qualified to make the Alterra investment based on what J.T. told him over the telephone and sent J.T. the First J.T. NAAF and the subscription agreement for J.T.'s signature.

[63] During cross-examination, it was pointed out to him that the First J.T. NAAF only contains J.T.'s basic personal information and states that J.T. had a medium level of investment knowledge. Certain information, such as J.T.'s net worth, investment objectives, risk tolerance and time horizon, was missing. When asked why information such as net worth was not filled out on the First J.T. NAAF, Trkulja explained variously that "I don't know why I didn't get the net worth" and that "[t]hat's as much information as I got from him, and I sent out the forms, and he said he'd fill out the rest" (Hearing Transcript dated September 14, 2011 at pp. 49-51). He also stated in cross-examination that "[J.T.] did have a risk tolerance of high. That's what he would have disclosed to us" (Hearing Transcript dated September 14, 2011 at p. 69).

[64] Trkulja acknowledged that he had never met with J.T. in person and that he communicated with J.T. over the telephone and email. He stated, however, that he spent about an hour on the telephone with J.T.

(ii) Interaction with I.D.

[65] Trkulja gave evidence that he first met I.D. when I.D. visited IHOC's office in Etobicoke. At that time, I.D. invested in some U.S. dollar mutual funds and signed a NAAF, completed by Trkulja, for this mutual funds investment (the "**First I.D. NAAF**"). Trkulja testified that he filled out the First I.D. NAAF, including the information that I.D. had a risk tolerance of 90% low risk and 10% high risk, based on his conversations with I.D. and the "investments that he made at the time that the form was completed" (Hearing Transcript dated September 9, 2011 at p. 82).

[66] It is unclear whether the First I.D. NAAF was dated February 4, 2006 or April 2, 2006. The First I.D. NAAF indicates that I.D. had a medium level of investment knowledge, investment objectives of "100% income", risk tolerance of 90% low risk and 10% medium risk, a time horizon of 3 years and net worth of $25,000 to $50,000.

[67] Trkulja testified that I.D. later contacted Trkulja by email and telephone numerous times indicating that he wished to purchase the Alterra investment. Trkulja testified that he made it clear to I.D. on several occasions that the investment involved high risks. According to Trkulja, he "made it loud and clear to Mr. [I.D.], loud and clear, that this was a high risk investment and that I did not think it was the right thing for him for a verity [*sic*] of reasons" (Hearing Transcript dated September 9, 2011 at p. 77). Despite this, I.D. insisted that they should meet.

[68] According to Trkulja, this resulted in a meeting at a coffee shop. Trkulja testified that he reviewed the product with I.D. and I.D. indicated he wanted to purchase this product. Trkulja testified that he cautioned I.D. that this was a very high risk investment and that only an accredited investor would be qualified to make this investment. Trkulja also testified that he offered I.D. the alternative of investing more money into the U.S. dollar mutual funds that I.D. was holding. It is Trkulja's testimony that, however, I.D. insisted that he had "over a million dollars" and wished to make this investment (Hearing Transcript dated September 9, 2011 at p. 77).

[69] Trkulja confirmed in his testimony that he filled out a second NAAF for I.D.'s signature for the Alterra investment (the "**Second I.D. NAAF**"; the First I.D. NAAF and the Second I.D. NAAF together will be referred to as the "**I.D. NAAFs**"). According to Trkulja, I.D. told him that "he was comfortable with completing the documents with 100 percent risk associated with the documents and he clearly specified that he had over a million dollars in investable assets" (Hearing Transcript dated September 9, 2011 at pp. 83-84). Trkulja referred to the Second I.D. NAAF in evidence and emphasized that I.D. initialed certain statements and signed the document acknowledging its content to be true.

[70] The Second I.D. NAAF, dated January 11, 2007, states that I.D. had a medium level of investment knowledge, investment objectives of "100% growth", risk tolerance of 100% high risk, a time horizon of 4 to 5 years, net worth of over $250,000, "net fixed assets" of more than $300,000 and "net liquid assets" of more than $1 million.

[71] Trkulja testified that he would have made more commissions by selling mutual funds than Alterra securities. He further testified that he would not secure an investment of $10,000 from someone who he did not believe was an accredited investor.

(iii) Interaction with K.M.

[72] Trkulja testified that K.M. called IHOC initially to inquire about CIBC principal protected notes. Following a meeting in K.M.'s home, K.M. and his wife invested a small amount of money in that product and in "RSPs" [*sic*] (Hearing Transcript dated September 9, 2011 at p. 72). Trkulja stated that he was "kind of intimidated by dealing with Mr. [K.M.]" because he learned, in the process of filling out a NAAF, that K.M. was an investigator with a financial regulatory agency (Hearing Transcript dated September 9, 2011 at p. 72). As a result, he was "always extremely, extremely explanatory on what we are talking about" (Hearing Transcript dated September 9, 2011 at p. 72). In Trkulja's words, "with [K.M. and his wife] we did everything in the most professional and ethical way possible from start until finish" (Hearing Transcript dated September 9, 2011 at p. 73).

[73] Trkulja testified that, shortly after, K.M. and his wife transferred "their whole CIBC account over to [IHOC] …" (Hearing Transcript dated September 9, 2011 at p. 72).

[74] According to Trkulja, K.M. then approached him with the stated intention of investing in Alterra. Trkulja testified that he discussed the risks of the investment, the accredited investor exemption and the "sophisticated investor rules" with K.M. and his wife. Trkulja testified that while there was no specific figure given with respect to the value of K.M.'s financial assets or net worth, K.M. indicated to Trkulja that he had "well over a million dollars" and "close to $2 million in assets" (Hearing Transcript dated September 9, 2011 at pp. 74-75). Trkulja also testified that he felt the investment to be suitable for K.M. because "1, 2, 3 percent of his net worth is not a crazy figure to take a small percentage of his net worth, a couple of percent, and invest it into higher risk products, especially if he is aware that they were higher risk products which it was" (Hearing Transcript dated September 9, 2011 at p. 75).

(b) Sawh

[75] Sawh holds a Bachelor of Science degree from the University of Toronto and a Master of Business Administration degree from Dalhousie University. As set out at paragraph [4], Sawh was registered as a salesperson (and later dealing representative) from December 27, 1995 to May 10, 2010. He testified that he completed "a lot of the industry courses", and holds designations including Certified Financial Planner and Chartered Financial Analyst (Hearing Transcript dated September 16, 2011 at p. 63). Prior to founding IHOC, he was employed at RBC for approximately 13 years. There, he held various positions including account manager, customer service manager, executive professional account manager and investment specialist.

[76] At the time of the Hearing and Review, Sawh had been licensed as a life insurance agent and a mortgage broker with FSCO since 2004 or 2005. Together with Trkulja at the time of the Hearing and Review, he was involved in selling insurance and mortgage related products through TS Wealth.

(i) Sawh's Evidence with respect to Trkulja's Sale of Exempt Products to J.T.

[77] Following the testimony of Trkulja and J.T., Staff and counsel for the Applicants located a NAAF and an Alterra subscription agreement, both dated December 8, 2006, that were signed by J.T. This NAAF shows that J.T. had a medium level of investment knowledge, investment objectives of "100% growth", risk tolerance of 100% high risk, a time horizon of 10 years or more and net worth of over $250,000 (the "**Second J.T. NAAF**" and together with the First J.T. NAAF, the "**J.T. NAAFs**"). These documents were put to Sawh during his testimony. He gave evidence on these documents as well as on his conduct in relation to Trkulja's interaction with J.T.

[78] Sawh testified that Trkulja received a signed subscription agreement and the First J.T. NAAF from J.T. Sawh further testified that Trkulja expressed his concerns to Sawh that the First J.T. NAAF was incomplete. In particular, Sawh testified as follows with respect to the instructions that he gave to Trkulja about the steps to be taken in the circumstances:

> What I recall from this was Vlad [Trkulja] receiving a package from Mr. [J.T.]. He brought it over to me because he was concerned that the package sent back with the subscription agreement, the KYC, with the New Account Application Form, that there were parts not completed, specifically the risk tolerance objectives, et cetera.
>
> What I told him we should do is – normally, we would just send the whole package back. Because of the delay in getting it originally, I told him make a call to Mr. [J.T.], explain what had happened, discuss with him what was missing, and get an understanding that he knows what we're filling out, and then send him back a copy so that he knows.
>
> (Hearing Transcript dated September 16, 2011 at pp. 149-150)

[79] In cross-examination, Sawh expressed his understanding that Trkulja had followed his instructions. He also indicated that a note should have been taken. However, he admitted that he did not have such a note. Sawh testified that, in hindsight, the best course of action would have been to return the package to J.T.: "In hindsight, we should have stuck to – what we should have done is just send the whole package back" (Hearing Transcript dated September 16, 2011 at p. 150).

(c) W.T.

[80] W.T. was in the hotel business prior to his retirement more than 25 years ago. At the Hearing and Review, he indicated that he had invested in the stock market and that he considered himself to be a knowledgeable investor, although he gave evidence that he did not know what a limited partnership is. In his testimony, W.T. was asked by counsel for the Applicants whether his "net worth, excluding retirement savings plans or [his] principal residence, was over $1-million". W.T.'s response was "I would say so, yeah" (Hearing Transcript dated September 14, 2011 at p. 181).

[81] According to his testimony, W.T. became a client of IHOC in or around 2007, as a result of his investment in Alterra. After learning about the Alterra investment opportunity from a newspaper advertisement, he called IHOC, met with Trkulja to discuss the investment and invested $150,000 in Alterra. He made no other investments through IHOC.

[82] W.T. testified that Trkulja reviewed the risk of the investment with him, did not pressure him into making the Alterra investment and did not mislead him in any way.

[83] W.T. only received one interest payment from his Alterra investment during the first year. At the time of the Hearing and Review, his principal investment had not been returned to him.

(d) N.R.

[84] At the time of the Hearing and Review, N.R. was 47 years old, married with one child and worked as a photographer. In relation to his investment experience, he testified that he held mutual funds and stocks prior to 2007. He characterized himself as having low to medium risk tolerance.

[85] N.R. first learned about IHOC in 2004 from a newspaper advertisement about CIBC principal protected notes. N.R. contacted IHOC and met with Trkulja at N.R.'s residence, but decided not to make this investment.

[86] There was no further contact between Trkulja and N.R. until N.R. approached Trkulja again in late 2007 to purchase a "teachers mortgage" (Hearing Transcript dated September 15, 2011 at p. 22). N.R. described the "teachers mortgage" as being similar to the "Smith Manoeuvre". N.R. further explained the "Smith Manoeuvre" investment strategy as "an investment that a certain amount of the equity is taken and invested in mutual funds … And that helps to pay down the mortgage" (Hearing Transcript dated September 15, 2011 at p. 28).

[87] N.R. found Trkulja professional, punctual and responsive. He felt that Trkulja had never pressured him into purchasing any products, and that Trkulja provided him with full disclosure of the risks and the fees involved.

[88] Trkulja did not offer N.R. any Golden Gate or Alterra securities. N.R. had never heard of Golden Gate or Alterra prior to the Hearing and Review.

(e) J.S.

[89] J.S. was, at the time of the Hearing and Review, 45 years old, single, with no children. He testified that he owned and operated a number of private career and tutoring centres. He testified that he was an accredited investor, but did not consider himself to be a sophisticated investor.

[90] J.S. testified that he was introduced to Trkulja by a friend and became a client of IHOC in 2005 after meeting with Trkulja two or three times. According to J.S., Trkulja asked him about, among other things, his long-term, medium-term and short-term financial aspirations, how well J.S.'s business was doing, how much money J.S. would like to invest and how liquid J.S. would like his investments to be.

[91] At the outset, J.S. purchased mutual funds through IHOC. Limited partnership flow-throughs and "IPPs" were later added to his investments. J.S. testified that Trkulja discussed the risks of these investments with him, did not pressure him into any kind of investments, provided him with timely, accurate and complete disclosure and was always available when J.S. needed to consult him.

[92] J.S. did not invest in either Alterra or Golden Gate. These investments were not recommended to him by Trkulja, nor was he aware that IHOC was selling those particular Exempt Products in 2006.

(f) C.D.

[93] C.D., aged 50, characterized his investment knowledge as "slightly above average" (Hearing Transcript dated September 16, 2011 at p. 10). He described his risk tolerance as "medium" at the time he was a client of IHOC and "low" at the time of the Hearing and Review (Hearing Transcript dated September 16, 2011 at p. 10).

[94] C.D. was a client of Sawh at RBC and transferred his portfolio to IHOC in 2004, shortly after Sawh left RBC and established IHOC. C.D. described the investments that he held at the time of the transfer as follows: "I was more or less in the stock market with some bonds, perhaps some more conservative ones" (Hearing Transcript dated September 16, 2011 at p. 9). C.D. testified that Sawh maintained "similar-type products" for C.D. after C.D. became a client of IHOC (Hearing Transcript dated September 16, 2011 at p. 9). Later, Sawh also assisted C.D. with his mortgage application.

[95] C.D. described Sawh as very accessible. He testified that Sawh would provide full disclosure by, for example, explaining the risks and advantages of the investments and the way fees and commissions worked. He did not feel that Sawh influenced his decision about what to buy or sell.

[96] C.D. had never heard of Alterra or Golden Gate prior to the preparation for the Hearing and Review.

(g) A.C.

[97] A.C. testified that he was a benefits and pension consultant at the time of the Hearing and Review. He worked with IHOC for approximately four years as an investment advisor prior to IHOC's suspension. At the Hearing and Review, he described his relationship with IHOC as that of an independent contractor with a commission-splitting arrangement. When he began working with IHOC, he was asked to sign a code of conduct which required advisors to "[p]ut the client first" and "[t]reat your client with responsibility" (Hearing Transcript dated September 16, 2011 at p. 26).

[98] A.C. considered his personal experience with the Applicants at IHOC to be "excellent" and the compliance and management of IHOC to be "excellent", "efficient" and "run well" (Hearing Transcript dated September 16, 2011 at pp. 24, 25 and 31). He testified that there was an "on-going" and an "open channel" of communication to discuss any regulatory issues (Hearing Transcript dated September 16, 2011 at p. 32).

[99] He testified that IHOC provided its advisors with professional training sessions and product seminars, including one about limited partnerships. He recalled that the seminar about limited partnerships discussed the accredited investor rule, the suitability obligations and the importance of full disclosure.

[100] A.C. did not sell limited partnership units of Alterra or Golden Gate when he was working with IHOC. He testified that he was not required to sell these Exempt Products by the dealer.

2. Witnesses for Staff

(a) J.T.

[101] J.T. testified that he was an instructor with a school board in Ontario. Prior to being an instructor, he had worked with special needs children and, as well, had operated a dairy farm and a natural food store. He testified that he usually described himself as having "average or medium" investment knowledge (Hearing Transcript dated September 12, 2011 at p. 103). He further testified that, at the time he became a client of IHOC, his annual salary from the school board was in the range of $25,000 to $30,000 and his net worth, consisting his "[p]roperty, house and investments in the form of mutual funds", was in the range of $400,000 to $500,000 (Hearing Transcript dated September 12, 2011 at p. 104).

[102] J.T. invested US$25,000 in Alterra but made no other investment through IHOC. At the Hearing and Review, he testified that he had not received any funds pursuant to his investment. J.T. believed that Trkulja was trying to help him get money back.

[103] As indicated at paragraph [55] above, we will now turn to J.T.'s evidence about his interaction with the Applicants prior to J.T.'s purchase of the Exempt Products.

(i) Interaction with the Applicants

[104] J.T. gave evidence that he first learned about IHOC from a newspaper advertisement about the Alterra investment opportunity. J.T. testified that he phoned IHOC to inquire about the investment opportunity and had a preliminary conversation with someone he believed to be a receptionist. It is J.T.'s evidence that the receptionist did not ask him about his financial situation. He testified that the receptionist then put him in contact with both Applicants, although he was not clear about the order in which he spoke to them.

[105] In a subsequent conversation, an individual who he believed to be Sawh or Trkulja provided him with a general overview of the Alterra investment opportunity. According to J.T., he asked for additional information and was told that he would be receiving an information package about the investment. J.T. testified that no one asked him about his financial situation during this conversation.

[106] J.T. testified that following those initial conversations, he received an information package which included the Alterra offering memorandum. His testimony is supported by a letter dated November 3, 2006 that he received from IHOC. J.T. described the information package as "tough reading for myself" and testified that he "didn't quite understand what [*sic*] most of it …" (Hearing Transcript dated September 12, 2011 at pp. 93 and 95).

[107] Having reviewed the information package, J.T. then called IHOC and indicated that he was interested in investing in Alterra. He did not recall whether he spoke to Trkulja or Sawh, although he testified that he spoke to one of the two. This exchange resulted in the First J.T. NAAF being sent to him, supported by an email in evidence dated November 16, 2006. J.T. testified that the First J.T. NAAF was already filled out when he received it.

[108] According to J.T., the information on the First J.T. NAAF was provided to IHOC by him in a ten to fifteen minute telephone conversation. J.T. testified that he was asked about his personal information, his income, his investment knowledge and his net worth, but did not recall being asked or was not asked about his investment objectives, risk tolerance or time horizon. He also testified that he was not asked detailed questions about his financial situation.

[109] It is J.T.'s evidence that he only received the First J.T. NAAF and no other documents. He confirmed that he signed the First J.T. NAAF and returned it to IHOC. He testified that he made payment for the product within days or a week of returning the First J.T. NAAF to IHOC. J.T. received a letter dated January 4, 2007 evidencing his investment in Alterra.

[110] J.T. testified that he did not know exactly what a limited partnership is, but recalled that there was a ten to fifteen minute discussion about that issue during the course of his dealings with either Trkulja or Sawh. He also testified that there was a "brief communication" about the risks of the investment which he described as being less than five (5) minutes long (Hearing Transcript dated September 12, 2011 at p. 113). However, he did not remember the details of the discussion and did not have much of an understanding about the risks involved.

[111] J.T. testified that he never met with anyone from IHOC prior to or following his investment in Alterra until the Hearing and Review.

[112] In cross-examination, counsel for the Applicants suggested that Trkulja spent about 45 to 60 minutes on the telephone with J.T. in the aggregate prior to J.T.'s investment, and J.T. agreed "[t]hat would be pretty close" (Hearing Transcript dated September 12, 2011 at p. 123).

(b) K.M.

[113] K.M. testified that he was an investigator for a financial regulatory agency at the time of the Hearing and Review and that he worked as a police officer with the Toronto Police prior to working for the financial regulatory agency. He further testified that, at the time he became a client of IHOC, he had annual income of $80,000, "liquid investable assets" of approximately $900,000 and net worth of approximately $1.8 million.

[114] K.M. and his wife invested US$25,000 in Alterra and $20,000 in Golden Gate. They received nothing in relation to their Alterra investments and interest payments of approximately $500 on their Golden Gate investments.

[115] As set out at paragraph [55] above, we will now turn to K.M.'s evidence about his interaction with Trkulja prior to his purchase of the Exempt Products.

(i) Interaction with Trkulja

[116] According to K.M., he phoned IHOC around late 2005 or early 2006, after he saw an advertisement about some mutual funds investments in a newspaper. Trkulja attended K.M.'s house, met with K.M. and his wife, spoke with them about "investments" and their financial situation and completed a know-your-client form on their behalf (Hearing Transcript dated September 14, 2011 at p. 137). The initial investments made by K.M. and his wife through IHOC related to some mutual funds and the transfer of K.M.'s RRSP accounts.

[117] K.M. testified that Trkulja later suggested both the Alterra and Golden Gate investments to him and his wife. During the Hearing and Review, he described his understanding of the Alterra and Golden Gate investments to be "a group of investments and mortgages like a partnership" (Hearing Transcript dated September 14, 2011 at p. 141). He further testified that, with respect to the risks of these two investments, he understood from Trkulja that "[t]here was slight risk, but it was more secure" (Hearing Transcript dated September 14, 2011 at p. 141).

[118] K.M. also gave evidence about what he was asked by Trkulja about his financial situation. His evidence is that he was asked about his net worth, the value of his "liquid investable assets", his RRSP accounts, his non-registered brokerage accounts, his real estate holdings and his income. He believed that he told Trkulja he was an accredited investor. K.M. testified that, with respect to some of these questions asked, such as those about his non-registered brokerage accounts, he only disclosed the fact that he held those accounts but did not provide detailed information such as where the accounts were held or the total value of those accounts.

[119] During cross-examination, K.M. confirmed the proposition advanced by counsel for the Applicants that he reviewed extensive documentation in fulfilling his duty as an investigator with a financial regulatory agency.

[120] K.M. also confirmed that he reviewed the offering memorandum related to the Alterra investment. More specifically, he confirmed that he read and understood the section about risk factors and potential loss of investment. However, in cross-examination, K.M. stated the following with respect to his understanding of the risks of the investments: "I didn't believe there was significant risk. If there was, I wouldn't have invested in it" (Hearing Transcript dated September 14, 2011 at p. 167).

[121] Counsel for the Applicants sought to challenge this statement by producing a note written by Trkulja, dated July 12, 2006, purportedly about a meeting between Trkulja and K.M. K.M. confirmed that the personal information about him and his wife in this note was accurate. However, when he was asked about the references in the note to "invested in LP's" and two entities, K.M. indicated that he did not know what was being referred to. When asked whether a statement of "okay w higher risk" in the note suggests a discussion about the risks of a limited partnership product, K.M. said "it's possible" (Hearing Transcript dated September 14, 2011 at p. 170).

[122] Counsel for the Applicants also suggested that some of the mutual funds in which K.M. invested involved higher risks. In response, K.M. pointed out that they were investments recommended by Trkulja. He further stated that he relied on his advisor for information about the risks of the products and that "I don't believe we would have invested in high risk mutual funds. If he said, listen, this [REDACTED] is a pretty high risk, I would have said, I don't think so" (Hearing Transcript dated September 14, 2011 at p. 174).

[123] K.M. also agreed in cross-examination with the comment made by counsel for the Applicants that he did not provide detailed information, such as the details relating to his non-registered brokerage accounts, because this information would be provided on a "need-to-know basis". That is, in the words of the counsel for the Applicants, he was "prepared to provide as much information as was required to sort of get to the next stage" (Hearing Transcript dated September 14, 2011 at p. 177).

(c) I.D.

[124] I.D. testified that he was an educational assistant with a school board. He received a Bachelor of Education, a Bachelor of Arts and a Master of Education from the "Lviv University" (officially known as the Ivan Franko National University of Lviv) in Ukraine in 1991 and is fluent in seven (7) Slavic languages. He considered himself to have limited investment knowledge. I.D. testified that, in 2007, his annual salary was $22,000. While I.D. provided testimony as to the value of his net financial assets or net assets, his testimony appeared to us to indicate some confusion on his part as to the meaning of these concepts.

[125] I.D. invested US$10,000 in Alterra. He never received any interest payments in his Alterra investment and the principal investment was not returned to him.

[126] As indicated at paragraph [55] above, we will now turn to I.D.'s evidence about his interaction with Trkulja prior to his purchase of the Exempt Products.

(i) Interaction with Trkulja

[127] I.D. gave evidence about the circumstances surrounding his becoming a client of IHOC. In 2006, he invested approximately $25,000 in mutual funds through IHOC. At that time, Trkulja completed the First I.D. NAAF which was signed by I.D. I.D. testified that the basic personal information such as his address, occupation, employer and income, was accurate. However, he indicated at the Hearing and Review that he had limited investment knowledge and did not know why the First I.D. NAAF indicated that he had a medium level of investment knowledge: "I didn't know how it work [*sic*], and I ask him so many times to explain it to me. And he did it, and I trust him" (Hearing Transcript dated September 15, 2011 at p. 52).

[128] He testified that the information on the First I.D. NAAF that he had investment objectives of "100% income" was accurate. However, I.D. went on to indicate that he understood that to mean "they're going to be invested 100 percent in Alterra" despite the fact that the Alterra investment did not take place until 2007 (Hearing Transcript dated September 15, 2011 at p. 53).

[129] I.D. further testified that the information on the First I.D. NAAF that his risk tolerance was 90% low risk and 10% high risk was accurate because it was filled out based on Trkulja's "evaluation" (Hearing Transcript dated September 15, 2011 at p. 53).

[130] I.D. testified that Trkulja asked him how much money he had, and his response was that "I have some money, and I want to invest it, but I don't know where" (Hearing Transcript dated September 15, 2011 at p. 57). With respect to the information on the First I.D. NAAF that I.D.'s net worth was in the range of $25,000 to $50,000, I.D. indicated that Trkulja completed that information on his behalf. When asked by Staff where Trkulja obtained that information, I.D. indicated "[m]aybe he asked me" and "I believe he got this information because I got the annual income, 22,000" (Hearing Transcript dated September 15, 2011 at p. 54).

[131] He also testified that he told Trkulja about his condominium purchase.

[132] I.D. then gave evidence about his purchase of Alterra securities through Trkulja. In 2007, I.D. saw an advertisement about the Alterra investment opportunity in a newspaper and phoned Trkulja indicating that he wished to invest some money in Alterra. According to I.D., Trkulja's response was: "no problem. Come in, and we're going to talk about this" (Hearing Transcript dated September 15, 2011 at p. 62).

[133] It is I.D.'s evidence that he attended the IHOC office to discuss the Alterra investment. He described the meeting as a "very quick meeting" in which Trkulja and I.D. spoke about the investment (Hearing Transcript dated September 15, 2011 at p. 63). According to I.D., Trkulja told him that the Alterra investment was a real estate investment in the U.S., and "nothing you have to be worried. Everything is safety [*sic*]" (Hearing Transcript dated September 15, 2011 at p. 63). However, I.D. testified that he was worried at the time and would prefer to invest in Canada. I.D. believed that Trkulja gave him a brochure about Alterra some time later. According to I.D., Trkulja "never provide [*sic*] [him] with all the details" about the Alterra investment (Hearing Transcript dated September 15, 2011 at p. 88).

[134] I.D. gave evidence about the completion of the Second I.D. NAAF during that meeting. He said that Trkulja "filled out this application by himself. I just signed it" (Hearing Transcript dated September 15, 2011 at p. 63). I.D. confirmed that while the Second I.D. NAAF shows that he had an investment objective of "growth of funds", this information was filled out by Trkulja. He testified that he did not provide this information to Trkulja, although he initialed the information to be true. According to I.D., no one explained to him what "growth of funds" means. However, he believed that "growth of funds" means "I'm going to invest my money and going to grow. For me, it means that [*sic*] safety" (Hearing Transcript dated September 15, 2011 at p. 68).

[135] I.D. testified that he did not tell Trkulja that he had a risk tolerance of 100% and did not know why his risk tolerance had changed on the Second I.D. NAAF. Further, he testified that he was not asked about the value of his "net fixed assets" or "net liquid assets" even though the Second I.D. NAAF describes them as more than $300,000 and $1 million respectively. He believed that his net worth, "net fixed assets" and "net liquid assets" as they appear on the Second I.D. NAAF were filled out by Trkulja based on "his evaluation" (Hearing Transcript dated September 15, 2011 at p. 73). I.D. testified that he signed and initialed the Second I.D. NAAF because Trkulja "told [him] to do this" (Hearing Transcript dated September 15, 2011 at p. 75).

[136] I.D. testified that he believed that Trkulja told him what "accredited investor" means but that he did not remember the explanation given. He believed that being an accredited investor would make him "eligible to invest the money at Alterra Capital" (Hearing Transcript dated September 15, 2011 at p. 71).

[137] During cross-examination, I.D. acknowledged that the 14% return in the Alterra advertisement "caught [his] eyes" (Hearing Transcript dated September 15, 2011 at p. 115). As a result, I.D. "told [Trkulja] that I'm interested to buy, but I'm not sure if my needs fit your requirements" (Hearing Transcript dated September 15, 2011 at p. 137).

[138] I.D. acknowledged that Trkulja did not recommend the investment to him. However, he indicated that if "[Trkulja] would told [him] that … this is not for you, just forget about those 14 percent…I everything [*sic*] trusted on him … I would never sign

paper or consider those 14 percent" (Hearing Transcript dated September 15, 2011 at pp. 121-122). According to I.D., Trkulja "didn't tell me anything about this risky stuff" (Hearing Transcript dated September 15, 2011 at p. 123).

D. The Sponsoring Firm

[139] According to the Applicants, their Application for reinstatement is supported by MGI. We received no evidence directly from MGI with respect to the intended relationship with the Applicants, including the compliance and oversight regime that would apply. We received testimony from the Applicants about their roles in MGI if the reinstatement of their registrations is granted. Trkulja testified that his role would be that of a salesperson and that he had no desire to take on any supervisory role. He testified that:

> But that's what the agreement was going to be, that we would be working under one of their offices. So one of their compliance people would be overseeing Sanjiv [Sawh] and my – our sales, our clients. So we'd have no supervisory role whatsoever. We would be a planner with MGI Financial.
>
> (Hearing Transcript dated September 14, 2011 at p. 115)

[140] Sawh testified as follows regarding his anticipated role in MGI:

> COMMISSIONER ROBERTSON: … Can you just share with us your expectations for your future role at MGI?
>
> THE WITNESS: In our discussions with MGI, my role would be that of a salesperson. There would be no supervisory role, compliance, nothing like that. Just strict sales.
>
> (Hearing Transcript dated September 16, 2011 at p. 191)

VI. ANALYSIS

A. Legal Framework for Registration

1. Registration under the Act

[141] Subsection 25(1)(b) of the Act sets out the registration requirement for an individual dealing representative:

> **25. Registration – (1) Dealers** – Unless a person or company is exempt under Ontario securities law from the requirement to comply with this subsection, the person or company shall not engage in or hold himself, herself or itself out as engaging in the business of trading in securities unless the person or company,
>
> …
>
> (b) is a representative registered in accordance with Ontario securities law as a dealing representative of a registered dealer and is acting on behalf of the registered dealer.

[142] `Registration is a privilege, not a right, that is granted to individuals and entities that have demonstrated their suitability for registration (see *Re Trend Capital Services Inc.* (1992), 15 O.S.C.B. 1711 at p. 1765; and *Istanbul*, *supra*, at para. 60).

[143] `Section 27 of the Act specifies the test that must be applied when determining whether to grant registration. Section 27 of the Act states:

> **27. (1) Registration, etc.** – On receipt of an application by a person or company and all information, material and fees required by the Director and the regulations, the Director shall register the person or company, reinstate the registration of the person or company or amend the registration of the person or company, unless it appears to the Director,
>
> (a) that, in the case of a person or company applying for registration, reinstatement of registration or an amendment to a registration, the person or company is not suitable for registration under this Act; or
>
> (b) that the proposed registration, reinstatement of registration or amendment to registration is otherwise objectionable.

> **(2) Matters to be considered** – In considering for the purposes of subsection (1) whether a person or company is not suitable for registration, the Director shall consider,
>
> (a) whether the person or company has satisfied,
>
> (i) the requirements prescribed in the regulations relating to proficiency, solvency and integrity, and
>
> (ii) such other requirements for registration, reinstatement of registration or an amendment to a registration, as the case may be, as may be prescribed by the regulations; and
>
> (b) such other factors as the Director considers relevant.
>
> …

[144] According to subsection 27(1) of the Act, registration will be granted unless the applicant is not suitable for registration or the registration is otherwise objectionable. Our analysis of the Applicants' suitability for registration begins at paragraph [155]. The analysis of whether the reinstatement of the Applicants' registrations is otherwise objectionable begins at paragraph [285] below.

2. Onus

[145] The Applicants submit that the language of subsection 27(1) of the Act is mandatory and places the onus on Staff to prove that the registrant is "not suitable for registration" or that the registration is "otherwise objectionable".

[146] In closing, Staff argued that it is not the applicant on this Application but is "responding", and as such, the "burden is not on Staff" (Hearing Transcript dated November 7, 2011 at p. 50).

[147] The issue of where the onus of proof lies in a Hearing and Review of a Director's decision to refuse registration under section 8 of the Act does not appear to have been squarely addressed in the Commission's jurisprudence, nor did we receive detailed submissions on this issue. However, a number of Director's decisions dealing with registration under section 27 of the Act (or its predecessor) state that the onus rests with Staff to prove that an applicant is not suitable for registration or that the registration is otherwise objectionable (see *Re Jaynes* (2000), 23 O.S.C.B. 1543 ("***Jaynes***") at p. 1546; *Re Curia* (2000), 23 O.S.C.B. 7505 at p. 7506; and *Re Adams* (2011), 34 O.S.C.B. 10042 at para. 11).

[148] We accept that Staff bears the onus of demonstrating that the Applicants are not suitable for registration or that the proposed reinstatement is otherwise objectionable. We are mindful, however, that section 27 gives the Director broad discretion in considering whether the person or company is not suitable for registration or whether the proposed registration is otherwise objectionable. Further, as discussed at paragraph [152] below, one of the primary means for achieving the purposes of the Act is the "requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants".

[149] In this Hearing and Review, we must decide whether, based on the evidence presented before us, Staff has demonstrated that the Applicants are not suitable for registration or that the proposed registration is otherwise objectionable. In any event, based on all the evidence and submissions below, we are satisfied that we would reach the same conclusion on this Application irrespective of which party bears the onus of proof.

3. Public Interest Jurisdiction

[150] It is well established in the Commission's jurisprudence that, "[w]hen exercising its discretion to review the decision of a Director, the Commission is required to act in the public interest with due regard to its mandate/purpose under the Act, set out in section 1.1 of the Act" (See *Re Michalik (*2007), 30 O.S.C.B. 6717 ("***Michalik***") at para. 44; and *Biocapital*, *supra*, at p. 2846).

[151] Section 1.1 of the Act provides that:

> **1.1 Purposes** – The purposes of this Act are,
>
> (a) to provide protection to investors from unfair, improper or fraudulent practices; and
>
> (b) to foster fair and efficient capital markets and confidence in capital markets.

[152] In pursuing the purposes of the Act, the Commission is required to have regard to certain fundamental principles, such as the "requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants" (Subparagraph 2(iii) of section 2.1 of the Act). Registrants have a very important function in the capital markets and they are also in a position where they may potentially harm the public. Regulating the conduct of registrants is therefore a matter of public interest (*Michalik*, *supra*, at para. 48).

[153] In *Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600 ("***Mithras***"), the Commission noted that its discretion in the public interest is to be exercised prospectively to protect the public and the integrity of the capital markets. The Commission stated that:

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

[154] These principles are relevant to our consideration of the Applicants' request for reinstatement under section 27 of the Act.

B. Are the Applicants Suitable for Registration?

[155] The three criteria for determining suitability for registration are codified in subsection 27(2) of the Act, following its amendment on September 28, 2009. Subsection 27(2) of the Act sets out the considerations for determining whether a person or a company is not suitable for registration. These are whether the person or company has satisfied the requirements prescribed in the regulations (now NI 31-103) relating to proficiency, solvency and integrity (Subsection 27(2)(a)(i) of the Act) as well as such other factors as the Director considers relevant (Subsection 27(2)(b) of the Act).

[156] The parties agree that the issues at play with respect to suitability for registration are proficiency and integrity. There is nothing in the record indicating that the Applicants lack financial solvency. The analysis of whether the Applicants are suitable to be registered will therefore focus on the application of both the proficiency and integrity criteria, established by subsection 27(2) of the Act and previous case law (see, for example, *Istanbul*, *supra*, at para. 65), to the Applicants.

[157] In determining whether the Applicants are suitable for registration, we must assess their suitability on the basis of their integrity and proficiency. As referenced at paragraph [153] above, their past conduct is relevant to this assessment because it assists in determining whether the Applicants are likely to meet the standards of suitability imposed by Ontario securities law now and in the future (*Mithras*, *supra*, at pp. 1610-1611). Accordingly, the past conduct of the Applicants will be assessed against the statutory requirements and the requirements and guidance provided by the MFDA existing at the time of the conduct, which governed those registered at the time. This analysis will form one of the bases for determining whether the Applicants are suitable for registration under the current regulatory regime. In addition, the Applicants' testimony before us at the Hearing and Review provides us with additional grounds for making the determination as to the Applicants' suitability for registration.

1. Proficiency

[158] In *Michalik*, the Commission discussed the purpose of proficiency requirements in Ontario securities law. As registrants have a very important function in the capital markets and are also in a position where they may harm the public, proficiency requirements are established to ensure that the public deals with qualified registrants (*Michalik*, *supra*, at para. 48). Proficiency requirements for registrants support, promote and enhance the purposes of the Act, which, as set out at paragraphs [151] and [152] above, include protecting the investing public by maintaining high standards of fitness and business conduct to ensure honest and reputable conduct by registrants. They also contribute to ensuring regulatory compliance and enhance the efficiency of the capital markets (*Michalik*, *supra*, at paras. 48-49).

[159] Subsection 3.4(1) of NI 31-103 sets out the proficiency requirement that: "[a]n individual must not perform an activity that requires registration unless the individual has the education, training and experience that a reasonable person would consider necessary to perform the activity competently…"

[160] In *Michalik*, the Commission noted in reference to the then existing OSC Rule 31-505 – *Conditions of Registration* ("**OSC Rule 31-505**") that registrants are required to apply the "know your client" and "suitability" standards in carrying out their functions and that they must have the proficiency to discharge the application of these standards (*Michalik*, *supra*, at para. 23).

[161] It is not contested that the Applicants have the education and qualifications to be considered suitable for registration. However, the evidence presented at the Hearing and Review raises the issue of whether the Applicants are sufficiently proficient in meeting certain know-your-client and suitability obligations required of dealing representatives of an MFD.

[162] In conducting our analysis of this issue, we first set out the law relating to know-your-client and suitability obligations at paragraphs [164] to [171]. Under Ontario securities law, the requirement to determine the suitability of an investment for a client contains a number of discrete elements. Accordingly, we set out the law relating to each of the specific elements at issue in this matter at paragraphs [172] to [182] below. We note that we set out the statutory requirements and the requirements and guidance provided by the MFDA that existed at the time of the conduct because, as discussed at paragraph [157] above, the past conduct of the Applicants will be assessed against those requirements and guidance. We also set out the requirements and guidance in place at the time of the Hearing and Review, because if the registrations of the Applicants are reinstated, the Applicants would be expected to have the proficiency to meet those requirements and follow that guidance.

[163] We then turn to the application of the proficiency criterion to the Applicants at paragraphs [183] to [255] below. As the regulatory requirements and previous case law discussed at paragraphs [164] to [182] below have established a number of specific dimensions to the know-your-client and suitability obligations that are of particular concern to us in this case, we separate them for ease of applying them to the Applicants' past conduct. They are the obligations to: ensure that the client is an accredited investor for trades of securities pursuant to the accredited investor exemption; obtain know-your-client information, including information regarding a client's investment needs and objectives, financial circumstances and risk tolerance; and "know your product". We address each of these issues in turn beginning at paragraph [183].

(a) The Law on Proficiency

(i) Know-Your-Client and Suitability Rules

[164] The Commission has recognized that the know-your-client and suitability requirements "are an essential component of the consumer protection scheme of the Act and a basic obligation of a registrant, and a course of conduct by a registrant involving a failure to comply with them is an extremely serious matter" (*Re Daubney* (2008), 31 O.S.C.B. 4817 ("***Daubney***") at para. 15 citing *Re E.A. Manning Ltd.* (1995), 18 O.S.C.B. 5317 at p. 5339).

[165] In *Daubney*, the Commission considered these obligations and noted that:

> The Alberta Securities Commission (the "ASC") described these two obligations as follows:
>
> > The "know your client" and "suitability" obligations are conceptually distinct but, in practice, they are so closely connected and interwoven that the terms are sometimes used interchangeably.
> >
> > The "know your client" obligation is the obligation to learn about the client, their personal financial situation, financial sophistication and investment experience, investment objectives and risk tolerance.
> >
> > The "suitability" obligation is the obligation of a registrant to determine whether an investment is appropriate for a particular client. Assessment of suitability requires both that the registrant understands the investment product and knows enough about the client to assess whether the product and client are a match. *(Re Marc Lamoureux* (2001), ABSECCOM 813127 ("*Re Lamoureux*") at 10.)
>
> Canadian securities authorities have adopted a three-stage analysis of suitability, according to which a registrant is obliged to:
>
> a) use due diligence to know the product and know the client;
>
> b) apply sound professional judgement in establishing the suitability of the product for the client; and
>
> c) disclose the negative as well as the positive aspects of the proposed investment.
>
> (*Re Foresight Capital Corp.*, 2007 BCSECCOM 101 ("*Re Foresight*") at para. 52.)

Knowing the client involves learning the client's "essential facts and characteristics", including the client's:

- age;
- assets, both liquid and illiquid;
- income;
- investment knowledge;
- investment objectives, including plans for retirement; and
- risk tolerance.

(*Re Lamoureux*, *supra* at 12-13.)

In addition, we consider that other essential facts and characteristics would include the client's:

- net worth;
- employment status; and
- investment time horizon.

(*Daubney*, *supra*, at paras. 16-19)

[166] At the time the Applicants sold mutual funds and Exempt Products, the know-your-client and suitability standards, which salespersons (now dealing representatives) must apply, were set out at section 1.5 of OSC Rule 31-505:

> **1.5 Know your Client and Suitability** — (1) A person or company that is registered as a dealer or adviser and an individual that is registered as a salesperson, officer or partner of a registered dealer or as an officer or partner of a registered adviser shall make such enquiries about each client of that registrant as
>
> (a) subject to section 1.6, enable the registrant to establish the identity and the creditworthiness of the client, and the reputation of the client if information known to the registrant causes doubt as to whether the client is of good reputation;
>
> (b) subject to section 1.7, are appropriate, in view of the nature of the client's investments and of the type of transaction being effected for the client's account, to ascertain the general investment needs and objectives of the client and the suitability of a proposed purchase or sale of a security for the client.

[167] NI 31-103 now creates two separate rules that apply to registrants, one dealing with know-your-client obligations, and the other dealing with suitability obligations. Section 13.2 of NI 31-103 contains the know-your-client requirements. It provides that:

> **13.2 Know your client** – … (2) A registrant must take reasonable steps to
>
> (a) establish the identity of a client and, if the registrant has cause for concern, make reasonable inquiries as to the reputation of the client,
>
> (b) establish whether the client is an insider of a reporting issuer or any other issuer whose securities are publicly traded,
>
> (c) ensure that it has sufficient information regarding all of the following to enable it to meet its obligations under section 13.3 or, if applicable, the suitability requirement imposed by an SRO:
>
> (i) the client's investment needs and objectives;
>
> (ii) the client's financial circumstances;

(iii) the client's risk tolerance, and

…

(4) A registrant must take reasonable steps to keep the information required under this section current.

[168] Section 13.3 of NI 31-103 describes the suitability obligation as follows:

> **13.3 Suitability** – (1) A registrant must take reasonable steps to ensure that, before it makes a recommendation to or accepts an instruction from a client to buy or sell a security, or makes a purchase or sale of a security for a client's managed account, the purchase or sale is suitable for the client.
>
> (2) If a client instructs a registrant to buy, sell or hold a security and in the registrant's reasonable opinion following the instruction would not be suitable for the client, the registrant must inform the client of the registrant's opinion and must not buy or sell the security unless the client instructs the registrant to proceed nonetheless.
>
> …

[169] Section 9.4 of NI 31-103 provides for an exemption from the suitability obligations set out in section 13.3 of NI 31-103. If a registered firm is a member of the MFDA, the suitability obligations set out in Rule 2.2.1 of the MFDA Rules, rather than section 13.3 of NI 31-103, apply to a dealing representative of an MFD.

[170] As the MFDA Settlement Agreement shows, MFDA Rule 2.2.1 was the applicable MFDA Rule that governed the conduct of the Applicants at the time they sold mutual funds and Exempt Products. As noted at paragraph [169] above, this rule continued to govern the conduct of its members at the time of the Hearing and Review. From the time the Applicants engaged in the sale of mutual finds and the Exempt Products to the time of the Hearing and Review, Rule 2.2.1 provided:

> **2.2.1 "Know-Your-Client".** Each Member and Approved Person shall use due diligence:
>
> (a) to learn the essential facts relative to each client and to each order or account accepted;
>
> (b) to ensure that the acceptance of any order for any account is within the bounds of good business practice; and
>
> (c) to ensure that each order accepted or recommendation made for any account of a client is suitable for the client and in keeping with the client's investment objectives; and
>
> (d) to ensure that, notwithstanding the provisions of paragraph (c), where a transaction proposed by a client is not suitable for the client and in keeping with the client's investment objectives, the Member has so advised the client before execution thereof.

[171] In addition, the MFDA acknowledges that there are specific suitability issues arising from the sale of securities pursuant to an exemption. According to MFDA Member Regulation Notice MR-0048 – *Know-Your-Product* ("**MFDA Member Regulation Notice MR-0048**"), issued on October 31, 2005, some additional considerations apply when products are sold pursuant to exemptions under securities law:

> Members should be particularly careful when examining suitability issues in relation to exempt securities. It should be noted that the classification of an investor as a "sophisticated purchaser" or an "accredited investor" does not negate the obligations of the Member with respect to suitability review. Members may consider providing training for Approved Persons and supervisory staff on the particular characteristics and concerns relating to exempt securities, to ensure such products are recommended only in appropriate circumstances.
>
> Members should also have policies and procedures in place with respect to the information to be provided to clients, to help ensure that clients fully understand the products being offered before entering into any transaction. The client should be clearly advised where a security is being sold under an exemption …

(ii) The Accredited Investor Exemption

[172] The legal framework for selling securities pursuant to the accredited investor exemption is also relevant to our consideration of the Applicants' proficiency for registration. The evidence shows that the Applicants sold Exempt Products pursuant to the accredited investor exemption set out in National Instrument 45-106 – *Prospectus and Registration Exemptions* (**"NI 45-106**"):

> **Accredited investor**
>
> **2.3 Accredited Investor** – (1) The dealer registration requirement does not apply in respect of a trade in a security if the purchaser purchases the security as principal and is an accredited investor.
>
> (2) The prospectus requirement does not apply to a distribution of a security in the circumstances referred to in subsection (1).

[173] An "accredited investor" is defined in section 1.1 of NI 45-106 to include:

> …
>
> j) an individual who, either alone or with a spouse, beneficially owns, directly or indirectly, financial assets having an aggregate realizable value that before taxes, but net of any related liabilities, exceeds $1,000,000,
>
> k) an individual whose net income before taxes exceeded $200,000 in each of the 2 most recent calendar years or whose net income before taxes combined with that of a spouse exceeded $300,000 in each of the 2 most recent calendar years and who, in either case, reasonably expects to exceed that net income level in the current calendar year,
>
> l) an individual who, either alone or with a spouse, has net assets of at least $5,000,000,
>
> …

[174] Further, at the time the Applicants sold Exempt Products, section 1.10 of Companion Policy 45-106CP – *Prospectus and Registration Exemptions* provided guidance to a seller of securities in determining the availability of the accredited investor exemption:

> **1.10 Responsibility for compliance** – A person trading securities is responsible for determining when an exemption is available. In determining whether an exemption is available, a person may rely on factual representations by a purchaser, provided that the person has no reasonable grounds to believe that those representations are false. However, the person trading securities is responsible for determining whether, given the facts available, the exemption is available. Generally, a person trading securities under an exemption should retain all necessary documents that show the person properly relied upon the exemption.
>
> …
>
> … under the accredited investor exemption, the seller must have a reasonable belief that the purchaser understands the meaning of the definition of "accredited investor". Prior to discussing the particulars of the investment with the purchaser, the seller should discuss with the purchaser the various criteria for qualifying as an accredited investor and whether the purchaser meets any of the criteria.
>
> It is not appropriate for a person to assume an exemption is available. For instance an [*sic*] seller should not accept a form of subscription agreement that only states that the purchaser is an accredited investor. Rather the seller should request that the purchaser provide the details on how they fit within the accredited investor definition.

[175] Staff referred us to *Re Goldpoint Resources Corp.* (2011), 34 O.S.C.B. 5478 ("***Goldpoint***"), a case involving non-registrants who purported to rely on the accredited investor exemption in their distribution of Goldpoint securities. Staff cites *Goldpoint* for the proposition that accredited investor status cannot be established simply on the basis of a statement from the investor certifying that he or she meets the accredited investor definition. Rather, accredited investor status should be determined on the basis of factual information provided by the investor about his or her financial position (*Goldpoint*, *supra*, at para. 100).

[176] In our view, a registrant subject to the MFDA Rules should meet at least the minimum standards set out in *Goldpoint* and should conduct appropriate due diligence on the financial circumstances of a prospective investor prior to making a determination of whether a product can be sold pursuant to the accredited investor exemption.

(iii) Know-Your-Product

[177] MFDA Member Regulation Notice MR-0048, issued on October 31, 2005, provides that Members should perform as part of the suitability obligations reasonable due diligence on products before offering them for sale. MFDA Member Regulation Notice MR-0048 notes that suitability obligations can only be properly discharged if the products are fully understood. It states:

> A basic level of due diligence must be completed on all products being considered for sale by the Member before the products are approved. Member procedures should provide for different levels of analysis for different types of products. For example, an extensive formal review may not be required for many conventional mutual funds. However, a more comprehensive review should be performed on products that are novel or more complex in structure. In the event that products are presently being sold that have not been subjected to a reasonable due diligence review, such a review must be performed before continuing to sell the products.
>
> In determining whether to approve a product for sale, Members should not merely rely on the representations of the issuer, or on the fact that the product appears to be similar to others, or that other firms are already offering the product. In all cases, the approval process must be independent and objective. Members are advised that simply making inquiries will not be sufficient to discharge their responsibility to conduct due diligence. Members must properly follow up on any questions they have raised until they have been satisfied that they have a complete understanding of the products they propose to sell.
>
> …
>
> It is critical that the Member develops an understanding of all features of the product. Issues such as liquidity of the product and the nature of any underlying investments and their inherent risks must be examined before assigning a risk ranking to the product. The Member should develop guidelines or an investor profile for which the product would be generally suitable, incuding [*sic*] risk levels, time horizon, income and net worth. The Member should also clearly identify investors for whom the product is not suitable. Concentration limits should be assigned to products and/or general classes of products where appropriate.

[178] Section 3.4 of NI 31-103 now sets out an independent requirement for a registrant to understand the structure, features and risks of each security the registrant recommends. Section 3.4 of Companion Policy 31-103CP – *Registration Requirements, Exemptions and Ongoing Registrant Obligations* ("**31-103CP**") further describes the know-your-product obligations as follows:

> The requirement to understand the structure, features and risks of each security recommended to a client is a proficiency requirement. This requirement is in addition to the suitability obligation in section 13.3 and applies even where there is an exemption from the suitability obligation such as, for example, the exemption in subsection 13.3(4) in respect of permitted clients.

[179] CSA Staff Notice 33-315 – *Suitability Obligation and Know Your Product* ("**CSA Staff Notice 33-315**"), issued on September 4, 2009, provides additional guidance to registrants on how to meet their suitability and know-your-product obligations.

[180] Although we appreciate that section 3.4 of NI 31-103 and CSA Staff Notice 33-315 were not part of the regulatory landscape at the time IHOC sold mutual funds and Exempt Products, know-your-product obligations are part of the regulatory regime which now would have to be adhered to if the Applicants were registered. These newer requirements are evidence of securities regulators' increasing concern to ensure that registrants understand the features of products they sell to clients and that this is a component of the required suitability analysis.

[181] As part of the know-your-product obligations, MFDA Member Regulation MR-0048 also states that MFDA members should explain certain specific risks of products sold to clients pursuant to exemptions:

> … It is important that the client also understands the implications of any restrictions that may apply with respect to liquidity and the potential absence of a secondary market for the securities. Finally, the client should be aware that an offering memorandum that may be provided prior to the sale of some exempt securities is not a prospectus, and that certain protections, rights and remedies that

> may exist under securities legislation in relation to prospectus offerings, including statutory rights of rescission and damages, may not be available to the client.

[182] Finally, CSA Staff Notice 33-315, issued on September 4, 2009, which provides that "[i]ndividual registrants should … explain the risks of products they are recommending to their clients", broadens this aspect of know-your-product to products generally.

(b) Application of Proficiency Criteria to the Applicants

(i) Ensuring that Clients Qualify as Accredited Investors

[183] The obligation to ensure that an investor meets the criteria to be an accredited investor arises in the context where securities are being sold pursuant to the accredited investor exemption in NI 45-106. The Applicants have indicated that they are not seeking to sell exempt products as dealing representatives in the future. Nevertheless, we are of the view that the evidence presented to us about the Applicants' approach to selling securities pursuant to the accredited investor exemption in the past speaks to their proficiency in both understanding relevant requirements under Ontario securities law and their ability to exercise appropriate judgment in meeting their regulatory obligations.

[184] At the Hearing and Review, we heard evidence from J.T. which shows that, based on the thresholds established by NI 45-106, he was not an accredited investor at the time he purchased Alterra securities.

[185] Although I.D.'s evidence does not provide us with a clear understanding of the actual value of his net financial assets or net assets, we find that the evidence does not support a conclusion that I.D. was an accredited investor at the time he purchased Alterra securities.

[186] The evidence we heard raises the question of whether adequate steps were taken by the Applicants to ascertain the accredited investor status of certain IHOC clients. On the one hand, Trkulja testified that he never sold any Exempt Products to clients whom he knew were not accredited investors. He testified that, at the time they invested in the Exempt Products, J.T., I.D. and K.M. provided information which led him to believe that they were accredited investors.

[187] On the other hand, all of the Staff witnesses, I.D., J.T. and K.M., gave testimony which suggests that they were not asked about their financial situation in adequate detail.

[188] We recognize that there is conflicting evidence about the steps taken by the Applicants to obtain financial information from these client witnesses and about the information communicated to the Applicants. However, we conclude that the Applicants' version of events is in itself demonstrative of their inadequate approach to their obligations.

[189] More specifically, in the case of I.D., it is Trkulja's evidence that he informed I.D. during a meeting that only an accredited investor could invest in Alterra. According to Trkulja, I.D. responded that he had more than $1 million in net financial assets and insisted that he wanted the Alterra investment. Based on what I.D. told him about his financial situation, Trkulja formed the view that I.D. qualified as an accredited investor.

[190] Trkulja justified his actions by stating that he had no reason to believe the information conveyed to him by I.D. was false:

> I have no reason to believe that someone tells me something that is not true when it's something as simple as, you know, what is your net worth? Do you have – you know, what is your income? What is your total investable assets? I have no reason to not believe someone.
>
> (Hearing Transcript dated September 9, 2011 at p. 88)

[191] According to Trkulja, he also made the determination that the information provided to him by I.D. for the Second I.D. NAAF was accurate based on his past experience that clients are often unwilling to disclose their complete financial situation:

> I have been doing this for 18 years, and I can tell you at least 50 to 100 times I would meet with someone, and they wouldn't disclose all of their financial assets. That's common sense. If they tell a financial advisor that they have so much money, then the financial adviser is going to try to consolidate so much business.
>
> …

> So what I'm trying to say is that in many, many situations, a client or a potential client doesn't want to disclose all of their assets for a variety of reasons. They just met you. It's like, why do you need to know all of my assets? So they give you what you need to know.
>
> (Hearing Transcript dated September 14, 2011 at pp. 40-41)

[192] In addition, Trkulja testified as follows with respect to the relationship between income and net financial assets or net assets:

> I'm sure there is a relationship. Like, there's more likely a possibility that, I was going to say a lawyer or a doctor or a dentist who is going to have a million dollars than, you know, someone that is a blue collar worker, but the reality is there's a lot of people out there that don't make a substantial amount of money that can still have millions of dollars. There's lots of people that run businesses, there's lots of people that trade businesses. I have friends that are roofers. I have friends that are plumbers. I have friends that are electricians, builders. They all have over a million dollars easily. So it's not – and I guarantee you their declared income is probably 50-, 60-, $70,000 a year. It's nothing significant.
>
> (Hearing Transcript dated September 9, 2011 at pp. 89-90)

[193] He further elaborated:

> When you look at statistics in this country, a million dollars is nothing significant anymore … So when someone tells me they have a million dollars in investable assets, it's not as though I should look at it as, you know, that's a lot of money. It is a lot of money but it's not unheard of anymore.
>
> (Hearing Transcript dated September 9, 2011 at p. 89)

[194] Contrary to Trkulja's statements above, we find that there was every reason to make further inquiries about I.D.'s net assets or net financial assets. Based on Trkulja's account of the events, I.D. insisted that he had net financial assets in excess of $1 million approximately one year after having indicated that the value of his net assets was in the range of $25,000 to $50,000. That I.D.'s net worth could have changed so drastically in one year when his income did not appear to have changed significantly and no other explanation was provided in itself warrants further inquiry.

[195] In addition, when asked in cross-examination why I.D. was sharing different information about his financial circumstances one year later, Trkulja offered the explanation that "[I.D.] was interested in the product maybe" (Hearing Transcript dated September 14, 2011 at p. 128). Although Trkulja recognized the possibility that I.D. may have been claiming that he had more than $1 million in net financial assets because he was interested in purchasing Alterra securities, he did not appreciate at that time the importance of taking further steps to verify I.D.'s financial position or to request an explanation of the change in his financial circumstances. His testimony also shows that he continued not to understand the importance of this obligation at the Hearing and Review.

[196] aving heard from I.D. during the Hearing and Review, it is also clear to us that, despite his education and his facility with Slavic languages, I.D. did not have the necessary understanding of financial terms to accurately describe his financial situation. It is apparent that I.D. did not have a clear understanding of the difference between income and net worth. Nor did he understand other terms on the NAAF such as "net fixed assets" or "net liquid assets".

[197] As discussed at paragraphs [194] to [196] above, these circumstances would reasonably create a question regarding the accuracy of the information that I.D. allegedly provided and the validity of his classification as an accredited investor. In our view, the reasonable course of action in those circumstances would have been to make further inquires about I.D.'s financial situation and take extra steps to ensure that I.D. understood what was being asked. Simply inquiring about I.D.'s financial information in a perfunctory way and accepting at face value his statements that he owned net financial assets in excess of $1 million did not satisfy Trkulja's regulatory obligations with respect to the accredited investor exemption. In addition, Trkulja's testimony at paragraphs [190] to [193] shows that not only did he not appreciate the impropriety of his actions in the past, he continued not to demonstrate an understanding of their shortcomings at the time of the Hearing and Review.

[198] With respect to J.T., Trkulja's claim that J.T. qualified as an accredited investor appears to be based on his representation that another IHOC staff member would have performed a "screening function" and ensured that J.T. was an accredited investor prior to sending him an information package about Alterra. However, we received no further corroborating evidence, such as policies or procedures in place at the time, regarding this "screening function", nor were we presented with evidence about the steps involved in executing this function. In any event, we are of the view that, as the registrant who ultimately facilitated J.T.'s purchase of Alterra securities, Trkulja had the responsibility to ensure that his client met the criteria to be an accredited investor before providing J.T. with the opportunity to purchase Exempt Products.

[199] We note that the First J.T. NAAF did not contain information about J.T.'s net assets or net financial assets. Further, Trkulja testified as follows about the missing information: "I don't know why I didn't get the net worth" and "[t]hat's as much information as I got from him, and I sent out the forms, and he said he'd fill out the rest" (Hearing Transcript dated September 14, 2011 at pp. 49-51). In light of the foregoing, we are unable to conclude that Trkulja had that information at the time the First J.T. NAAF was completed.

[200] We further observe that the First J.T. NAAF was not designed to identify financial assets as opposed to other assets, in accordance with the requirements of the accredited investor exemption. Therefore, even if the NAAF was complete, it would not form an adequate basis to conclude that J.T. was an accredited investor. However, Trkulja was prepared to execute J.T.'s purchase of Alterra securities in the face of this missing information, as evidenced by the e-mail message dated November 16, 2006 which directed J.T. to write a cheque payable to Alterra and informed J.T. that the subscription agreement and the First J.T. NAAF had been sent to J.T. for his signature.

[201] We note that information missing from the First J.T. NAAF appears on the Second J.T. NAAF. Nonetheless, as discussed at paragraph [200] above, Trkulja was prepared to execute J.T.'s purchase without obtaining information about J.T.'s net assets or net financial assets. Taken at its highest, the evidence shows that the information was not collected on a timely basis for the purchase of Alterra securities. More importantly, Trkulja's cursory approach, which focused only on the completion of the NAAF, demonstrates his failure to fully understand his obligations in respect of the accredited investor exemption. We therefore have concerns about whether Trkulja can adequately discharge the obligations of a registrant in the future.

[202] The fact that an investor declared himself to be an accredited investor does not absolve a registrant of the responsibility to take adequate steps in the circumstances to ascertain that the investor meets the criteria to be accredited based on his or her financial circumstances. We also note that Trkulja's testimony demonstrates a lack of precision about the distinction between net financial assets and net assets in the qualifying rule in NI 45-106, set out at paragraph [173] above. In order for an investor to avail himself or herself of the accredited investor exemption, he or she (either alone or with a spouse) must own net financial assets having an aggregate realizable value that exceeds $1,000,000 or net assets having an aggregate realizable value that exceeds $5,000,000. For example, with respect to K.M., Trkulja's testimony that he was told that K.M. owned "well over a million dollars" and "close to $2 million in assets" is not sufficiently precise to make a determination about whether K.M. met the requirements for an accredited investor (Hearing Transcript dated September 9, 2011 at pp. 74-75).

[203] Turning to Sawh, in his testimony regarding J.T. which we set out at paragraphs [78] and [79] above, Sawh's efforts appear to have been merely focused on having the NAAF completed. He does not appear to have questioned the information received, and in particular, the lack of information about J.T.'s financial situation to support J.T.'s eligibility to purchase Exempt Products. This lack of inquiry raises questions about whether Sawh fully understood his obligations with respect to the accredited investor exemption and therefore whether he can adequately discharge the obligations of a registrant in the future.

[204] We have considered the evidence from J.S. and W.T. who appeared to have made investments with IHOC pursuant to the accredited investor exemption. More specifically, counsel for the Applicants led evidence from W.T. that he invested in Alterra and had net financial assets of more than $1 million. Counsel for the Applicants also led evidence from J.S. that he invested in products such as "limited partnership flow-throughs" and was an accredited investor. In addition, Trkulja testified that he refused the order of a client, S.B., to purchase Golden Gate securities, despite the client's claim that he qualified as an accredited investor, because Trkulja reviewed the NAAF, "looked at obviously his age, his income and everything and it just didn't make sense" (Hearing Transcript dated September 9, 2011 at p. 93).

[205] We find that this evidence, at its highest, shows that Trkulja and Sawh sold exempt products to some investors who met the requirements to be accredited and declined one purchase where it was appropriate to do so. However, in light of the evidence from Staff's witnesses which shows that they were not asked about their financial situation in adequate detail, we are not convinced that Trkulja had a sufficient understanding of the regulations and their purpose to allow him to consistently discharge those obligations (Hearing Transcript dated September 12, 2011 at pp. 160-161; and Hearing Transcript dated September 14, 2011 at p. 45).

[206] In sum, we are troubled by Trkulja's reliance on the financial information represented to him by his clients where there were clear indications of a need to exercise due diligence. We are also troubled by his failure to recognize the impropriety of that reliance at the Hearing and Review. Trkulja's continued insistence in his testimony that the client witnesses were accredited investors, despite the strong evidence to the contrary in the case of J.T. and I.D., supports the finding that his proficiency to be registered, at the time of the Hearing and Review, remained inadequate.

(ii) Obtaining Know-Your-Client Information and Determining Suitability

[207] The analysis set out at paragraphs [184] to [206] about the Applicants' performance of their accredited investor obligations is directly applicable to the consideration of whether the Applicants have the ability to proficiently discharge their know-your-client and suitability obligations more generally. In particular, that analysis also shows that the Applicants failed to

discharge their obligation to obtain know-your-client information about their clients' financial circumstances, and that they continued not to understand the importance of this requirement at the Hearing and Review.

[208] For example, with respect to the First I.D. NAAF completed in order for I.D. to purchase mutual funds, Trkulja acknowledged in cross-examination that he was "just taking the information that's provided to me. I'm not trying to overanalyze it. I'm taking the information that was provided to me" (Hearing Transcript dated September 14, 2011 at p. 35). Trkulja simply accepted the information without making further inquiries notwithstanding his admission that he found it unusual for I.D. to have a net worth in the range of $25,000 to $50,000 because, according to Trkulja, "Net worth is usually substantially higher than that" (Hearing Transcript dated September 14, 2011 at p. 35).

[209] The testimony of the Applicants also demonstrates their lack of understanding of other aspects of the know-your-client and suitability obligations. We take it from the evidence that we summarized at paragraph [69] above that I.D. completed the Second I.D. NAAF in order to trade in exempt securities. We are troubled by the evidence regarding the change of risk tolerance and investment objectives from the First I.D. NAAF to the Second I.D. NAAF. According to the I.D. NAAFs, I.D.'s risk tolerance changed from 90% low risk and 10% medium risk to 100% high risk, and his investment objectives changed from "100% income" to "100% growth".

[210] In Trkulja's evidence, when I.D. first became a client of IHOC, he made the assessment that I.D. had a risk tolerance of 90% low risk and 10% medium risk based on his conversations with I.D. and "the investments that [I.D.] made at the time that the form was completed" (Hearing Transcript dated September 9, 2011 at p. 82). It is Trkulja's evidence that, when I.D. first approached him about the Alterra investment, Trkulja did not think the Alterra investment was suitable for I.D. because of the initial assessment that he made. Trkulja also testified that he cautioned I.D. on various occasions that the investment involved high risks and was not suitable for I.D.

[211] However, when I.D. insisted that he wished to purchase the Alterra investment, Trkulja, in his own words:

> … explained to [I.D.], we have to change your KYC because you are now saying that you are willing to take a greater amount of risk with your funds.
>
> Your objectives have changed from investing into mutual funds that may pay out a quarterly distribution to now investing into a real estate limited partnership where you can lose your money. Your objectives have changed. Your risk tolerance has changed.
>
> And it works the other way as well. We have clients that have invested into hedge funds in the past where – one client specifically had all of his money with us in hedge funds. And all of a sudden, he wanted all of his money in money market funds and – I believe it was just money market funds. So we had to change his KYC from 100 percent high risk to 100 percent safe. Because people change their investment objectives based on what's going on sometimes with the market if they're traders.
>
> (Hearing Transcript dated September 14, 2011 at pp. 130-131)

[212] According to Trkulja, I.D. also said that "he was comfortable with completing the documents with 100 percent risk associated with the documents" (Hearing Transcript dated September 9, 2011 at p. 83).

[213] Trkulja's statements reflect a fundamental misunderstanding of the law. A person's risk tolerance and investment objectives do not, as Trkulja suggested above, change simply because he or she wishes to invest in a riskier product. In considering the risk tolerance of a client, registrants not only have to take into account the client's indication about his or her risk tolerance, but also the client's personal circumstances such as age and ability to sustain financial losses (*Jaynes*, *supra*, at p. 1547; and *Daubney*, *supra*, at para. 18). In that regard, we adopt the comments made by the Director in *Jaynes*, where, with respect to the registrant in that case, there were concerns:

> … as to whether he, in fact, understands what is entailed in addressing "suitability" and "know your client" obligations. [The applicant's] responses with regard to these issues were confused; he appeared to be saying that there is nothing wrong with executing speculative trades for clients provided they have indicated that they have a certain level of tolerance for risk. In fact, notwithstanding what a client may indicate as their risk tolerance level, speculative trades may be wholly unsuitable based on their personal circumstances; a registrant's responsibility is to properly identify when this is the case and even refuse to execute unsuitable trades on behalf of a client when necessary.
>
> (*Jaynes*, *supra*, at p. 1547)

[214] MFDA Member Regulation Notice MR-0025 – *Suitability Obligations for Unsolicited Orders* ("**MFDA Member Regulation Notice MR-0025**"), issued on February 24, 2004, provides the following guidance with respect to unsuitable orders: "Members are not obliged to accept a purchase order from a client that is determined by the Member to be unsuitable. Whether or not a Member wishes to refuse such a trade is an internal policy decision of the Member".

[215] The Applicants' record provided at the Hearing and Review included a copy of IHOC's policies and procedures manual (the "**Compliance Manual**"). The Compliance Manual outlined the internal policies and procedures that would have been applicable in these circumstances. Section 8.1 of the Compliance Manual provided that, "If the client proposes changing his or her investment objectives or risk tolerance, you should discuss this with your client. Under no circumstances should such a change be made solely to suit a specific order. All changes should be consistent with the client's other KYC/NAAF information". Section 8.3 of the Compliance Manual stated "You are required to use good judgment to ensure that a trade in mutual funds by a client is suitable for that client, in light of that client's particular needs and objectives". Section 8.3.1.2 of the Compliance Manual in fact instructed that an order in these circumstances should be refused. However, Trkulja, by his own admission, changed the risk tolerance to facilitate the purchase of Alterra securities and accepted the trade order from I.D.

[216] We also find the evidence relating to Trkulja's interaction with J.T. to be troubling. It is not contested that the First J.T. NAAF was incomplete. Much of the information required to determine suitability, including J.T.'s investment objectives, risk tolerance and net worth, was missing from the First J.T. NAAF. According to Trkulja, as set out paragraph [199] above, "[J.T.] said he'd fill out the rest" (Hearing Transcript dated September 14, 2011 at p. 50). We find the fact that Trkulja asked his client to fill out information such as net worth, investment objectives and risk tolerance amounted to an abdication of his know-your-client and suitability obligations.

[217] Further, as mentioned at paragraphs [200] and [201] above, at the time Trkulja sent out the First J.T. NAAF, Trkulja was prepared to execute J.T.'s purchase of Alterra securities. As set out at paragraph [62], Trkulja takes the position that he made a decision that J.T. qualified for the investment based on what J.T. told him over the telephone. It is unclear to us how Trkulja could have determined the suitability of the investment for J.T. when the information referenced at paragraph [216] was missing.

[218] Trkulja's testimony appears to suggest that he owed a lesser obligation to J.T., who made what he described as a "one product purchase", than to clients such as J.S. and K.M. with whom Trkulja had a long-term relationship (Hearing Transcript dated September 9, 2011 at p. 95). As MFDA Member Regulation Notice MR-0025 states, the obligation to make a suitability determination applies to all proposed trades, regardless of whether a trade was recommended by the registrant or was unsolicited, or whether or not the registrant has a continuing relationship with the client.

[219] We also find that the instructions given by Sawh to Trkulja regarding the missing information on the First J.T. NAAF, set out at paragraphs [78] and [79], to be inadequate and to raise concerns about his understanding of the know-your-client and suitability obligations. Although Sawh was presented with a NAAF with missing information in relation to the purchase of an Exempt Product that was classified as high risk, there is no evidence that he questioned whether it was a suitable investment for J.T. Despite his clear obligations as the chief compliance officer of IHOC to ensure that a suitability assessment was conducted, there is no evidence that he took any steps to oversee the determination of suitability in this situation. Rather, as set out at paragraphs [78] and [79] above, he simply asked Trkulja to call J.T. and obtain the missing information, complete the NAAF and send a copy back to J.T., in order to execute the purchase.

[220] At the Hearing and Review, Sawh was given an opportunity to describe the appropriate conduct for this situation. We take from Sawh's testimony on this point, set out at paragraphs [78] and [79] above, that he considered the appropriate course of action to be to send the package back to J.T. for him to complete the relevant forms. He said nothing about a suitability analysis for a new client purchasing a high risk product. This indicates that Sawh still did not understand at the time of the Hearing and Review the proper steps to be taken in the circumstances, as described paragraph [219] above.

[221] The shortcomings in Sawh's application of the know-your-client and suitability obligations, both at the time of J.T.'s purchase of Alterra securities and at the Hearing and Review, lead us to the view that he does not possess the required judgment to apply these regulatory requirements in the future.

[222] Finally, we note that Trkulja contended that J.T., I.D. and K.M. were accredited investors and relied on that classification in arguing that they qualified for the investment. We note that, as set out in MFDA Member Regulation Notice MR-0048, classification as an accredited investor does not absolve a registrant of the responsibility to determine the suitability of a transaction for the client.

[223] We have considered the evidence from the witnesses on behalf of the Applicants. This evidence shows that, in these cases, the Applicants had discussions with those witnesses about their financial circumstances. However, that evidence is not sufficiently detailed and compelling to mitigate our concerns about the Applicants' inadequate conduct with respect to I.D. and J.T. and to convince us that the Applicants understood the know-your-client and suitability obligations.

[224] In summary, in the case of Trkulja, we are troubled by his exclusive reliance on the financial and other know-your-client information represented to him by his clients. Despite his education and extensive experience in the securities industry, the evidence shows that Trkulja failed to exercise good judgment and was not able to identify situations where aspects of a client's personal circumstances called for careful analysis with regard to suitability. Accordingly, he did not make reasonable inquiries in those circumstances and this led to a failure to properly and independently discharge his know-your-client and suitability obligations. The position taken by Trkulja at the Hearing and Review, as exemplified by his testimony set out at paragraphs [190] to [193] and [211], shows a continuing failure to recognize the impropriety of his past actions. It further shows a lack of understanding of the policy rationale underlying the know-your-client and suitability standards and the importance of their careful application by registrants. We accept Staff's argument that Trkulja does not have the required proficiency to be registered.

[225] In the case of Sawh, we recognize that while Sawh fell below the standards required of him in his role as a compliance officer, he is not seeking to act in a similar capacity in the future. However, the evidence shows that, with respect to J.T. and the First J.T. NAAF, he had an opportunity to review and apply know-your-client and suitability standards. He appeared not to have applied the standards mandated by Ontario securities law at the relevant time, nor did he turn his mind to the substantive requirements of suitability when given the opportunity at the Hearing and Review to revisit them. This shows an incomplete understanding of the know-your-client and suitability obligations, a continued failure to exercise good judgment, leading, in our view, to a lack of proficiency to be registered.

(iii) Know-Your-Product

Conducting Due Diligence on Products

[226] From the testimony of the Applicants, we understand that both of the Applicants were involved in conducting due diligence on the Exempt Products and the determination to sell Exempt Products to IHOC clients. Although Sawh was more involved in the compliance responsibilities of IHOC and the review of Exempt Products, Trkulja also had significant involvement in interviewing various individuals from Alterra and Golden Gate along with Sawh.

[227] At the Hearing and Review, the Applicants gave evidence regarding the steps they took to conduct due diligence on the Exempt Products. With respect to Alterra, they both testified that they met with the individuals comprising the management team of Alterra, reviewed their background and felt comfortable with their qualifications. They reviewed the product by reading the offering memorandum. Having done so, they felt that the percentage return of 14% and the "numbers and what they were saying made sense" when compared to similar products in the market at the time (Hearing Transcript dated September 16, 2011 at p. 130; see also Hearing Transcript dated September 14, 2011 at p. 80).

[228] As well, they reviewed Alterra's partners in the United States and the general nature of the properties in which Alterra would invest. This appears to be supported by a letter entitled "Example of Due Diligence on Property" which sets out a description of the property, its development, the estimated project costs, capital structure, ratio analysis, profit margin summary and a breakdown of construction costs. This letter was put to Sawh during the Hearing and Review. Sawh confirmed that it was a document prepared by IHOC and he testified about IHOC's due diligence activities based on the letter:

> Regarding this specific letter, this is some of the due diligence we did looking at the types of properties, where it's located, to get an idea where they're planning to build; the development itself, what they're looking to build; the economy in the area at the time, more or less the demand for those types of properties.
>
> Actually, to confirm the demand we had someone who works at Re/Max here, we had them contact someone out in this same area to tell me a little bit more about that area to get a comfort of where they're building and so on, the estimated project costs, and this was how they were using it to develop. Not very much different than a development structure.
>
> (Hearing Transcript dated September 16, 2011 at pp. 131-132)

[229] Trkulja testified that he met with the lawyer who was engaged in drafting the offering memorandum as part of the due diligence process. Sawh testified that he reviewed "[t]he operations side of things…because we knew as an infrastructure what you need to run" (Hearing Transcript dated September 16, 2011 at p. 130). According to Sawh, he also "tried to see what type of relationships [Alterra was] also trying to foster, and that was, in part, some of the due diligence work" (Hearing Transcript dated September 16, 2011 at p. 133). He elaborated that Alterra had a relationship with a large brokerage house. He felt that this relationship "would sort of confirm our feelings. If a large organization that had a legal department to assess risk, et cetera, if they would approve of a company or align themselves, it would give us more of a comfort level" (Hearing Transcript dated September 16, 2011 at p. 133).

[230] With respect to Golden Gate, the Applicants testified that they reviewed the documents provided by Golden Gate, including the offering memorandum and the subscription agreement, as well as the structure of the product. A letter that Sawh

wrote to the MFDA dated August 13, 2008 about IHOC's due diligence efforts was put to him at the Hearing and Review, and based on this letter, he testified:

> Asked for assessment of the risk to our product, and our assessments – what we did was we looked at the structure once again, looked at what the fund was going to be doing. So we assessed a risk of the underlying investments and tried to assess it with that.
>
> The cost of the product? Based on the fact that our costs are associated with mortgage broker fees and finance fees, the numbers made sense as far as how they plan on paying out 8 percent.
>
> (Hearing Transcript dated September 16, 2011 at pp. 134-135)

[231] Both Applicants testified that they attended the Golden Gate office where they met with a number of Golden Gate staff members and discussed with them the mortgage-based products offered by Golden Gate, a type of product with which they were familiar. They also discussed the size of the fund, the infrastructure of the company, the management of the fund and a staff member's own investment in Golden Gate. The Applicants were shown an unaudited financial statement of the company and felt that "as far as the numbers go, they seemed reasonable" (Hearing Transcript dated September 16, 2011 at p. 135).

[232] Sawh also noted that Golden Gate had a "mortgage brokers license". He testified that he spoke to Golden Gate's mortgage agents and they "didn't have anything negative to say" about Golden Gate (Hearing Transcript dated September 16, 2011 at pp. 135-136).

[233] In cross-examination, Trkulja described the way in which he rated the Exempt Products as medium risk:

> Because we looked at the underlying portfolio or the way it was supposed to be structured. And if you look at the types of mortgages that should have been held in the LP, first mortgages, small percentage of first mortgages, high quality second mortgages, the values up to 85 percent, and a small amount of commercial mortgages. <u>If you actually look at the product as a whole, okay, outside of the fact it's an LP, it's a medium type risk investment.</u>
>
> [Emphasis added]
>
> (Hearing Transcript dated September 14, 2011 at p. 30)

[234] Trkulja testified that the Applicants considered the steps taken above to be "sufficient due diligence" at the time (Hearing Transcript dated September 14, 2011 at p. 21).

[235] In our view, the due diligence process employed by the Applicants as described at paragraphs [227] to [233] was deficient. The Applicants clearly fell short of the expectations imposed on MFDA Members set out in MFDA Member Regulation Notice MR-0048 and reproduced at paragraph [177] above. The Applicants also failed to follow IHOC's own policies and procedures set out in section 2.2.1 of the Compliance Manual, the substantive elements of which are closely consistent with MFDA Member Regulation Notice MR-0048.

[236] As both of the Applicants acknowledged, their evaluation of the Exempt Products was based largely upon the representations of, and the documents provided to them by, the issuers. It emerged from Sawh's response to the questions posed by the Panel about the analysis in the letter entitled "Example of Due Diligence on Property" referenced at paragraph [228] above that, while the document was prepared by IHOC, the analysis in the document was based solely on the documents provided to them by Alterra:

> THE WITNESS: That was from Alterra and the sub-agreements, et cetera, what they were going to do … Like, their sub-agreements in reading through it, and then these numbers came from Alterra as far as how they're going to be producing it … These numbers came from Alterra. Like, this is their projections, so to speak. So these are their projections, and what we did is, by reading through the sub-agreement, compared to see if this made sense on other products like this.
>
> CHAIR: So you didn't calculate these numbers yourself, then.
>
> THE WITNESS: No.
>
> CHAIR: They came directly from Alterra?
>
> THE WITNESS: We just verified if they were reasonable.
>
> (Hearing Transcript dated September 16, 2011 at pp. 196-197)

[237] Sawh also confirmed that he initially assigned a risk ranking of "medium" to the Exempt Products based on the information in the subscription agreements of Alterra and Golden Gate. IHOC only changed the risk rating to "high" upon the MFDA's request following the 2006 MFDA Compliance Examination.

[238] In our view, the Applicants' due diligence process was particularly inadequate in light of the fact that Golden Gate and Alterra securities were sold pursuant to exemptions under applicable securities legislation. Limited partnership units sold under an exemption from securities law do not benefit from the same transparency and liquidity characteristics or regulatory oversight as other products. For example, securities sold under an exemption will not be liquid investments. Offering memoranda are not prospectuses and are not subject to regulatory review. Given the absence of such safeguards, we find that the Applicants failed to conduct an adequate review of the Exempt Products. This issue is particularly important when determining the suitability of these products for clients. The evidence shows that the Applicants focused their due diligence on the underlying investments in mortgages and compared them to other mortgage pools that may or may not have shared the same legal structure. As Trkulja's testimony at paragraph [233] shows, he did not appear to understand the fact that the structure of a limited partnership sold pursuant to an exemption is a risk factor in and of itself which may be relevant to the determination of suitability.

[239] We also have concerns about the Applicants' judgment arising from the factors on which they appeared to have relied with respect to reviewing the Exempt Products. The Applicants, and in particular, Trkulja, placed significant reliance on media accounts of the issuers' principals and the issuers' association with high profile political figures. Also, as discussed at paragraph [229] above, Sawh testified that he relied on Alterra's relationship with other companies that he assumed had conducted due diligence on the products. These factors, along with the other steps taken by the Applicants as discussed above, are not an adequate approach to due diligence in this context.

[240] The Applicants ought to have taken from the MFDA's request in 2006 to change the risk rating of the Exempt Products that their initial review was deficient. In accordance with MFDA Member Regulation Notice MR-0048, the Applicants should have conducted another due diligence review. They nonetheless continued to sell these products, as exemplified by the sales to I.D. and J.T. in January 2007 and December 2006 respectively.

[241] We take note of Trkulja's admission during the Hearing and Review that he "should have done more due diligence" and that he had "learned to look beyond more than what employees of a corporation will say" (Hearing Transcript dated September 14, 2011 at p. 22; and Hearing Transcript dated September 12, 2011 at p. 63). Despite this acknowledgement, we are of the view that his testimony as a whole shows that he did not fully appreciate the shortcomings of his conduct. For example, Trkulja insisted at the Hearing and Review that:

> We did due diligence. I don't know if it was considered enough by the regulators, but we did do due diligence.
>
> (Hearing Transcript dated September 14, 2011 at pp. 18-19)

[242] We find Trkulja's insistence that he conducted "an independent objective and comprehensive review … but again it wasn't a one hundred complete full independent objective and comprehensive review" shows an unduly literal approach toward the know-your-product obligations (Hearing Transcript dated September 12, 2011 at p. 62). It is not clear to us that Trkulja understood the regulatory policy underpinning of the know-your-product assessment, which is for registrants to achieve a sufficient understanding of the underlying features and risks of the product in order to assess the suitability of the investment for specific clients.

Explaining Risks of Products to Clients

[243] As part of the know-your-product and suitability obligations, registrants now have an obligation to explain to their clients the risks of products they invest in. We have concerns about whether the Applicants fulfilled regulatory expectations about explaining the risks of the Exempt Products that they sold, and hence their capacity to discharge this aspect of proficiency requirements in the future.

[244] We find that the evidence about the interaction between Trkulja and J.T. shows that Trkulja did not adequately explain the risks of the Alterra investment to J.T. J.T. testified that there were limited discussions about the risks of the Alterra investment. He found the offering memorandum to be "tough reading" (Hearing Transcript dated September 12, 2011 at p. 95). Trkulja provided no evidence that he discussed the risks of the investment with J.T. Based on the above, we find J.T.'s testimony that there were limited discussions about the risks of the investment to be consistent with Trkulja's summary of his interaction with J.T. set out at paragraph [60] above. More specifically, Trkulja's evidence shows that he simply sent J.T. information about the Alterra investment, such as the offering memorandum, "as he [J.T.] wanted to", and relied on J.T. to review the information (Hearing Transcript dated September 9, 2011 at p. 95). In particular, Trkulja testified that:

> He completed the offering memorandum himself. We didn't direct him on how to complete it … nowhere did we indicate where he needs to sign on the offering memorandum or subscription agreement. That was simply sent to him for him to read and complete as needed.
>
> (Hearing Transcript dated September 9, 2011 at p. 96)

[245] We also find that the evidence about the interaction between Trkulja and I.D. supports a finding that Trkulja failed to adequately explain the risks of the Exempt Products to I.D. We are cognizant of the inconsistencies between the evidence of Trkulja and I.D. As set out at paragraphs [67] and [68] above, Trkulja testified that he cautioned I.D. that the Alterra investment was a high risk investment on many occasions, whereas, as set out at paragraphs [133] and [138], I.D.'s evidence is that the product and its risks were not explained to him.

[246] We are troubled by the lack of evidence supporting Trkulja's testimony. If he did provide clear warnings about the high risk nature of this investment and was concerned about its suitability for I.D., we would have expected to see written notes in the file, a discussion with the compliance officer (Sawh) or at the extreme, a refusal to process the order as outlined by the MFDA Rules and directed by the following sections in IHOC's Compliance Manual:

> **8.3.1.1 Reasonable Orders**
>
> A client may wish to make a purchase which would result in a portfolio more heavily weighted in equities than the model portfolios currently suggest, given the investment objectives of the client. Although such an order would not be recommended, the purchase may still be considered reasonable once the client's circumstances are taken into account and you may accept the transaction. As a general rule, more leeway can be given to sophisticated clients – those who have a relatively good understanding of investing. In such cases, a simple word of caution and a notation on the trade ticket followed by the client's initials acknowledging that the client was cautioned is sufficient. The following warning is to be printed on the trade ticket as well as in the notes section of the client profile:
>
> "This order was unsolicited. The client has been advised that the order might not meet the client's investment needs and objectives and is not recommended by the Investment House of Canada Inc."
>
> **8.3.1.2. Unreasonable Orders**
>
> If, for example, an income-oriented investor indicates that he or she wants to invest 100% of his or her liquid assets in [REDACTED] Energy Fund or [REDACTED] International Equity Fund, such an order would be completely inappropriate. In such cases, you should:
>
> - Explain that the purchase does not meet with the client's stated investment objectives (i.e., the investor is income oriented and the investment will not produce any income);
> - Suggest that the clients either change the trade order or inquire as to whether the client's personal circumstances have changed. You must not change investment objectives only to correspond to the trade;
> - <u>If the client refuses to change the trade order, or to change the investment objective, or such a change is totally unwarranted given the client's age, financial circumstances or other factors, the order should be refused. Determining whether an order is reasonable or not requires consideration of many factors and is, in the end, a judgment call. In case of uncertainty about this decision, consult your BCO.</u>
>
> It is the responsibility of the Representative to ensure that the investments recommended and acted upon are suitable for the client …
>
> [Emphasis added]

[247] Instead, we are presented with evidence of a significant change to the risk tolerance on a NAAF, that apparently passed without further review by the compliance regime. These factors, coupled with the evident lack of financial sophistication revealed in I.D.'s testimony, support the finding that Trkulja did not adequately explain the risks of the Alterra investment to I.D.

[248] We have considered the evidence of W.T., N.R., J.S. and K.M., set out at paragraphs [82], [87], [91] and [117] above, that the risks of the investments they made through Trkulja were explained to them. We note that, in the case of K.M., there is

conflicting evidence about what level of risk in relation to the Exempt Products was communicated to him. We have also considered the evidence of C.D. with respect to his interaction with Sawh which we set out at paragraph [95]. He testified that Sawh explained the risks of his mutual funds investment to him.

[249] We adopt our reasons at paragraph [223] that the testimony, at its highest, suggests that Trkulja may have explained the risks of specific investments to these witnesses. However, in light of the findings about Trkulja's interactions with I.D. and J.T., we are not persuaded that he has consistently discharged this aspect of know-your-product and suitability in the past or that he has the proficiency to meet future obligations if his registration is reinstated.

[250] We note that although W.T. considered himself to be a knowledgeable investor and appears to meet the criteria to be an accredited investor, he demonstrated by his evidence that he did not understand the terms "accredited investor" or "limited partnership". This underscores the importance of ensuring that the risks of investments are adequately explained. Even investors who have the ability to sustain a loss or who have some investment knowledge may still require the assistance of a registered individual to provide them with information about the attributes of a particular type of product that is unfamiliar to them.

Findings on Know-Your-Product

[251] In summary, we find the Applicants' past failure to conduct due diligence on the Exempt Products and provide explanation of the risks of these products to clients, along with their failure at the Hearing and Review to show that they understood these shortcomings, raise further questions about their proficiency for registration. The Applicants' roles as the senior managers of IHOC allowed them together to implement a compliance regime that emphasized form over substance in a manner antithetical to the proficiency standards of securities regulation. The Applicants' failure to conduct adequate due diligence and to explain the risks of products to clients contributed to failures in their role as gatekeepers facilitating the connection between the issuers and IHOC's clients. In light of the fact that the know-your-product requirement is now more significant to current regulatory obligations, we do not believe that the Applicants will be able to discharge these responsibilities appropriately if their registrations are reinstated.

(c) Findings on the Proficiency of the Applicants

[252] Viewed in its entirety, the evidence shows that the Applicants fell below the standards required of registered individuals during the period at issue. Both Applicants failed in the fundamental responsibility of registrants to deal with their clients in a proficient manner. The testimony of all the clients witnesses, even I.D. and J.T., revealed that the Applicants had successfully developed professional relationships with their clients. Their registrations, educational background and significant employment experience in the industry should have supported their successful discharge of the requirements imposed on registrants. Unfortunately, neither of the Applicants exercised the required level of judgment and responsibility to satisfy the regulatory requirements.

[253] In addition, as the senior managers and directing minds of IHOC, the Applicants also failed to create and maintain an appropriate compliance regime that demonstrated their understanding of the substance of the regulatory requirements. Although they had created a Compliance Manual, they either did not apply or implement the policies and procedures set out therein or applied them in a cursory fashion, apparently without regard to the regulatory objective sought to be achieved. This leads us to doubt their ability to understand and comply with Ontario securities law requirements on an ongoing basis.

[254] The Applicants represented to us that the failures of suitability assessment that were uncovered were isolated. In light of the direct evidence from the Applicants themselves about their approach to suitability, the MFDA Compliance Examinations and the Applicants' demonstrated failure to understand the need to conduct due diligence on complex products, we take the view that these failures reflect an absence of appropriate judgment expected in the circumstances rather than isolated failures.

[255] As a result of their failure to meet their know-your-client, know-your-product and suitability obligations, some of their clients invested in high risk Exempt Products that they did not understand and suffered financial losses they had no ability to sustain. At the Hearing and Review, the Applicants continued to show that they failed to understand the shortcomings of their actions and the importance of registration requirements in protecting investors. Accordingly, we find that the Applicants do not have the proficiency to be registered as dealing representatives of an MFD.

2. Integrity

[256] Having considered the proficiency of the Applicants to be registered, we now turn to the issue of the integrity of the Applicants as a criterion for their registrations. For the reasons set out at paragraph [162] above, we first set out the law relating to the integrity requirement both at the time of the relevant conduct and at the time of the Hearing and Review. We then consider two issues relevant to the assessment of whether the Applicants satisfy the integrity requirement.

(a) The Law on Integrity

[257] While integrity is not defined under the Act, the Commission in *Istanbul* stated that an assessment of integrity should be "guided by the criteria set out in paragraph 2.1(1)(iii) of the Act. This provision states that an important principle that the Commission shall consider in pursuing the purposes of the Act is 'the maintenance of *high standards of fitness and business conduct* to ensure *honest and responsible conduct* by market participants'" [Emphasis in original] (*Istanbul*, *supra*, at para. 68). In *Istanbul*, *supra*, at para. 66, the Commission cited an earlier decision by the Director in *Re Wal*l (2007), 30 O.S.C.B. 7521 which addresses the issue of integrity. The latter decision explains that:

> OSC staff look at the honesty and the character of the applicant when analyzing integrity. In particular, staff examines the applicant's dealings with clients, compliance with Ontario securities law and other applicable laws, and the use of prudent business practices.
>
> (*Re Wal*l, *supra*, at para. 23)

[258] In *Istanbul* itself, the Commission found that the applicant misappropriated his clients' loyalty points and that he lacked the trustworthiness and integrity required of a registrant (*Istanbul*, *supra*, at para. 80). In particular, the Commission made the following findings with respect to conflict of interest arising from the applicant's conduct:

> There is also a self-dealing aspect to the Applicant's conduct. By improperly issuing Air Miles to his wife, the Applicant engaged in conduct that benefited not only his spouse but also himself. Further we note that during the period from 2002 to 2007 the Applicant also issued Air Miles directly to himself. The Applicant justified the issuance of Air Miles coupons to his wife on the basis that she had significant holdings with the bank; however, four out of the five accounts in question were held jointly by the Applicant and his wife. Thus, the Applicant as a joint holder of four of the accounts knowingly benefited. This aspect of his conduct is troubling to us because registrants should be able to identify and avoid conflicts of interest that result from a non-arm's length relationship.
>
> [Emphasis added]
>
> (*Istanbul*, *supra*, at para. 73)

[259] At the time the Applicants sold Exempt Products and mutual funds, OSC Rule 31-505 and the MFDA Rules imposed a standard of integrity on salespersons of an MFD. More specifically, section 2.1 of the OSC Rule 31-505 provided that:

> **2.1 General Duties** – (1) A registered dealer or adviser shall deal fairly, honestly and in good faith with its clients.
>
> (2) A registered salesperson, officer or partner of a registered dealer or a registered officer or partner of a registered adviser shall deal fairly, honestly and in good faith with his or her clients.

[260] Rule 2.2.1 of the MFDA Rules states:

> **2.1.1 Standard of Conduct.** Each Member and each Approved Person of a Member shall:
>
> (a) deal fairly, honestly and in good faith with its clients;
>
> …

[261] As referenced at paragraph [258] above, the way in which an applicant addresses conflicts of interest is a reflection of the applicant's integrity. Rule 2.1.4 of the MFDA Rules deals with a Member's obligations with respect to conflicts of interest or potential conflicts of interest:

> **2.1.4. Conflicts of Interest**
>
> (a) Each Member and Approved Person shall be aware of the possibility of conflicts of interest arising between the interests of the Member or Approved Person and the interests of the client. Where an Approved Person becomes aware of any conflict or potential conflict of interest, the Approved Person shall immediately disclose such conflict or potential conflict of interest to the Member.

> (b) In the event that such a conflict or potential conflict of interest arises, the Member and the Approved Person shall ensure that it is addressed by the exercise of responsible business judgment influenced only by the best interests of the client and in compliance with Rules 2.1.4(c) and (d).
>
> (c) Any conflict or potential conflict of interest that arises as referred to in Rule 2.1.4(a) shall be immediately disclosed in writing to the client by the Member, or by the Approved Person as the Member directs, prior to the Member or Approved Person proceeding with the proposed transaction giving rise to the conflict or potential conflict of interest.
>
> (d) Each Member shall develop and maintain written policies and procedures to ensure compliance with Rules 2.1.4(a), (b) and (c).

[262] In MFDA Member Regulation Notice MR-0054 – *Conflicts of Interest* ("**MFDA Member Regulation Notice MR-0054**"), issued on June 22, 2006, the MFDA takes the position that the concept of materiality is implicit in Rule 2.1.4 of the MFDA Rules:

> MFDA staff does not expect Members to anticipate every potential conflict, regardless of the remoteness of a problem arising, and provide written disclosure to clients of such conflicts. However, written disclosure must be provided in all cases where there is a reasonable likelihood that a client would consider the conflict important when entering into a proposed transaction. For example, this would include a situation where an Approved Person refers a client to a company in which the Approved Person has an ownership interest for tax preparation services.

[263] Rules 2.2.1 and 2.1.4 of the MFDA Rules and the MFDA Member Regulation Notice MR-0054 remain in force today to govern and provide guidance about the obligations of its Members and their representatives in relation to conflicts of interest. In addition, sections 13.4 and 13.6 of NI 31-103 set out the requirements that currently apply to registrants with respect to conflicts of interest. Guidance with respect to the current interpretation of integrity under the Act can also be found in section 1.3 of 31-103CP, which states that conflicts of interest include "other employment or partnerships, service as a member of a board of directors, or relationships with affiliates …".

(b) Application of Integrity Criteria to the Applicants

[264] We note that no allegations of fraud, misappropriation or high pressure sales tactics were made against the Applicants, nor is there any evidence before us that raises these issues. In determining the integrity of the Applicants, however, we are guided by the principle that the Commission shall consider in pursuing the purposes of the Act which, as set out in *Istanbul*, *supra*, at para. 68 and subparagraph 2(iii) of section 2.1 of the Act, excerpted at paragraph [152] above, is "the maintenance of *high standards of fitness and business conduct* to ensure *honest and responsible conduct* by market participants" [Emphasis in original].

(i) Proposed Transactions with Alterra and Golden Gate

[265] As established in Rule 2.1.4 of the MFDA Rules, registrants have an obligation to conduct themselves with integrity by addressing conflicts or potential conflicts of interest in an appropriate manner. It is not contentious that IHOC and the Applicants entered into discussions with Golden Gate and Alterra whereby the Applicants proposed to sell a significant equity interest in IHOC to Alterra or Golden Gate. It is also not disputed that these proposed transactions were not disclosed to IHOC clients. The parties, however, disagree as to whether these proposed transactions created conflicts of interest or potential conflicts of interest which required IHOC and the Applicants to mitigate or to otherwise address such conflicts or potential conflicts "by the exercise of responsible business judgment influenced only by the best interests of the client" (Rule 2.1.4 of the MFDA Rules).

[266] The Applicants testified that in 2006, they recognized that the regulatory environment of the mutual fund business was changing rapidly and that IHOC's infrastructure was no longer sufficient to respond to the changing environment. As a result, they explored various options to protect the interest of their clients while operating a viable business, and one such option was to sell IHOC to another dealer. The Applicants testified that their intention was to look for a place with "good infrastructure for compliance, operations" (Hearing Transcript dated September 16, 2011 at p. 120).

[267] As set out at paragraphs [46] to [49] above, the Applicants engaged in such discussions with various entities from 2006 to 2008. IHOC was not successful in its efforts to consolidate with another dealer. According to the Applicants, these proposed transactions were not concluded for a variety of reasons. For example, both Applicants testified that they terminated their discussions with one of them, because that entity "wanted to tie the purchase with sales into their product" which, according to the Applicants, would constitute a conflict of interest (Hearing Transcript dated September 16, 2011 at p. 119; see also Hearing Transcript dated September 12, 2011 at pp. 40-41)

[268] The Applicants further testified that they made the securities regulators, including the MFDA and the Commission, aware of the discussions between IHOC and other entities. According to the Applicants, they communicated with the regulators and kept them informed on a regular basis. Both Applicants testified and submit that they did not disclose their discussions with Alterra and Golden Gate to IHOC clients because the transactions did not materialize and therefore did not amount to a conflict or potential conflict of interest.

[269] More specifically, Trkulja justified the non-disclosure by stating, in reference to the MFDA Settlement, that:

> Well, to me it doesn't mean that there was a conflict of interest. It says that it may have constituted a potential conflict of interest … and in my opinion, there wasn't a conflict of interest because the lawyer representing Alterra who was also representing us in the proposed transaction, clearly indicated to the Ontario Securities Commission via letter that we would not be disclosing any sort of conflict of interest to investors until the deal closed. So that's why I don't view this as a potential conflict of interest because there was no deal that never closed [*sic*] and we informed the Ontario Securities Commission of that via letter.
>
> (Hearing Transcript dated September 12, 2011 at pp. 70-71)

[270] Similarly, at the Hearing and Review, Sawh was asked questions about the transactions. In direct examination, he was asked to read the following excerpt from the MFDA Member Regulation Notice MR-0062 – *Exempt Securities of Non-Arm's Length Issuers*, issued on May 24, 2007:

> A. "Where Members or Approved Persons have a significant direct or indirect interest in securities or other products being sold to clients through the Member there is a material conflict of interest that, under MFDA Rule 2.1.4, must be addressed by the exercise of responsible business judgment influenced only by the best interests of the client."
>
> Q. All right, stop. When you read this, did the Alterra transaction or the Golden Gate transaction ever proceed to a point where that particular paragraph would apply?
>
> A. No.
>
> Q. Why is that?
>
> A. It didn't materialize.
>
> Q. In other words, there was no direct or indirect interest in securities –
>
> A. No.
>
> Q. – or other products being sold? It didn't actually occur?
>
> A. No.
>
> (Hearing Transcript dated September 16, 2011 at pp. 143-144)

[271] Despite the Applicants' testimony as summarized above, we find that there is a regulatory concern relating to conflict of interest arising from the Applicants' conduct. In this case, the MFDA Settlement Agreement shows that IHOC sold Alterra securities to clients between October 2005 and February 2007, and in particular, that Trkulja sold Alterra securities in two periods, between October 2005 and May 2006 and between October 2006 and February 2007 (MFDA Settlement Agreement, *supra*, at paras. 17-18 and 40). Meanwhile, the evidence shows that IHOC commenced consolidation discussions with Alterra in February or March 2006 and continued those discussions until June 1, 2006 (MFDA Settlement Agreement, *supra*, at paras. 40-41). As well, the evidence shows that the Applicants sold Golden Gate securities between February 1, 2006 and January 20, 2007 and had two rounds of discussions with Golden Gate from June 5, 2006 to July 19, 2006 and from April 16, 2007 to December 19, 2007 (MFDA Settlement Agreement, *supra*, at paras. 21, 43-47).

[272] By engaging in discussions with Alterra and Golden Gate to sell an equity interest in IHOC to one of them at periods that overlapped with their efforts to sell Alterra and Golden Gate's Exempt Products to IHOC clients, the Applicants placed themselves in a position of conflict or potential conflict of interest. We believe this is expressed in the MFDA Settlement Agreement where the Applicants admitted to "actual or potential conflicts" of interest (MFDA Settlement Agreement, *supra*, at paras. 49-50 and 78).

[273] Further, we disagree with the Applicants' submission that the negotiation discussions did not create a conflict or potential conflict of interest because no transaction was concluded. The question of whether there are obligations arising from a conflict of interest or a potential conflict of interest is not determined by a one-dimensional analysis of whether a transaction ultimately materialized. The issue that should be considered, in accordance with Subrule 2.1.4(b) of the MFDA Rules, is whether the Applicants addressed the conflicts or potential conflicts of interest "by the exercise of responsible business judgment influenced only by the best interests of the client".

[274] The Applicants submit that they were anxious about looking for a partner because they could not manage the structure of their dealer. By Trkulja's own admission, the Applicants were "desperately looking for a partner" during the period in which they sold Exempt Products (Hearing Transcript dated September 14, 2011 at p. 122). Sawh testified that Golden Gate and Alterra were "purchasing an equity share in us, right, because they're trying to build their financial service company so were looking at a mutual fund dealer and fund [*sic*] an infrastructure to help that" (Hearing Transcript dated September 16, 2011 at p. 164). Sawh's evidence also demonstrates that the negotiations between the Applicants and Alterra had progressed to the point where Sawh was "out as part of Alterra interviewing people from an executive search company to come in to head up that compliance department" for the newly amalgamated entity (Hearing Transcript dated September 16, 2011 at p. 164).

[275] In our view, there is a reasonable likelihood that investors would consider IHOC's sale of Alterra or Golden Gate Exempt Products to them at the same time as IHOC wished to develop its relationship with the issuers of the Exempt Products, and indeed at a time when the Applicants were actively discussing selling their equity interest in IHOC to one of these issuers, to be a material conflict between the interests of the investors and those of the Applicants. For example, although the Applicants argued that it was not financially advantageous to them to sell Exempt Products as compared to mutual funds on a transaction-by-transaction basis because the commissions on the Exempt Products were lower, the Applicants' desire to sell their equity interest in IHOC to one of these entities may have created a different type of incentive for the Applicants to sell the Exempt Products. This circumstance contributed at the least to a perception of a conflict or potential conflict of interest and a failure to exercise "responsible business judgment" in addressing that conflict or potential conflict.

[276] We were not referred to any evidence showing that the Applicants took any steps, such as disclosure to clients or implementing additional policies or procedures, to address such conflicts or potential conflicts of interest. In the circumstances, we are not persuaded that the Applicants conducted themselves "by the exercise of responsible business judgment influenced only by the best interests of the client". The testimony of the Applicants at the Hearing and Review, which included a denial of the need to address such conflicts or potential conflicts, further adds to our discomfort as to whether they would be able to uphold the standards of integrity required of a securities industry professional.

(ii) ailure to Disclose Change of Risk Rating to Clients

[277] As set out at paragraph [52] above, IHOC initially rated the Exempt Products as medium risk investments. When the MFDA conducted the 2006 MFDA Compliance Examination, MFDA Staff advised IHOC and the Applicants that it considered the Exempt Products to be high risk investments.

[278] In his cross-examination at the Hearing and Review, Sawh was asked whether steps were taken to inform IHOC clients that the risk rating of the Exempt Products was changed following the 2006 MFDA Examination. Sawh responded that he understood Trkulja to be responsible for calling the clients and informing them of this change, but he did not personally take any such steps:

> Q. Did you take steps to ensure that all your clients were informed that the risk levels for those particular funds had been changed?
>
> A. Yes.
>
> Q. You did?
>
> A. Not me personally, but Vlad [Trkulja] had made calls to everyone.
>
> Q. You did?
>
> A. Discussions.
>
> Q. Really? When did you do that?
>
> A. We were notified in the November 6th examination that we were to change the risk ranking to "high" and amend all the KYCs.
>
> Q. I see. Did you inform your clients that you had changed the risk ranking?

> A. Well, when we had to go amend the KYCs, my understanding is Vlad [Trkulja] was discussing that with clients.
>
> Q. But did you do it?
>
> A. No, I didn't.
>
> Q. No, you didn't. So you didn't actually call any clients.
>
> A. No. We had a discussion, myself and Vlad [Trkulja], and that's what he was instructed to do.
>
> [Emphasis added]
>
> (Hearing Transcript dated September 16, 2011 at pp. 177-178)

[279] Sawh was then confronted with a statement that he made during an interview conducted by the MFDA on October 4, 2007, pursuant to section 22.1 of the MFDA Bylaw 1 (the "**MFDA Interview**"). During the MFDA Interview, he was asked the same question:

> Mr. Smith: Did you go back to the clients and say, "We put you into this as medium, it's really a high, are you comfortable?"
>
> Mr. Sawh: And lose every client we have? No, we didn't go back and speak to them. But if – in subsequent meetings and reviews we'd discuss it with them. And to date, everyone's received their interest cheques, I know that, as well as – yes. If they're called back and so on, we'd sit down with them. If we have to go through the new account applications, we'd explain what it is.
>
> [Emphasis added]
>
> (Transcript of the MFDA Interview dated October 4, 2007 at p. 25)

[280] Sawh confirmed at the Hearing and Review that he remembered being asked those questions and providing those responses. Sawh was then given an opportunity to explain the contradiction between the statements he made in the MFDA Interview and his testimony at the Hearing and Review. In reference to the excerpted portion of the MFDA Interview, Staff concluded with the following:

> Q. That's not what [page 25 of the transcript of the MFDA Interview] says. That's clearly not what this states, is it.
>
> What this says is...When you're asked did you go back to the clients and say, "We put you into this as medium, it's really a high, are you comfortable," you said, "And lose every client we have? No, we didn't go back and speak to them. But if – in subsequent meetings and reviews we'd discuss it with them."
>
> So which is it?
>
> A. No, we went back in subsequent meetings. Vlad [Trkulja] was calling them, clients, and meeting with them.
>
> Q. I see. But you didn't go back and speak to them. You didn't make an effort to; it was only if you were having a subsequent meeting?
>
> A. No, no. Vlad [Trkulja] was calling to set up meetings with these clients.
>
> Q. I see.
>
> A. Some would come into the office; some wouldn't.
>
> [Emphasis added]
>
> (Hearing Transcript dated September 16, 2011 at p. 181)

[281] We have difficulty accepting Sawh's testimony at the Hearing and Review as credible. In the first place, when asked the same question on two different occasions, he provided responses that are contradictory in nature. He testified at the Hearing and Review that he provided instructions to Trkulja to inform all affected clients about the change in risk rating of the Exempt Products. Meanwhile, he stated previously in the MFDA Interview that IHOC did not take steps to inform all affected clients about the change in risk rating because it would be adverse to IHOC and the Applicants' interests and that "And to date, everyone's received their interest cheques". His prior statements, which were closer in time to the 2006 MFDA Compliance Examination, as well as the reasons he provided in those prior statements for non-disclosure, which show an immediate concern about the viability of his business, cast doubt on the credibility of his testimony given at the Hearing and Review.

[282] In addition, there is no corroborating evidence before us to support the claim that IHOC put appropriate procedures in place to identify investors for whom the Exempt Products were no longer suitable as a result of the change in risk rating. We were not presented with, for example, any notes taken on the instructions given by Sawh to Trkulja about the communications to affected clients, nor were there policies and procedures before us about any concerted efforts by IHOC to communicate to affected clients about the change of the Exempt Products' risk rating.

[283] We are not persuaded that Sawh took adequate steps to ensure that affected clients were informed about the change in risk rating and, as a result of the change, to re-examine the suitability of the investments for those clients. In addition, Sawh's failure to adequately explain the discrepancies between the statements that he made during the MFDA Interview and his testimony at the Hearing and Review in a forthright manner also contributes to our concerns about his integrity.

(c) Findings on the Integrity of the Applicants

[284] `We find that the Applicants' failure to appropriately disclose or otherwise manage the conflicts or potential conflicts of interest involved in their negotiations to sell their equity interest in IHOC to Alterra or Golden Gate, while selling those issuers' Exempt Products to IHOC clients, did not meet the "high standards of fitness and business conduct to ensure honest and responsible conduct by market participants". Their continued denial at the Hearing and Review of the need to disclose or otherwise manage such conflicts or potential conflicts further prevents us from concluding that they will address conflicts of interest in accordance with the integrity requirements of registration in the future. Sawh's testimony at the Hearing and Review about the process undertaken by IHOC to revisit the change in risk rating of the Exempt Products, which we do not find credible in light of his prior statements at the MFDA Interview, adds to our discomfort about his integrity to be registered. In sum, we find that the Applicants lack the integrity required to be registered as dealing representatives of an MFD and are not suitable for registration.

C. Is the Reinstatement of the Applicants' Registrations Otherwise Objectionable?

[285] Staff submits that even if the Commission found that the Applicants have the requisite integrity and proficiency for registration, the Commission should refuse the reinstatement of their registrations on the grounds that the reinstatement is "objectionable".

[286] The Applicants did not make detailed submissions on this issue beyond making the general argument that "[t]here is no evidence that the Applicants pose any risk to the investing public, nor any evidence to warrant the exercise of the Commission's jurisdiction to prevent likely future harm to Ontario's capital markets".

[287] In light of our findings with respect to the Applicants' lack of suitability to be registered, it is not strictly necessary, in our view, to deal with the issue of whether the reinstatement of the Applicants' registrations is otherwise objectionable. However, for the sake of completeness, we address this issue briefly below.

1. Law and Analysis

[288] We were not provided with a great deal of guidance as to the considerations that would be relevant to an assessment of whether the registration of an applicant (or a reinstatement) would be "otherwise objectionable". No definition of the term is provided in the Act. We were not referred to any previous decisions at the Commission level that have considered this issue in any detail.

[289] In our view, a purposive approach should be taken to the analysis of the concept, that is to say, we should consider whether registration would be "otherwise objectionable" in light of the Commission's mandate, as expressed in section 1.1 of the Act and set out at paragraph [151] above, (a) to provide protection to investors from unfair, improper or fraudulent practices; and (b) to foster fair and efficient capital markets and confidence in capital markets. As referred to at paragraph [150] above, the Commission explained in *Michalik* that "[when] exercising its discretion to review the decision of a Director, the Commission is required to act in the public interest with due regard to its mandate/purpose under the Act, set out in section 1.1 of the Act" (*Michalik*, *supra*, at para. 44).

[290] As noted at paragraph [152] above, section 2.1 of the Act directs the Commission, in pursuing the purposes of the Act, to have regard to a number of principles, such as requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants. As the Commission stated in Istanbul and Michalik, registrants are in a position where they may harm the public, and regulating the conduct of registrants is therefore a matter of public interest (*Istanbul*, *supra*, at para. 57; and *Michalik*, *supra*, at para. 48).

[291] A number of aspects of the evidence led at the Hearing and Review about the Applicants' conduct shed light on the question of whether it would be in the public interest to reinstate the registrations of the Applicants. We consider these aspects below.

(a) The Applicants' Representations about their Registration Status

[292] As set out at paragraphs [58] and [76] above, the Applicants own TS Wealth through which they sell insurance and mortgage products. TS Wealth has a website at tswealth.ca.

[293] In cross-examination, Trkulja was referred to a TS Wealth webpage that captures the content of the website as of April 5, 2011. The page entitled "Investments" contained the following statements as of that date:

> TS Wealth Inc. offers a broad range of investment products to investors including Guaranteed Investment Certificates, government and provincial bonds, mutual funds, wrap accounts, principal protected notes, annuities and guaranteed investment funds.

[294] Trkulja explained that references to government bonds, mutual funds and wrap accounts were inadvertently placed on the TS Wealth website:

> … the reason why that was inadvertently put on our web site is because when we were going to transition over from the Investment House of Canada to MGI Financial, our brand was going to change to IHC Financial. So our web person … had created a new web site that wasn't live…we asked our web designer … to remove those specific words from the web site.
>
> …
>
> So that's my explanation on that. That should have never made the web site.
>
> (Hearing Transcript dated September 14, 2011 at pp. 111-112)

[295] Email exchanges between Trkulja and the web designer were introduced into evidence through Sawh. Based on the email exchanges, the Applicants recalled that they began creating the TS Wealth website on or around February 22, 2011. On March 14, 2011, Trkulja sent a communication to the web designer requesting that the statements set out at paragraph [293] be replaced with a revised passage which would effectively remove the references to government bonds, mutual funds and wrap accounts.

[296] Since May 2010, following the MFDA Settlement, Trkulja and Sawh had not been registered to trade in securities and accordingly were not entitled to hold themselves out as being able to sell government bonds, mutual funds or wrap accounts. Although the email message dated March 14, 2011 shows that Trkulja took steps to remove the references to government bonds, mutual funds and wrap accounts, those references remained on the website as of April 5, 2011. The Applicants' lack of care in ensuring that they did not represent themselves as being able to carry out registerable activities, both at the initial creation of the webpage and the subsequent failure to remove those references in a timely manner, adds to our discomfort about their ability to conduct themselves in accordance with the requirements of regulated activity.

[297] We also have concerns about the Applicants' forthrightness in their disclosure to their former clients, with whom they maintained a professional relationship following the MFDA Settlement, about what activities they were licensed to carry out. N.R. testified that he continued to communicate with Trkulja and thought Trkulja was "working with similar investments, like mutual fund advising" (Hearing Transcript dated September 15, 2011 at p. 31). He understood himself to be receiving investment advice from Trkulja with respect to the "Smith Manoeuvre" investment strategy, described at paragraph [86] above, as recently as a few months prior to the Hearing and Review.

[298] In re-examination, counsel for the Applicants sought to clarify the identity of N.R.'s advisor after the suspension of IHOC. N.R. stated that, another advisor with MGI was the adviser meeting with him and directly giving him advice related to those accounts after IHOC's suspension. N.R. also stated that Trkulja was not present during those meetings. However, when asked whether Trkulja was part of the meetings, N.R. responded "Indirectly. I was still communicating with Vlad [Trkulja]" (Hearing Transcript dated September 15, 2011 at p. 43). Counsel for the Applicants also sought to clarify the nature of the recent discussions between Trkulja and N.R. N.R. described those discussions as "carryover from dealing with Vlad [Trkulja].

Just how the market conditions are affecting just the current state of the investment" (Hearing Transcript dated September 15, 2011 at p. 44).

[299] Although counsel for the Applicants attempted to clarify in re-examination the nature of the discussions between Trkulja and N.R., we remain troubled that the consequences of the suspension of Trkulja's registration were not made fully clear to N.R.

[300] Both examples of representations in the TS Wealth website and Trkulja's interaction with N.R. speak to the Applicants' failure to exercise appropriate judgment and a lack of respect for the need for precision and clarity concerning the privileges of registration.

(b) The Applicants' Responses to Questions about the MFDA Settlement

[301] At the Hearing and Review, Staff put questions to the Applicants about their admissions in the MFDA Settlement Agreement. We observe that their responses to the questions about their conduct that formed the basis of the MFDA Settlement lacked forthrightness and candor. Where the Applicants admitted to failures, they admitted to failures of an administrative nature only rather than acknowledging their failures of judgment.

[302] For example, Trkulja was asked about his admissions in the MFDA Settlement Agreement, one of which was that he "sold Exempt Products to some clients without ensuring that the clients qualified as accredited investors in accordance with National Instrument 45-106" (MFDA Settlement Agreement, *supra*, at para. 31). He responded that he relied on the "sophisticated investor exemption", rather than the accredited investor exemption, as follows:

> A. In some cases, clients were accredited investors – sorry, not accredited investors, sophisticated investors, and that's what we relied on and it appears now, after seeing what we've been going through the last year or year-and-a-half, it appears that maybe one or two clients potentially may actually not be accredited investors but that's not what we were told initially. It's what we are being told now.
>
> Q. And so to the best of your knowledge, speaking only for yourself, did you sell any exempt products to any clients at any time where you knew that they were not accredited?
>
> A. Definitely not.
>
> (Hearing Transcript dated September 12, 2011 at pp. 59-60)

[303] When asked the same question again on a different day of the Hearing and Review, Trkulja refused to acknowledge that he sold Exempt Products to I.D. and J.T. without ensuring that the Exempt Products were suitable for these clients. Staff read from the MFDA Settlement Agreement as follows:

> Q. Between October 2005 and the 2006 examination in June 2006, Trkulja and Sawh sold one or more of the exempt products to clients without ensuring that the exempt products were suitable for some clients and in keeping with the client's investment objectives.
>
> A. Correct. Because we looked at –
>
> Q. Wait a second. Which clients?
>
> A. I don't know. Some clients. One or two clients.
>
> Q. Which ones?
>
> A. I don't recall.
>
> Q. Okay. Did you ever know?
>
> A. No.
>
> Q. So it wasn't Mr. [J.T.]?
>
> A. I'm not certain it was Mr. [J.T.]. It could have been numerous clients.
>
> Q. Was or wasn't Mr. [I.D.]?

A. I don't know.

[Emphasis added]

(Hearing Transcript dated September 14, 2011 at pp. 67-68)

[304] Sawh was similarly asked about the admissions in the MFDA Settlement Agreement at the Hearing and Review. For instance, he was asked about the admission that, in 2009, "the deficiencies identified in the 2006 MFDA Report described above had not been addressed and remained outstanding" (MFDA Settlement Agreement, *supra*, at para. 56). Sawh insisted that the deficiencies identified in the 2006 MFDA Compliance Examination had been remedied:

> Q. Except that in paragraph 56, and you agreed because you signed off on this, the 2009 MFDA report identified, among other things, that:
>
> "The deficiencies identified in the 2006 MFDA report described above had not been addressed and remained outstanding."
>
> A. They're talking about similar deficiencies identified, not the exact same ones.
>
> Q. Well, I mean, I don't want to parse language here too much.
>
> A. But you have to.
>
> Q. But it says "the" deficiencies identified in the 2006 MFDA report.
>
> A. Yes. So the deficiencies could be incomplete KYCs; that's "the deficiency". The specific deficiency of client A, B or C, that was rectified. The remedies to ensure that it didn't happen again were approved by the MFDA. The remedies didn't catch the same deficiencies to come back in the same category.
>
> Q. So that's your explanation of that paragraph, that they're not the same deficiencies?
>
> A. The same category.
>
> Q. I see. Okay. So, in other words, it may not have happened to the same clients, but it was sill [*sic*] happening in the same way; is that what you're saying?
>
> A. There were some deficiencies that ... We weren't perfect. Like, some things we would have missed.
>
> So it doesn't quantify it in the sense that if there are a hundred deficiencies in one category, specific ones; the same category may show up and maybe there's only four, but the deficiencies still existed.
>
> (Hearing Transcript dated September 16, 2011 at pp. 169-171)

[305] Trkulja took the same position on this issue:

> Not the same deficiencies. We actually – those deficiencies were actually addressed and corrected from the 2006. They just – they may have happened again in 2009.
>
> (Hearing Transcript dated September 14, 2011 at p. 75)

[306] The Applicants' statements in cross-examination about the 2009 MFDA Compliance Examination do not provide us with comfort that they have learned from their past compliance failures and would endeavour to avoid similar deficiencies, particularly deficiencies relating to know-your-client and suitability issues, in the future. Although we have not engaged in an exhaustive comparison of the 2006 MFDA Compliance Examination and the 2009 MFDA Compliance Examination, we note that, for example, in the 2006 MFDA Compliance Examination, the MFDA identified 6 accounts in a sample of 45 client files that had incomplete, inadequate or no know-your-client information, and in the 2009 MFDA Compliance Examination, the MFDA identified at least 31 accounts out of a sample of 77 client files that had inadequate know-your-client information.

[307] We further observe that the Applicants' assertion that the deficiencies were corrected is at odds with the report given to IHOC by the MFDA following the 2009 MFDA Compliance Examination, which was referred to the MFDA Enforcement Department. Finally, we note Trkulja's perplexing comment at the Hearing and Review that "[i]t could have been numerous clients" to whom the Applicants sold Exempt Products without ensuring that those products were suitable for those clients, as set out at paragraph [303] above.

[308] Trkulja testified that he and Sawh have worked in the financial services industry for many years and understood their admissions. He also acknowledged that the MFDA Settlement was negotiated with the assistance of legal counsel. The Applicants now come before us and advance interpretations of the admissions in the MFDA Settlement Agreement which are contrary to the plain language of those admissions, as exemplified by paragraphs [302] to [305] above. The Applicants' position at the Hearing and Review demonstrates a failure to learn from their previous regulatory deficiencies, which leads us to be unwilling to reinstate their registrations.

2. Findings on Objectionability

[309] Registrants hold positions of trust in the securities industry and towards their clients, creating a responsibility on their part to fulfill an important role directed towards the protection of investors and fostering fair and efficient capital markets and confidence in capital markets. However, the Applicants' conduct since the MFDA Settlement and their testimony at the Hearing and Review did not convince us that they understood the seriousness of their previous shortcomings or that they would behave differently in the future.

[310] In the intervening time since the MFDA Settlement, we were not told of any actions taken by the Applicants that would demonstrate their acknowledgement of their prior errors. The focus of testimony at the Hearing and Review was to minimize transgressions and to refuse to take responsibility for the admissions in the MFDA Settlement Agreement. Viewed in their entirety, the actions of the Applicants do not provide us with sufficient comfort that they would be able to achieve the high standards of business conduct required of securities industry professionals. Accordingly, we find that the reinstatement of the registrations of the Applicants as dealing representatives of an MFD would not be in the public interest and is therefore otherwise objectionable.

VII. CONCLUDING REMARKS

[311] Pursuant to section 27 of the Act, it is the responsibility of the Commission to register individual dealing representatives in Ontario. The framework of the registration regime requires a determination by the Commission as to the Applicants' suitability to be registered and whether the reinstatement of the Applicants' registrations is otherwise objectionable, which is separate from any agreements entered into with the MFDA.

[312] In coming to our decision, we considered the previous cases referred to us by the Applicants which they argue involve conduct that was dishonest, egregious, motivated by financial gain or involved willful blindness. While we acknowledge that, as the Applicants submit, no allegations of fraud were made against them in the MFDA Proceeding and they have no prior history of regulatory proceedings against them, the evidence presented to us at the Hearing and Review warrants the exercise of the Commission's jurisdiction to refuse the reinstatement of their registrations.

[313] In summary, we find that the Applicants lack the requisite proficiency and integrity to be registered as dealing representatives of an MFD and that the reinstatement of their registrations is otherwise objectionable. The evidence shows that the Applicants do not possess the requisite proficiency to adequately apply the know-your-client and suitability standards or to conduct the necessary due diligence on products. In addition, we find that the Applicants lack the integrity to be registered because of their failure to appreciate and implement appropriate measures to deal with conflicts or potential conflicts of interest and their lack of forthrightness at the Hearing and Review about the shortcomings of their conduct. Finally, we find that the reinstatement of the Applicants' registrations is otherwise objectionable based on their conduct following the MFDA Settlement and their testimony about that settlement at the Hearing and Review, neither of which provides us with comfort that they would be able to achieve the high standards of business conduct required of securities industry professionals.

[314] Finally, the Applicants asked us to consider the reinstatement of their registrations on the basis that MGI would be closely monitoring and supervising them. However, the Applicants did not provide sufficient evidence of how such an arrangement would address the Applicants' lack of suitability for us to consider granting the Application. Given the absence of detail, along with our findings on the Applicants' proficiency and integrity as well as the objectionability of their registrations, we do not find the Applicants' representations about their association with MGI to be a sufficient basis for granting the reinstatement of their registrations.

[315] Accordingly, we dismiss the Application and deny the reinstatement of the registration of each of Sawh and Trkulja as a dealing representative of an MFD.

DATED at Toronto this 1st day of August, 2012.

"Mary G. Condon"

"Judith N. Robertson"

3.1.5 Shaun Gerard McErlean and Securus Capital Inc. – Corrected Reasons – s. 127

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

AND

INTHE MATTER OF
SHAUN GERARD MCERLEAN AND
SECURUS CAPITAL INC.

REASONS AND DECISION
(Section 127 of the Act)

Hearing:	November 14, 15, 16,17, 21, 23 and 24, 2011, January 12, 2012, March 26, 28 and 30, 2012, April 2, 3, 5, 11 and 12, 2012 and June 18, 2012		
Decision:	**J**uly 19, 2012		
Panel:	Vern Krishna, Q.C.	–	Commissioner and Chair of the Panel
	James D. Carnwath, Q.C.	–	Commissioner
Appearances:	Matthew Britton	–	For Staff of the Commission
	Self-Represented	–	Shaun Gerard McErlean
	No one appeared on behalf of Securus Capital Inc.		

TABLE OF CONTENTS

I. INTRODUCTION

[1] On December 8, 2010, Enforcement Staff ("**Staff**") of the Ontario Securities Commission (the "Commission") filed a Statement of Allegations as follows:

> Staff allege that Shaun Gerard McErlean ("**Mr. McErlean**" or "**Shaun McErlean**") and Securus Capital Inc. ("**Securus**") (collectively the "**Respondents**"):
>
> (a) between January 22, 2009 and August 12, 2010, the Respondents engaged in or participated in an act, practice or course of conduct relating to securities that the Respondents knew, or reasonably ought to have known, perpetrated a fraud on any person or company, contrary to s. 126.1(b) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "***Act***");
>
> (b) between January 22, 2009 and September 28, 2009, McErlean traded securities without being registered to trade securities and without an exemption from the dealer registration requirement, contrary to s. 25(1)(a) of the *Act*;
>
> (c) between September 29, 2009 and August 12, 2010, without an exemption from the dealer registration requirement, the Respondents engaged in or held themselves out to be engaged in the business of trading securities without being registered in accordance with Ontario securities law, contrary to s. 25(1) of the *Act*;
>
> (d) between January 22, 2009 and September 28, 2009, McErlean acted as an adviser without registration and without an exemption from the adviser registration requirement, contrary to s. 25(1)(c) of the *Act*;
>
> (e) between September 29, 2009 and August 12, 2010, the Respondents, without an exemption from the adviser registration requirement, engaged in the business of, or held themselves out as engaging in the business of, advising with respect to investing in, buying or selling securities without being registered in accordance with Ontario securities law, contrary to s. 25(3) of the *Act*;
>
> (f) between January 22, 2009 and August 12, 2010, the Respondents traded securities which was a distribution of securities without having filed a preliminary prospectus or a prospectus with the Director or having an exemption from the prospectus requirement, contrary to s. 53(1) of the *Act*; and
>
> (g) that Mr. McErlean, as a director of Securus, authorized, permitted or acquiesced in the conduct of Securus contrary to s. 129.2 of the *Act*.

[2] We find that each of the allegations made by Staff against Mr. McErlean and Securus have been proven on a balance of probabilities.

II. STAFF WITNESSES

[3] Witnesses' testimony will be identified by Transcript Volume number and page number as "Tr. Vol. -, pp. xx – xx". Exhibits entered will be referred to by exhibit number as "Ex. – ". Hearing briefs will be referred to by Volume number, Tab and Page number as "Vol - , Tab(s) -, pp. xx – xx".

A. Indi Dhillon

[4] Mr. Dhillon is a forensic accountant in the Enforcement Branch of the Commission and his task is to assess and investigate potential breaches of Ontario securities law. He has been with the Commission for 15 years.

[5] Mr. Dhillon was assigned to the investigation of Mr. McErlean and Securus in March of 2010. During the course of his investigation, he collected documents and records that were filed, subject to identification, as Hearing Briefs, Volumes 1-16 inclusive.

[6] Mr. Dhillon's search of the National Registration Database revealed that Mr. McErlean was registered in October 2004 as an investment representative, sponsored by CIBC World Markets ("**CIBC**"). His registration terminated on January 22, 2009.

[7] During his investigation, Mr. Dhillon learned of Aquiesce Investments ("**Aquiesce**"). A Business Names Report shows Aquiesce to be a sole proprietorship with an address of 102 Bear Trail, Newmarket, Ontario. Aquiesce is shown as engaged in investment consulting. Mr. McErlean applied for registration of Aquiesce and his residence address is also 102 Bear Trail, in Newmarket, which is Mr. McErlean's residence (Ex. 1, Vol. 16, Tab 1, pp. 1-3).

[8] A subsequent search by Mr. Dhillon revealed that Aquiesce was not registered with the Commission, neither was it a reporting issuer in Ontario.

[9] Staff referred Mr. Dhillon to Vol. 1, Tabs 2–32, introduced as Ex. 2. The tabs contain all the bank statements and supporting documentation for TD Canada Trust Acc. No. 522 1560 in the name of Aquiesce INV. The account opened on December 10, 2008; transactions are shown until January 2, 2009. The last entry at Tab 32 shows a balance of $101,337.28. Mr. Dhillon was then referred to Vol. 16, Tab 2, pp. 4-30, entered as Ex. 3. Documents at Tab 2 include a complaint received at the Contact Center of the Commission from one TB, acting for a Colorado company, GP Co. and its CEO, Mr. JG. The complaint referred to an "Aquiesce Investments Trade Agreement" with PD Co., one of JG's companies. The agreement was never signed by Aquiesce and was described in an internal Staff memo as not contrary to Ontario's securities law. Considerable questions were posed to Mr. Dhillon concerning this unsigned agreement, which apparently did not contravene Ontario's securities law. Further pages from Tab 2, pp. 31 - 33 were entered as Ex. 4. Mr. Dhillon's evidence on this area and these two exhibits are of little or no assistance to the Panel.

[10] Mr. Dhillon was then asked about a meeting he had with James Dickson, a senior manager in the Corporate Investigations Department of the Royal Bank of Canada ("**RBC**"). When Mr. Dhillon and Mr. Dickson met, RBC account statements in the name of Securus were shown to Mr. Dhillon, together with supporting documents. Mr. Dickson showed Mr. Dhillon a Statement of Claim filed by ALLC, a Colorado company, against Mr. McErlean, Aquiesce, TD Waterhouse Canada Inc. ("**TD Waterhouse**"), the Toronto-Dominion Bank ("**TD Bank**"), and RBC (Ex. 5, Vol. 12, Tab 3, p. 10-22).

[11] In paragraph 17 of the Statement of Claim, the plaintiff pleads that on June 11, 2009, USD $2 million was wired from the plaintiff's account to be deposited to the Aquiesce Acc. No. 522 1560 for credit to ALLC.

[12] Staff referred Mr. Dhillon to Vol. 1, Tab 33, entered as Ex. 6, which he identified as a discount brokerage account application made by Shaun McErlean to TD Waterhouse. In the application, Mr. McErlean identifies his primary financial institution as TD Canada Trust, Newmarket with the Acc. No. 522 1560, as earlier identified in these Reasons. The TD Waterhouse brokerage account was numbered 72YJ94.

[13] Staff referred Mr. Dhillon to Vol. 1, Tabs 34, 35 and 36, entered at Ex. 7. Mr. Dhillon said these tabs contained transactions in the Aquiesce brokerage account with TD Waterhouse No. 72YJ94 from July 1, 2009 to August 31, 2009.

[14] Staff then drew Mr. Dhillon's attention to Ex. 2 containing the records for Acc. No. 522 1560 in the name of Aquiesce. Mr. Dhillon demonstrated that in the period from December 12, 2008 to June 4, 2009 there were deposits in the account of $400,000 approximately. This sum appeared to be made up of deposits by three or four persons based in Ontario. By June 4, 2009 there was a nominal amount in the account of $17.34. However, on June 11, 2009 a wire transfer from ALLC went into the account in the amount of USD $2 million or CAD $2,229,988.85. The wire transfer is found in Ex. 2, Vol. 1, Tab 19, p. 214. The "Payment Details" indicate the amount of the transfer is for further credit to ALLC in Acc. No. 77C436B-A.

[15] Mr. Dhillon was asked to explain how the CAD $2,229,988.85 was used. He replied:

(i) two entries of $74,040 and $86,380 were transferred to close a particular account;

(ii) a Canadian draft of $570,113.06 was distributed as follows:

(a)	to Bernadette McErlean,	$8,056.58;
(b)	RM, a relative of Shaun McErlean	$24,390.11;
(c)	to BM, a relative of Shaun McErlean	$22,500;
(d)	to SB,	$25,000;

(e)	to SP,	$100,000;
(f)	to RK,	$333,333.33;
(g)	to Shaun McErlean,	$17,500; and
(h)	to CIBC VISA,	$39,333.04
	Total:	$570,113.06

[16] Mr. Dhillon noted that RK had previously deposited $300,000 into the Aquiesce Acc. No. 522 1560.

[17] Mr. Dhillon identified a transfer from Acc. No. 522 1560 of $1,400,000 to TD Waterhouse. He said it appeared the monies were invested in publicly traded companies, as shown at Ex. 7, Vol. 1, Tab 34, p. 385.

[18] Mr. Dhillon then took us to Ex. 2, Vol. 1, Tab 21, p. 248 and identified a wire transfer to TD Acc. No. 522 1560 of $1,145,442.73 from Cash Flow Financial LLC, being approximately USD $1 million. On the same date there was a transfer to the TD Waterhouse brokerage Acc. No. 72YJ94 of $800,000, shown in Ex. 2, Vol. 1, Tab 34, p. 385.

[19] Mr. Dhillon then described a transfer from the trading Acc. No. 72YJ94 of $8,000 to Aquiesce Acc. No. 522 1560 on the June 19, 2009, found at Ex. 2, Vol. 1, Tab 34, p. 385. The deposit to the Aquiesce account is found at Ex. 2, Vol. 1, Tab 21, p. 248.

[20] Mr. Dhillon turned to his investigation of Securus, and an account opened at RBC for that company by Mr. McErlean, Acc. No. 101-842-3. He was referred to Vol. 3, Tab 1 which contain the opening documents for the account and Tab 2, which contained the account statements from December 2009 to August 2010. Tabs 3 to 10 provide the back up bank documents supporting the transactions that occurred in that account over that period. These documents were entered as Ex. 8, Vol. 3, Tabs 1-10.

[21] The documents show that Mr. McErlean was the president of Securus and the signing officer. His principal occupation is shown as being a “business consultant” which is typewritten. The words “investment advisor” have been added in handwriting. Much heat but not much light was expended on how the words “investment advisor” came to appear on the banking documents. The Panel’s conclusion is that this evidence is of no assistance in finding whether Mr. McErlean purported to act as a investment advisor.

[22] Entered as Ex. 9, Vol. 4, Tabs 1-14 inclusive were documents pertaining to Securus delivered by RBC to the Commission. They were described as not as complete as the banking documents filed at Ex. 8.

[23] Staff then referred Mr. Dhillon to Vol. 13, Tab 1, entered as Ex. 10, a document prepared by Mr. Dhillon described as Source and Application of Funds for RBC Business Bank Acc. No. 101-842-3 for the period from December 22, 2009 to August 9, 2010. An edited version (to remove personal information of investors) here follows:

Securus Capital Inc.

Source and Application of Funds for RBC Business Bank Account No. 03342-101-842-3 for the period from December 22, 2009 to August 9, 2010

Source of Funds:	**$**
Wire Transfers:	
TK AG, (apparently a German corporation)	2,129,140
RW (apparently a German resident)	1,410,560
MT REG (apparently a German trust)	1,390,700
MVWP (apparently a German resident)	1,369,400
Ms. LK (a Dubai resident)	1,543,568
EAEB (apparently a Dubai corporation)	1,310,963
Other Deposit (source unknown)	258,467
Other deposits/credits re items under $5,000	8,611
Total:	**9,421.409**

Application of Funds:	
To Shaun McErlean Cash or Visa payments	316,860
To Shaun relatives:	362,327
To Shaun related entities or persons:	
R3 Auto and Finance	717,007
Warrior One MMA Ltd.	359,096
RT Wood Natural Energy Corp.	389,000
M&AD	75,000
RS	20,000
Sub-total: To Shaun, relatives or related entities or persons	**2,239,290**
To former clients/investors of Shaun:	
LLF Lawyers LLP in Trust – Payment for ½ ALLC	1,049,700
RK – former CIBC client	375,575
To current investors:	1,352,414
Unknown debit memos and cheques, bank charges and other cheques under $5,000	2,451,523
Total:	**7,468,502**
Balance in RBC Account as of August 9, 2010	**1,952,907**
Adjustment for Pending deposit from investor not credited to a/c:	
Pending Deposits – July 25, 2010 wire transfer of USD $1,049,968 from Ms. LK – bank account statements reflect only a deposit of USD $248,968 – CDN equivalent – $258,466.91. Using the same exchange conversion rate -- USD $800,000 is equivalent to $830,522	832,522
Adjusted balance in the RBC account as of August 9, 2010	**2,785,429**

(There are two small errors made in entering the Canadian equivalent amounts from the USD $1,049,968 transfer from Ms. LK.)

[24] Mr. Dhillon took us to the cross-entries for Acc. No. 101-842-3 found in Ex. 8, Vol. 3. He explained the reference to a "pending deposit from an investor not credited to the a/c." Ms. LK wired USD $1,049,968 for deposit on July 25, 2010. The bank account statements reflect only a deposit of USD $248,968, or CAD $258,466.91. Mr. Dhillon explained that Mr. McErlean requested a draft of USD $800,000 immediately from the transfer to the effect that that sum did not go in and go out of the account. The Canadian equivalent of $258,466.91 of the balance of that transfer is shown as "other deposit – source unknown" on Ex. 10.

[25] Mr. Dhillon demonstrated by reference to the bank records that the item "current investors" relates to the investors who wired funds. We are satisfied that $1,352,414 was returned to them.

[26] Mr. Dhillon also demonstrated to our satisfaction that from the $2,451,523 described as "unknown debit memos, etc.," an amount of $584,674.27 was transferred to AS in Trust in respect of an Emco purchase. Mr. Dhillon's understanding was that this was a building in Barrie, Ontario.

[27] Overall, we are satisfied that the source and application of funds prepared by Mr. Dhillon accurately shows the sums of money deposited in the Securus bank Account No. 101-842-3 for the period described, subject to the minor errors in the calculation of the exchange rate from U.S. dollars to Canadian dollars. We accept the accuracy of the application of those funds, making allowance for the USD $800,000 applied to ALLC which were never deposited in the account.

[28] Mr. Dhillon then confirmed that Staff received a number of documents from RBC indicating that offshore individuals were calling RBC inquiring whether their entities, corporate or otherwise, had accounts at RBC.

[29] In Ex. 11, Vol. 12, Tabs 4-8 inclusive, are found email communications between RBC and TJ, a German investor, forwarded to Mr. Dhillon. Included are copies of an account summary TJ received from Dr. Uri Moelkner. An account summary on RBC letterhead shows a credit of €1,445,600. At Tab 6 is a communication from Securus Fund, L.P. ("**Securus Fund**"), 108 West 13th Street, Wilmington, Delaware, 19801, U.S.A.

[30] TJ confirmed to RBC that he had never heard of Shaun McErlean.

[31] In Vol. 12, Tabs 1-20, entered as Ex. 12, are email communications between RBC and one DH, representing a corporate entity JCNGNBH. TJ was inquiring about an RBC Acc. No. 102-8223 with a further account reference of 7205414. In Tab 14 at p. 63, is a letter on Securus Fund letterhead with an address of 29 Boo Lane, Pawley Islands, Georgetown, Delaware, U.S.A. to JCNGNBH over the purported signature of Shaun McErlean. Also included is a confidential private placement memorandum of Securus (Tab 17) and a limited partnership agreement of Securus Fund. The general partner is shown to be Oristi Holdings S.A. and a signature purported to be that of Shaun McErlean is affixed. In Vol. 12, Tab 21, entered as Ex. 13, are a number of inconsequential emails.

[32] In Ex. 14, Vol. 12, Tabs 23-25 inclusive, are documents concerning Tobias Haessner, a witness in this proceeding, including emails, banking documents and account statements with reference to MT REG. Mr. Haessner sought confirmation that MT REG had an RBC Acc. No. 720 6920A, containing €1 million.

[33] At Tab 23, there is an email from Mr. Haessner setting out account numbers for each of TK, MT REG, RW, MVWP and EAEB. The evidence of Mr. Dickson of RBC will establish that these accounts were non-existent. At Tab 25, there is an email from Shaun McErlean to KM, a U.S. citizen living in Durham, North Carolina, and Mr. Haessner, in which Mr. McErlean complains about his loss, the misguided shady business people he got involved with and instructs them to inform all clients "that our business relation has come to an end. I will transfer all funds to the account details that I have on file. I'm done."

[34] The following Exhibits were also entered through Mr. Dhillon:

(1) Exs. 15, 15A and 16 containing email correspondence between Staff and Shaun McErlean;

(2) Ex. 17, Vol. 9, Tabs 1-10 inclusive being the transcript of Shaun McErlean's voluntary interview dated August 13, 2010;

(3) Ex. 18, Vol. 9, Tabs 11-14 being a transcript of Shaun McErlean's compelled interview dated August 20, 2010;

(4) Ex. 19, Vol. 2 in its entirety containing documents pertaining to Right Step Solutions Inc., Radical Rods, Rides & Restoration Inc. ("**Radical Rods**") and R3 Auto and Finance Inc. regarding customer profiles and various account statements and banking documents;

(5) Ex. 20, Vol. 10, Tabs 1-9 inclusive containing incorporation documents and bank documents referring to the companies set out in (4), above;

(6) Ex. 21, Vol. 5, Tabs 1-3, contains RT Wood Natural Energy Corp. documents;

(7) Ex. 22, Vol. 16, Tab 5 is a sales history report identifying the Securus real estate purchase from Emco Limited, a property in Barrie occupied by Securus interests; and

(8) Ex. 23, Vol. 13, Tabs 2-7 contains orders and directions of the Commission and the Supreme Court of Justice (Ontario).

[35] In cross-examination by Mr. McErlean, Mr. Dhillon acknowledged that he told Mr. McErlean at the end of his voluntary interview "We appreciate that you've come down, and you've been cooperative with us, and you answered our questions. We appreciate that."

[36] Mr. McErlean's cross-examination of Mr. Dhillon provides little assistance to the Panel. Understandably, Mr. McErlean was unfamiliar with the techniques of cross-examination and on many occasions attempted to put in evidence circumstances of which Mr. Dhillon was unaware. His questions involved jumping from exhibits to exhibits without providing any clarity to the point Mr. McErlean was making.

[37] Considerable time was spent on asking Mr. Dhillon why he swore an affidavit that the false bank statements were prepared by Securus. Mr. Dhillon tried to explain that at that point in the investigation the name Securus was at the top of the documents. It was nothing more nor less than that.

[38] Ex. 24, Vol. 13, Tabs 8-10, contains certificates regarding Aquiesce, Securus and Shaun McErlean.

[39] Mr. McErlean also spent considerable time on the words "investment advisor" hand-written in the banking documents for Securus referred to earlier in these Reasons. We have concluded that the appearance of those words in the banking documents is not evidence that Mr. McErlean was advising investors.

[40] However, Mr. McErlean noted that Mr. Dhillon had sworn an affidavit that he, Mr. McErlean, acknowledged "that the investors who advanced these funds into the RBC account have generally promised a guaranteed rate of 5%." Mr. Dhillon was pressed on the point and finally acknowledged that nowhere in the voluntary interview did Mr. McErlean say there was a guaranteed return.

[41] During the cross-examination of Mr. Dhillon, Mr. McErlean entered Exs. 25-29. We find them of no value and they play no part in our decision.

[42] In re-examination, Staff entered Ex. 30, including investigative notes of Mr. Dhillon dated August 17, 2010. Entered as Ex. 31, was a transcript which was of no assistance to the Panel.

B. Richard Radu

[43] Mr. Radu is a Senior Investigator in the Enforcement Branch of the Commission. His evidence may be found in Tr. Vol. 3, pp. 67-122 and Tr. Vol. 4, pp. 16-95. From 1988 to 1999 he was a member of the Royal Canadian Mounted Police (the "**RCMP**"). For eight of those years he was in Commercial Crimes, specifically assigned to the Market and Securities Unit. Before he joined the RCMP, he was an assistant manager with the Bank of Nova Scotia in Saskatchewan.

[44] After familiarizing himself with the file on Shaun McErlean, he conducted a telephone interview with KM. He made notes of the interview and incorporated them in his will-say statement. KM is a U.S. citizen living in Durham, North Carolina. He met Mr. McErlean before January 2009 when Mr. McErlean worked at TD Bank. Sometime after their first meeting, Mr. McErlean called KM to advise that he wanted to leave TD Bank and start his own company. He asked KM to invest up to a $1,000,000 towards the $4,000,000 in total he felt he needed.

[45] KM told Mr. Radu he owned a dormant company, Securus Fund. He spoke with a friend of his, DF, about setting up an operation with Mr. McErlean to bring in clients. Finally a partnership was organized, including KM's friend, DF, Dr. Uli Moelkner and Mr. McErlean.

[46] Funds were to be deposited with Securus Fund and Mr. McErlean would be the trader, with zero risk to the clients. Mr. McErlean was to open an account in the name of Securus Fund and then open an account for each client and to provide appropriate documentation. KM told Mr. Radu that Mr. McErlean was to do all of the trading, that he never doubted Mr. McErlean; he knew Mr. McErlean's aunt, known as MI, very well.

[47] Following TK's investment, KM noticed the account was in the name of "Securus Capital Inc." and not "Securus Fund, L.P." Mr. McErlean told KM that they couldn't use the word "Fund" so he used "Capital Inc.". Mr. McErlean assured KM that Securus was in the name of the four partners but never did provide KM with confirming documentation. It was only later that KM discovered that Mr. McErlean had sole control of the Securus account.

[48] Following the creation of the partnership, KM discovered that Dr. Moelkner was involved in a law suit in Germany and so KM removed Dr. Moelkner from Securus Fund.

[49] Five clients provided approximately €1,000,000 for a total of €5,500,000. According to KM in his conversation with Mr. Radu, the sum should still be there. KM said that he received RBC records from Mr. McErlean regarding separate accounts for each client. However, when he contacted someone at RBC, he was told the Commission had frozen the Securus account on August 12, 2010.

[50] Mr. McErlean's aunt, MI, told KM that Mr. McErlean used Securus for other purposes of which KM was not aware. KM received no money from Securus on a monthly basis. An entity by the name of Cascade received three payments of $25,000 each. KM ended the interview by agreeing to provide Staff with documents. Mr. Radu subsequently received a wealth of documents from KM. The first set involved Investor MVWP, one of the investors shown on Mr. Dhillon's Source and Application of Funds. In Vol. 8, Tab 6 were three documents. A document entitled, Asset Management Agreement and Power of Attorney between MVWP and Securus Fund was entered as Ex. 32, Vol. 8, Tab 6, pp. 46-53. A second Asset Management Agreement and Power of Attorney was entered as Ex. 33, Vol. 8, Tab 6, pp. 54-61. This document was signed by MVWP and on behalf of

"Secur Capital L.P." and "Secur Capital Inc." by S. McErlean and KM. A third document, a letter from MVWP to Mr. McErlean, was entered as Ex. 34, Vol. 8, Tab 6, p. 62 in which he purports to cancel his contract with Securus Fund.

[51] KM sent a further tranche of three documents. The first document is an account application to RBC Direct Investing Inc., signed by MVWP, entered as Ex. 35, Vol. 8, Tab 7, pp. 65-69. The second involves the communication to the Dresdner Bank, involving Investor MVWP transferring €1,000,000 to RBC Acc. No. 526 942A. No such account existed with RBC. This became Ex. 36, Vol. 8, Tab 7, pp. 70-71. The final document is described as a business account statement on the letterhead of RBC confirming over $1,000,000 in Securus Acc. No. 101-842-3, entered as Ex. 37, Vol. 8, Tab 7, p. 72.

[52] Documents involving Investor MT REG and Securus Fund were entered as Exs. 38-43 inclusive. Significant among the documents is Ex. 40, Vol. 8, Tab 4, p. 34, a letter on Securus Fund letterhead, to MT REG confirming the establishment of an account at RBC in Newmarket. The letter is signed by Shaun McErlean.

[53] Exhibit 44, Vol. 8, Tab 3 is a copy of an email from Shaun McErlean to KM enclosing a blank application form to open an account at RBC.

[54] Exhibits 45-56 are all found in Vol. 6, Tabs 3-5 and consist of emails and attachments referencing TK. The emails confirm that TK invested a total of €1,420,000 by transferring sums to Securus. The emails also confirm Mr. McErlean forwarded a fake RBC statement referencing TK's investment.

[55] Mr. Radu testified about a telephone interview he conducted with NK, a resident of Sedona, Arizona, in the U.S. NK said he invested USD $1,000,000 with Mr. McErlean and Securus to be invested in medium-term notes that are normally sold between banks. He was put in touch with Mr. McErlean by BS and MI. In June 2010, NK travelled to Toronto and set up an account at RBC over which he had control. He said he still has his USD $1,000,000. NK subsequently learned later in 2010 that the Commission had frozen the account.

[56] Subsequently, NK forwarded an email with eight attachments entered as Ex. 57, Vol. 8, Tab 10. In Ex. 58, Vol. 12, Tab 28 are documents confirming NK's interaction with the Commission's Contact Center.

[57] In Ex. 59, Vol. 12, Tab 27, are documents flowing from a complaint by VT regarding his account with RBC over which he retained control. He told the Contact Center that the account was opened with the help of BS and MI who, in conjunction with Mr. McErlean, offered a minimum investment return of 50% per month from a private placement program. BS and MI were identified as sharing 15% in the program. VT was looking for $2,500,000 from Mr. McErlean based on the promised return.

[58] Finally, Mr. Radu was referred to Vol. 12, Tab 26, entered as Ex. 60. Tab 26 contained documents with respect to the investment of ALLC. Mr. Radu spoke with Mr. A, a representative of AALC, and learned that there was no interest in pursuing ALLC's loss with the Commission. Mr. A declined to be interviewed.

[59] Mr. Radu identified a transcript of Mr. McErlean's compelled interview as conducted by Mr. Radu and entered as Ex. 61.

[60] Staff then entered Ex. 62, Vol. 11, all having to do with Mr. Bateman, a witness to be subsequently called.

[61] Mr. Radu was then asked about an interview he conducted with Ms. LK, a resident of Dubai. The interview was conducted on December 8, 2010 and Ms. LK was represented by counsel. Her voluntary interview was entered as Ex. 63, Vol. 6, Tabs 6 – 50. In addition, all documents provided to Staff by Ms. LK during her interview at Commission offices may be found in Ex. 64, Vol. 7, Tab 1-9.

[62] In anticipation of LK attending to testify, additional documents were entered through Mr. Radu. Exhibit 65, Vol. 8, Tab 2 is a Securus Capital Private Investment Agreement between Securus and Ms. LK. Exhibit 66, Vol. 8, Tab 1 is a private treaty agreement between her and Cartol Limited.

[63] Exhibit 67, Vol. 8, Tabs 11-53 are the telephone records for Mr. McErlean's residence from January 2009 to September 2010.

[64] Exhibit 68, Vol. 9, Tab 16 is a CD-ROM containing PIN to PIN messages sent from Mr. McErlean's BlackBerry provided to Staff by Research In Motion.

[65] Mr. McErlean's cross-examination of Mr. Radu began by asking him to look at Ex. 25, Vol. 6, Tab 1, an Asset Management Agreement and Power of Attorney. Mr. Radu agreed that the font in the first seven pages of the document was quite different from the font on the signature page. Mr. McErlean then referred Mr. Radu to Ex. 25, Vol. 6, Tab 2, p. 28, which appears to be a stand-alone document in the form of a signature page, much like the one at p. 9 of Tab 1. Mr. Radu said he never questioned KM about the difference in the font size of the signature pages.

[66] Mr. McErlean asked Mr. Radu to examine p. 44 in Vol. 8, Tab 6. The document is an email with three attachments dealing with investor MVWP. At p. 46 is an Asset Management Agreement and Power of Attorney that appears to be signed on p. 53 by MVWP and Dr. Uli Moelkner on behalf of Securus Fund. At p. 54 in the same tab is a Asset Management Agreement and Power of Attorney. Once again, Mr. Radu was asked to compare the font size on the first seven pages of the document with the signature page found at p. 61. Once again, Mr. Radu agreed the font size was different. At p. 62 in the same tab is a letter addressed to Securus Fund at 108 West Thirteenth Street, Wilmington, Delaware, 19801, U.S.A. and beginning with "Dear Mr. McErlean". Mr. Radu was asked if he knew how Mr. McErlean received this letter or if he received it. Mr. Radu acknowledged that he did not.

[67] Mr. McErlean then produced 14 pages of hand-written notes made by Mr. Radu during the course of the investigation. The notes were entered as Ex. 69. The gist of his cross-examination on this point was to stress to Mr. Radu that KM was willing to attend for an interview but was never interviewed. After considerable questions and discussion, Mr. Radu acknowledged that KM was repeatedly asked to come and testify. KM continued to say he was willing to do so but never appeared. Also filed on the cross-examination was Ex. 70, a Document Case Assessment sent to Mr. Radu.

[68] The Panel took from Mr. McErlean's cross-examination of Mr. Radu that we will hear his explanations for the matters raised with Mr. Radu during the cross-examination. A number of inconsistencies were acknowledged by Mr. Radu but he, of course, could offer no explanation for the changes in the font size of some agreements nor why KM apparently was unwilling to appear.

C. James Dickson

[69] Mr. Dickson is a Chartered Accountant and a specialist in investigative and forensic accounting. He is the senior manager for forensic accounting at RBC in the Corporate Investigation Services group. He performed the same function for KPMG in the preceding years before joining RBC.

[70] Mr. Dickson was asked if RBC received a number of requests from companies and individuals residing in Germany. Mr. Dickson stated that requests came in to confirm account balances or account statements for accounts they either held in their own name or as sub-accounts of Securus. The various documents that were provided to Mr. Dickson sometimes referred to Securus Fund and sometimes to Securus. All of the enquiries came from persons who believed they had advanced funds into accounts with RBC. Mr. Dickson's understanding was that the persons in Germany were making some sort of investment with Securus.

[71] Part of the documentation received included falsified RBC Account Statements. Mr. Dickson's review confirmed that they did not in fact represent true accounts held with RBC. He identified that the funds in fact were, for the most part, paid into accounts maintained by Securus at RBC. RBC decided to restrain the accounts and conducted a general overview of what had taken place and determined that just under $2,000,000 was remaining in the account at that point. The bank attempted to get in touch with Mr. McErlean, but was not successful and the matter was reported to the Commission.

[72] The investigation revealed that persons in Germany were not clients of RBC nor was Securus Fund. The evidence did establish that the persons in Germany had deposited funds in the account in the name of Securus.

[73] Mr. Dickson was referred to Ex. 9, Vol. 4, Tabs 1-14 inclusive containing the Securus documents provided to the Commission by RBC. Mr. Dickson confirmed that the documents were the type of documents completed by any company opening an account in the ordinary course.

[74] Mr. Dickson was referred to Ex. 5, Vol. 12, Tab 13, the Statement of Claim filed by ALLC, in which ALLC sued Mr. McErlean and, among others, RBC.

[75] Mr. Dickson confirmed that Aquiesce held an account with RBC. It was his understanding that ALLC had advanced funds to Mr. McErlean and/or Aquiesce for investment purposes in the approximate amount of $2,000,000.

[76] Mr. Dickson was then asked to examine a number of documents purporting to be RBC statements or referencing RBC account numbers. At the end of this exercise, he was asked to look at Ex. 14, Vol. 12, Tab 23, p. 191, which listed TK, MT REG, RW, MVWP and EAEB who appear in the Source and Application of Funds document set out earlier in these Reasons. For each customer, an account number is shown and it was Mr. Dickson's evidence, which we accept, that the account numbers are false and do not exist at RBC. Mr. Dickson said that the customers listed are not customers of RBC. No accounts at RBC have an 'A' at the end of the account number.

[77] Mr. Dickson was taken to Ex. 14, Vol. 12, Tab 25, pp. 211-213 and 214, purporting to be "screenshots" of account statements presumably brought up on a computer screen. Mr. Dickson testified that none of the screenshots were genuine representations of an RBC account at the applicable dates. His investigation showed that all the screenshots were fakes.

[78] We took from Mr. Dickson's evidence that the only Securus account with RBC was Acc. No. 101-842-3 and any other representation with a different account number held by Securus was bogus.

[79] Mr. Dickson was then asked to review wire transfers from investors that were deposited into the Securus account, entered as Ex. 9, Vol. 4, Tabs 1-14. He confirmed that over $9,000,000 was credited to the account from individuals and entities offshore. In Vol., 4, Tab 4, he identified a wire transfer of CAD $1,480,000 into the account from TK. In Tab 5, he identified a wire transfer of CAD $595,980 going into the account from TK. In Tab 6, he identified a wire transfer of €999,972 going into the account from RW, representing CAD $1,410,560.50. In Tab 7, he identified the transfer of €1,000,000 going into the account from MT REG. In Tab 8, he identified a wire transfer for €1,000,000 going into the account from MVWP. In Tab 9, he identified a wire transfer for CAD $53,160 going into the account from TK. In Tab 10, he identified a wire transfer for USD $557,634 going into the account from Ms. LK. In Tab 11, he identified a wire transfer for USD $896,054.42 going into the account from Ms. LK, of which the Canadian equivalent was CAD $922,488.03. In Tab 12, he identified a wire transfer for USD $46,302 going into the account from Ms. LK, of which the Canadian equivalent was CAD $46,996.53. In Tab 13, he identified a wire transfer of €999,972 going into the account from EAEB, resulting in a conversion to CAD $1,310,963.29. In Tab 14, he identified a wire transfer of USD $1,049,968 going into the account from Ms. LK. Of that amount, USD $800,000 was purchased as a draft for payment to LLF Lawyers, who acted for ALLC. The draft for the $800,000 was created with the funds never going into the account. The balance of the funds after conversion to CAD $258,467 did go into the account.

[80] Mr. Dickson confirmed that as of August 9, 2010 the balance in the Securus account was $1,952,905.39. The account remains under restraint. Mr. Dickson said that RBC made one, possibly two attempts to meet with Mr. McErlean and he was either unavailable or unwilling to meet with an investigator.

[81] Mr. McErlean's cross-examination of Mr. Dickson was somewhat helter-skelter, directed towards establishing that Mr. McErlean was not trying to avoid a meeting with RBC. This was of little help to the Panel.

[82] However, Mr. McErlean directed Mr. Dickson to Vol. 12, Tab 6, p. 29, where TJ writes to Mr. Barbour of RBC to this effect: "here are the copies of the account summary we got from Dr. Moelkner. There were 11 summaries from Chadstone, this was the first one." Mr. Dickson was then referred to p. 31 in Tab 6 where appears a purported business account statement on the letterhead of RBC. The statement shows an Acc. No. 101-842-2, the account in the name of TJ and HJ. The balance in the account is shown as €1,445,600. Mr. Dickson confirmed that the statement was bogus and that the sum of €1,445,600 went into the Securus account, not into an account purportedly controlled by TJ and HJ.

[83] Mr. Dickson was then referred to Vol. 12, Tab 9, p. 45, a letter from TJ addressed to the head office of RBC. TJ writes "Allegedly our trustee, Dr. Moelkner (Securusfund) established a bank account with the Acc No. 03342-101-842-2 for me, TJ and my wife, HJ with the Royal Bank of Canada." TJ goes on to ask for an acknowledgement of the account and the amount of the money which is deposited into the account. Mr. Dickson confirmed that this was not a RBC account.

[84] Staff counsel then returned Mr. Dickson to Ex. 9, Vol. 4, Tabs 4-14. Once again, Mr. Dickson identified these as copies of the wire transfers from investors that were deposited into the Securus account. He confirmed that Euro dollar amounts were converted to Canadian funds and U.S. dollar amounts were also converted in the same manner. The dollar amounts reflected the amounts credited to the various investors in the Source and Application of Funds document reproduced earlier in these Reasons.

[85] Mr. Dickson also confirmed that the wire transfer by Ms. LK of $1,049,968 was the subject of two drafts, one for USD $800,000 paid to LLF Lawyers and the balance deposited into the Securus account. Mr. Dickson also confirmed that as of August 20, 2010 the balance in the Securus account was $1,952,905.39.

[86] Mr. McErlean's cross-examination of Mr. Dickson did not assist the Panel.

D. Tobias Haessner

[87] Mr. Haessner is a resident of Crailsheim, Germany and is self employed. He has a degree in political science and subsequently obtained a degree in marketing from the Free University of Berlin.

[88] In 2009, Mr. Haessner met DF, a man with a background and contacts in Africa, specifically African governments. It had always been his goal to develop projects and help finance projects in Africa. Mr. Haessner started to work for DF in 2010. He was to research and investigate different kinds of projects, including renewable energy, solar thermics and geothermics. He ordered feasibility studies, visited scientific congresses and studied the appropriate literature. The plan was to open an office in Botswana in 2010. DF told Mr. Haessner he had some experience in trading, particularly in certain kinds of project financing involving medium-term notes and senior unsubordinated bank debentures. When he started with DF no money had yet been raised for the intended projects.

[89] DF had contacted Uli Moelkner, an alleged friend who claimed to have access to some "really rich clients". Also, in January 2010, another contact was made with Shaun McErlean who thought he could access RBC and get involved in trading. Shortly put, Uli Moelkner was a fraudster and involved in criminal behaviour. He had no access to financing. Following his arrest in July 2010, he was sentenced to seven and a half years in prison.

[90] In the fall of 2009, DF had been introduced to Mr. McErlean by KM, a resident of the United States. The introduction was via email and telephone; KM never met Mr. McErlean in person. The same was true of Mr. Haessner who got to know Mr. McErlean through email.

[91] A company was established by Uri Moelkner, KM, DF and Shaun McErlean. The company, named Securus Fund, was formed to trade in medium-term notes with funds to be invested by clients, not by Uri Moelkner. During the first month in 2010, it became clear that Mr. McErlean established a second company, Securus, in Canada. Mr. Haessner said it should have been a subsidiary of Securus Fund but that never happened.

[92] The investment plan communicated to clients in Germany was such that their money would be collected and bundled at several sub-accounts at RBC in order to achieve trading power at the main account of Securus. Mr. McErlean told DF and KM that he was able to earn profits, approximately 20% per month. The intention was that a client would receive 5% of the 20% monthly sum, earned or accumulate the 5% monthly, with the balance to be divided among the shareholders and then to be used for project financing. There was no breakdown of how the profits would be distributed amongst the various parties. During the first months, KM, DF, Shaun McErlean and Uri Moelkner received €25,000; another €40,000 went into project financing. There was no written agreement about what would happen with the money.

[93] Five investors put approximately €5,500,000 in the scheme. They were told that they would get their own accounts or sub-accounts at RBC. After completing the account application information at RBC, Mr. McErlean provided DF and Mr. Haessner with an account number. Mr. McErlean wired instructions saying that the money goes to the main account at Securus but for credit to or for the benefit of the named client and in a sub-account number for that client. Shaun McErlean sent RBC account opening forms to Germany and the client filled them out; the forms were returned to Mr. McErlean who provided an account number for that client. The sub-account number was in turn forwarded to the client who then carried out the actual transfer of the funds to the Securus account by wire transfer. All account statements for the client were received from Mr. McErlean, never from RBC. It was originally planned that all clients would get their own internet banking and access at RBC as represented by Mr. McErlean. Later on, he said that RBC had technical problems; for that reason Mr. McErlean provided screenshots of internet banking accounts and account statements.

[94] Account statements were only in the name of Securus and not in the name of the client. Delays developed in timely payments of the monthly sums promised and Uri Moelkner became belligerent in seeking payments for the clients he introduced. Mr. Haessner wrote Mr. McErlean, KM and DF stating that he was unwilling to continue to work in the environment created by arguments over timeliness. In turn, Mr. McErlean wrote that the corporation was coming to an end and he would send all the money back to the clients. Ultimately, the matter was brought to the attention of the Commission.

[95] Mr. Haessner was taken to Vol. 15, Tabs 1-12 inclusive which contained a series of email communications from Mr. McErlean to Messrs. Haessner and DF and corresponding emails in reply. Included in the material furnished by Shaun McErlean regarding the clients' accounts with RBC are fake screenshots and fake account statements as identified earlier by Mr. Dickson. The emails reveal a picture of clients in Germany wondering where there money was, why they were not receiving confirmation of their sub-account, and why they were not receiving monthly payouts. It is obvious to us that Mr. McErlean was doing everything in his power to put off the inevitable discovery of his deception by using fake RBC bank statements and fake RBC screen shots of the account.

[96] Mr. McErlean's cross-examination of Mr. Haessner did not assist the Panel.

E. Ms. LK

[97] Ms. LK has been a resident of Dubai, United Arab Emirates, for the past 15 years. She owns two companies in Dubai, one which buys and sells commodities, the other active in real estate. Her evidence may be found in Tr. Vol. 8, pp. 4-81.

[98] LK confirmed that Mr. Richard Radu of the Commission emailed her in the fall of 2010. Arrangements were made for LK to come to Toronto in December 2010 to be interviewed at the offices of the Commission. She brought with her a book of documents containing all the relevant documents and emails with people she dealt with involving her investment with Securus.

[99] She was asked to examine Ex. 64, Vol. 7, Tabs 1-9, and she confirmed that it contained the documents involving Securus.

[100] LK described how she met two persons, named Steve Carleson and Benny Tolentino, while in the United Arab Emirates. Mr. Carleson was from the United States and Mr. Tolentino from the Philippines. She described Mr. Carleson as a

retired banker who was trading in financial instruments. Messrs. Carleson and Tolentino told her "a lot of stories" about how well they were doing in investing in financial instruments. Ultimately, LK signed an agreement with Cartol Limited, a company owned by Messrs. Carleson and Tolentino (Ex. 64, Vol. 7, Tab 1, pp. 2-7). The agreement called for LK to invest USD $1,500,000 "as collateral in a matched funds program and private placement transaction". She was required to complete a set of "compliance" documents, apparently to satisfy international banking regulations. She was also required to complete an application for an account with RBC. It was explained to her that her investment would be held by the bank in a separate account controlled by her as collateral for the investment program. Once all the documents were completed to the satisfaction of Messrs. Carleson and Tolentino, LK was passed on to one Brian Smith, located in the United States, and described as the owner of the trading platform. Her communication with Brian Smith was entirely by emails.

[101] Brian Smith explained to Ms. LK that her initial attempt to open an account with RBC was unsuccessful because it should have been sent to Securus. She was assured that she would have access to the account and that she would receive the profit from her investment weekly.

[102] Having sent $1,500,000 to Securus, LK repeatedly asked who her manager was at RBC and who the trader was. She kept getting put off by Brian Smith. Ultimately, she asked to receive a "screenshot" of her account. It was at this point she learned that the trader was Shaun McErlean and that her funds were deposited in the Securus account with RBC. In Ex. 64, Tab 1, pp. 50-52, are three transfer of funds documents evidencing LK's investments in Securus totalling USD $1,500,000 and referring to her RBC Acc. No. 5147894A. As we learned earlier from Mr. Dickson, this account did not exist. At Tab 1, p. 49, there is evidence of a further approximately USD $1 million transferred to Securus, again referencing the same bank account with RBC 5147894A.

[103] LK testified that after she transferred USD $1,500,000, in June of 2010 she was never able to get access to "her account". She received countless excuses from Brian Smith and subsequently from Shaun McErlean. In Ex. 64, Tab 2, are a series of emails from Brian Smith to LK. They confirm LK's evidence that she received nothing but excuses from Mr. Smith as to why it was not possible to have her account with RBC and not have the money under the control of Securus.

[104] In Ex. 64, Tab 9 are 80 emails from LK to Shaun McErlean, running from July 15, 2010 to December 1, 2010. The overall tenor of the emails is LK's demand that she receive confirmation that her funds were secure and under her control. Not until November 6, 2010 did she finally lose patience and threaten legal action.

[105] In Ex. 64, Tab 8 are copies of 76 emails sent by Shaun McErlean to LK. Each email is either designed to reassure LK that her money was in a separate account with RBC, or to explain why the separate account did not materialize.

[106] From July 8, 2010 to September 2, 2010, Shaun McErlean sent 23 emails either promising LK she would receive confirmation of her separate account with RBC, or putting off her inquiries. The Commission's temporary cease-trade order against Securus was issued August 12, 2010. No mention of this was disclosed to LK until September 3, 2010, over three weeks later.

[107] On September 3, 2010 Shaun McErlean emailed LK confirming the existence of the temporary cease-trade order. Since this "had made conducting business extremely difficult", he told LK "I'm looking to move in a different direction". He explained he was looking for a single partner in his business venture, and then offered the opportunity to LK.

[108] From September 3, 2010 to December 1, 2010, Shaun McErlean sent a further 53 emails to LK, promising a resolution of her matter, while still describing the business plan in which he invited her to participate.

[109] We find the emails to be total fabrications on the part of Mr. McErlean designed to explain why the banking problem could not be solved. The various excuses all bear the classic hallmark of a consummate fraudster attempting to put off the inevitable discovery of his scheme.

[110] Ms. LK has not recovered any part of the USD $2,500,000 she transferred to Securus.

F. Jack Bateman

[111] Mr. Bateman lives in Newmarket and is a certified electrician. In the Fall of 2008, he incorporated a company called Warrior One MMA Ltd. ("**Warrior One**"), of which he was the sole shareholder and director. The company put on live events for mixed martial arts exhibitions. He staged three such events in 2009 in the province of Québec. He estimated it took $200,000 to $250,000 to put on one such event. He financed the events through himself and through his family.

[112] Mr. Bateman met Mr. McErlean in the fall of 2009. He learned that Mr. McErlean had a business that developed underfunded and understaffed companies such as his. In the early spring of 2010, Mr. Bateman called on Mr. McErlean because he was looking for a partner to help put on the events. This, he said, involved a tremendous amount of work. The work included booking the venues, hiring the fighters, organising television contracts and sponsorships. For the three events in 2009, Warrior

One paid the expenses, including those sums paid in advance by way of deposit. Revenue came from ticket sales and merchandise.

[113] Mr. Bateman said that originally a small amount of money came in to Warrior One's account to pay for expenses but the revenue never came into the company. After 2009, Mr. McErlean was funding expenses outside Warrior One and paid them directly to whomever money was owed. The bulk of the revenues did not come to Warrior One, to the effect that everything was being done outside the company.

[114] The first show in 2010 was put on in Montréal. It was not a financial success because, Mr. Bateman said, the promotion of the show was not done correctly. He said Mr. McErlean and his company, Dreams to Reality, had taken over that portion of the responsibilities. There was also a problem with lack of alcohol at the event – alcohol was neither ordered nor delivered.

[115] Mr. Bateman then embarked on a story that has all the earmarks of bad crime-fiction. Following the second show in Halifax, Mr. Bateman picked up a cheque from Halifax Regional Municipality for $27,000 in favour of Warrior One. After he picked up the cheque, a gentleman he believed to be with the Italian mafia drove to his house in Newmarket. Having learned from his father of the man's arrival, Mr. Bateman called some police friends in Newmarket who sent an undercover officer to sit across the street from Mr. Bateman's house. The man from Montréal told Mr. Bateman that he was owed $5,000 and that if he didn't have the money by 12 noon on Friday that he and his colleagues would kill Mr. Bateman.

[116] Mr. Bateman called Mr. McErlean and told him of the threat he received. Mr. McErlean called back the same night and said, "it was dealt with". Mr. Bateman then had a call from the man from Montréal saying that it had not been dealt with. Eventually Mr. McErlean told Mr. Bateman to come and pick up a cheque. The cheque may be found in Vol. 11, Tab 3, pp. 67-68. The cheque is made by Halifax Regional Municipality payable to "Warrior I" for $27,297.01. On the back is Shaun McErlean's signature and an endorsement which reads, "signed over to Right Steps Solutions Inc. by Shaun McErlean, owner of W-1. Loan Repayment". Mr. McErlean told him to take the cheque and cash it and pay the man from Montréal and pay the remainder of the expenses left over from the Halifax show. Mr. Bateman completed his story by saying he set up a sting with the Organized Crime Unit of the York Regional Police so that when the man from Montréal met him at the bank, Mr. Bateman handed over the cash while the crime unit filmed the meeting.

[117] In cross-examination, Mr. McErlean recalled to Mr. Bateman that Mr. Bateman received $100,000 by way of loan from Aquiesce. Mr. McErlean drew his attention to Vol. 1, Tab 29, p. 336, the bank statements for Aquiesce, showing a transfer from Aquiesce for $100,000 on September 1, 2009. He then referred Mr. Bateman Vol. 1, Tab 29, p. 342 showing $100,000 deposited into the TD Canada Trust account of Warrior One. Mr. Bateman said that his original evidence was mistaken and apologized.

III. RESPONDENT WITNESSES

A. Shaun McErlean

[118] Shaun McErlean lives in Newmarket, Ontario with his wife, Sarah McErlean. At the beginning of his testimony he told the Panel he was going to include a lot of information which might not seem relevant. He also assured the Panel that at some point it would become relevant. He certainly carried through with his first assurance; he was less successful with his second.

[119] Mr. McErlean described his attendance at the University of Western Ontario where he obtained a degree in administrative and commercial studies. Following university, he took a position with CIBC as a customer service representative in October, 2002. He moved to CIBC Private Banking and became licensed with the Mutual Fund Dealers Association. In October of 2004, he moved to CIBC Wood Gundy and had his Commission certification upgraded to a Registered Representative. Over the next four years, Mr. McErlean "won every investing award that CIBC Wood Gundy had to offer."

[120] In 2008, Mr. McErlean said that the economic downturn caused him to consider his occupation. He couldn't handle watching people in his portfolio lose money based on the recommendations he made. His attendance at work became sporadic; he missed trades and trader reports. Whatever errors he made, he covered from his own money; he did not disclose the majority of those errors that occurred in November and December of 2008.

[121] In January, 2009, CIBC Wood Gundy suspended Mr. McErlean for not disclosing an outside business activity and for what they deemed to be irregular banking activities. In April of 2009, Mr. McErlean learned that Investment Industry Regulatory Organization of Canada ("**IIROC**") wanted to conduct a voluntary interview with him. Mr. McErlean told IIROC that CIBC had all of the answers that they were looking for and more.

[122] Mr. McErlean then described a business plan he chose to pursue, a plan developed by him and his wife. He described in considerable detail the plight of the small business person who had "no clue how to operate the day-to-day aspects of a business." These small business owners found financing difficult and Mr. McErlean, as a business consultant, would help these business owners.

[123] In December, 2008, Mr. McErlean set up a sole proprietorship under the Ontario *Business Names Act* called Aquiesce, mentioned earlier in these Reasons in paragraph 7. Aquiesce would provide financial consulting services and financial resources necessary to allow small-sized companies to become successful. In lieu of a fee, Mr. McErlean was looking for a percentage of those companies. He found that raising money for Aquiesce was difficult. In the end he relied on assistance from his parents, loans from aunts, uncles, family friends and a few former clients from Wood Gundy. He began what he called the "buy in process" of the first of his companies, Radical Rods. That company was owned by his father-in-law and was engaged in renovation and repair of classical cars.

[124] Mr. McErlean described his efforts to obtain capital from a number of investors ending up with CK, who had a network of six to eight individuals with cash-flow. CK introduced them to him in May, 2009. There were three in particular: ALLC, who advanced USD $2 million; Mr. AW who advanced USD $1 million; and a gentleman named JG, who never advanced anything. Mr. McErlean stated he was "astounded" when CK arranged to have USD $ 2 million transferred to the Aquiesce business account at TD Bank. He said he was only looking for $750,000 to $1 million. He used $570,000 to consolidate all of the small loans that he had taken from family and friends and $1.4 million was placed in an account at TD Waterhouse in the name of Aquiesce.

[125] CK arranged for AW to forward USD $1 million into the Aquiesce account. AW chose to have his money sent back to him within a few months. Mr. McErlean said AW was re-paid the USD $1 million plus something for interest earned during the time he controlled those funds. A considerable amount of time was spent in identifying the transfer of funds to AW over a period of several months. Considerable time was spent identifying when the repayments were made. Mr. McErlean later produced a document (Ex. 73) showing AW was re-paid USD $1 million in five payments ending September 14, 2009. The same exhibit shows repayments to ALLC of USD $ 2 million on July 20 and July 28, 2010.

[126] Mr. McErlean completed his evidence on Aquiesce by testifying that everything was informal, there were no written agreements and there was no description of what any bonus or incentives would have been. He acknowledged that his arrangement with these investors wasn't professional and that mistakes were made.

[127] In August, 2009, Mr. and Mrs. McErlean turned their attention from Aquiesce and took their original concept of assisting small business owners "to the next level". Mr. McErlean incorporated Right Step Solutions Inc. ("**Right Step**") and secured a website. There were to be three parts to the website: companies that the McErlean's partnered with whose dreams they were helping to become a reality; people who had done something to achieve their dream and a charitable section where they would help someone else achieve some type of dream. The Panel heard considerable evidence about their efforts carrying out charitable works, evidence which does not assist us. Towards the end of 2009, Mrs. McErlean left her employment to work with Right Step full time.

[128] Mr. McErlean then told us of his first meeting with Dr. Uli Moelkner and DF. They were introduced by KM, someone Mr. McErlean had met earlier. He described Dr. Moelkner and DF as successful businessmen engaged in African projects of a humanitarian nature. Mr. McErlean said it made sense for him to move forward in a working relationship with Dr. Moelkner and DF. To this end, KM signed over 75% of his hedge fund, named Securus Fund, to Dr. Moelkner retaining 25% for himself, DF and Mr. McErlean. Mr. McErlean was asked to incorporate a company in Canada which he did, Securus, wholly-owned by Mr. McErlean. The intention was that Dr. Moelkner would arrange for investors that he knew to transfer funds to Securus. Mr. McErlean described the plan as one where he would do his business in Canada, Dr. Moelkner, KM and DF would run the African projects and any non-Canadian business, with DF to be responsible for ensuring that the investing clients were happy.

[129] We heard considerable evidence about attempts to carry out projects, humanitarian and otherwise, in Africa. That evidence is of no assistance to us.

[130] On February 1, 2010, the first transfer from the German clients of Dr. Moelkner arrive from someone known as TK. He sent €1 million to Securus. The total received by Securus from four German investors are shown on Ex. 10 (Vol. 13, Tab 1, p. 1) as follows:

TK (three transfers)	$2,129,140
RW (€999,972)	$1,410,560
MT REG (€1 million)	$1,390,700
MVWP (€1 million)	$1,369,400

[131] In March of 2010, Mr. McErlean received a telephone call from one Brian Doherty who warned him about Dr. Moelkner whom he described as having a very bad reputation for walking away with people's funds. He decided to look into Dr. Moelkner's reputation in Europe and drew his concerns to the attention of DF. DF responded with a glowing defence of Dr.

Moelkner. To make a long story short, Mr. McErlean, KM and DF finally learned that Dr. Moelkner was indeed dishonest, and had been tried and convicted of fraud.

[132] Mr. McErlean spent day two testifying about the application of funds shown on Ex. 10, (Vol. 13, Tab 1, p. 1), entitled Source and Application of Funds for the Securus bank account number 03342-101-842-3 for the period December 22, 2009 to August 9, 2010. It will be recalled that this document was prepared by Mr. Dhillon.

[133] Mr. McErlean first drew the Panel's attention to evidence supporting the payments to ALLC against the funds advanced by ALLC of USD $2 million. In addition to the $1,049,700 shown on Ex. 10 as paid to the lawyers in trust for ALLC, Mr. McErlean produced evidence, which we accept, showing that all the sums payable to ALLC by way of settlement included an annual interest rate of 10%. Similarly, Mr. McErlean filled in a hole in his earlier testimony that satisfied the Panel that entire sums owing to AW were returned to him. Mr. McErlean then testified as to sums invested in R3 Auto and Finance Inc. and what he expected to recover by way of the monthly payments were the sums loaned to the high-credit risk borrowers. He did not dispute that Securus advanced $717,007 to R3 Auto and Finance as shown on Ex. 10. We find ALLC and AW were repaid with money advanced by subsequent investors in Securus, such as Ms. LK.

[134] Mr. McErlean described his participation in RT Wood Natural Energy Corp ("**RT Wood**"). Mr McErlean disputed the amount of $389,000 advanced to RT Wood as shown on Ex. 10. His evidence satisfied us that Securus advanced $934,000 to RT Wood.

[135] Mr. McErlean then turned to the payments shown on Ex. 10 to MD and AD in the amount of $75,000, together with a single payment of $20,000 to RS. These sums, Mr. McErlean explained, were spent to acquire Barrie Core Wellness. Mr. McErlean confirmed that the total paid to MD and AD and RS for the interest in Barrie Core Wellness was $135,000, which purchased a 50% interest in the business for Right Step.

[136] Mr. McErlean then dealt with the purchase of a building in Barrie to be used by his father-in-law's company, Radical Rods, as well as R3 Auto & Finance and a few other companies. We took from Mr. McErlean's evidence and from Ex. 78, filed, that the total amount expended by Securus to acquire the Barrie property for Radical Rods and others was $1,181,000 approximately.

[137] Mr. McErlean introduced Ex. 80 purporting to be a list of expenses incurred by Securus in promoting the Warrior One exhibitions. The expenses total $1,107,000 approximately and Mr. McErlean testified that the income from the exhibitions was $692,000 approximately after making allowances for repayment of HST. Mr. McErlean estimates the loss on the promotion to be in the neighbourhood of $300,000.

[138] It should be borne in mind that these conclusions by the Panel do not begin to adequately describe the fractured, complex and sometimes incomprehensible testimony of Mr. McErlean. This, we find, to be partly explained by the lack of documents setting out the relationships, the obligations and the agreements for loan repayments, etc. that one would expect to find. It may be further explained by Mr. McErlean's unfamiliarity with presenting evidence in a manner of this kind. Nevertheless, we are satisfied on the balance of probabilities given by Mr. McErlean that the figures referred to earlier in the testimony given on day two to be close to accurate.

[139] On March 30, 2012, Mr. McErlean appeared and asked for an adjournment as his father had fallen ill. The matter was adjourned until Monday, April 2, 2012 at 11:00 a.m.

[140] Mr. McErlean appeared with a number of lending agreements and other documents relating to the various companies in which Securus had invested money. They were entered as Exs. 84 – 92. The Panel identified them all as non-arms-length lending agreements and the documents speak for themselves. Nothing further produced or spoken by Mr. McErlean was of any assistance to the Panel. Cross-examination by Mr. Britton started after the lunch recess.

[141] In cross-examination, Mr. Britton, Staff counsel, began by confirming Mr. McErlean's employment with CIBC Wood Gundy. He obtained confirmation that of the $2 million advanced to Aquiesce, $570,000 approximately was used to pay off relatives and former clients who had advanced money to him. He further obtained confirmation that Mr. McErlean transferred about $1.4 million from the sums advanced into a trading account at TD Waterhouse, which he used to trade equity. A further USD $1 million from AW was also transferred into the trading account. Mr. McErlean confirmed that it was clear that AW and ALLC were advancing money to him to invest in enterprises that Mr. McErlean thought would be profitable and that they would be repaid out of the profits earned by his investing.

[142] Mr. Britton took Mr. McErlean through the events leading up to his engagements with Dr. Moelkner, DF and KM. Mr. Britton then embarked upon a long series of questions centered on emails purportedly sent by Mr. McErlean to KM, DF and Dr. Moelkner. The series of questions are found at Tr. Vol. 12, pp. 60-133.

[143] A pattern of the examination was established early on when Mr. McErlean was asked about a certain email, purportedly from him to AM dated October 26, 2009. Mr. McErlean declared it to be a forgery. He explained that the emails originated on DF's computer. It was put to Mr. McErlean that his evidence was to the effect that DF, or someone, composed fraudulent emails and forgeries. Mr. McErlean replied that this was so.

[144] The cross-examination continued with specific references to individual emails. The pattern of response was that emails apparently damaging to Mr. McErlean's defence were declared to be forgeries and those emails either neutral or in his favour were identified as being genuine.

[145] Mr. Britton then turned his questions to the relationship between Mr. McErlean and LK. Mr. McErlean confirmed that his aunt, MI played a part in introducing LK to him, along with BS and KM. Mr. McErlean was asked to look at the agreement between Securus and LK found in Vol. 7, Tab 1, p. 43. The agreement had been provided to Staff by LK. Mr. McErlean's attention was drawn to a clause in the agreement which recited that the funds loaned by LK would remain under the investor's sole control during the period of the agreement. Mr. McErlean testified that the clause was not in the agreement that he prepared and sent to BS. He said either BS or KM changed the agreement he forwarded to them. Mr. McErlean also said the initials at the bottom of each page of the agreement were his, that certain clauses were added, which were not in the original document he forwarded to BS. He concluded by confirming that the document was a forgery. There then followed a series of questions involving LK's attempt to open a bank account with RBC in order to retain control of her funds. Various emails and documents indicating that Mr. McErlean was attempting to get the funds transferred to the Securus account were shown to Mr. McErlean. The same pattern of questions and answers continued; if there was an email or document, which apparently contradicted Mr. McErlean's position in this matter, he declared it a forgery. If a document was neutral or supported his position he acknowledged its authenticity.

[146] Mr. Britton's continued cross-examination of Mr. McErlean centered on the relationship between Ms. LK and Mr. McErlean. Mr. McErlean was referred to numerous emails and telephone records that seemed to indicate that Mr. McErlean was deceiving LK about where her funds were. Mr. McErlean's responses continued to follow the same pattern as the previous days' cross-examination. If her emails alleged misrepresentations by Mr. McErlean that were harmful to his defence, he declared them to be forgeries.

[147] One exchange from this portion of the cross-examination gave the Panel an inkling of how Mr. McErlean approached his relationships with investors:

> Q: You told her I'm wiring you your funds; they'll be there whenever, when you didn't have the money?
>
> A: Officially, no.
>
> Q. Officially? What is officially? You didn't have the money, right?
>
> A. I went to various people looking to raise enough funds, and in October of 2009, there was an investment group in Washington DC which was exceptionally interested in our natural energy company. They were looking to invest funds with us which not only would [LK] have been repaid, everybody would have been repaid. Nothing ever came of that.
>
> I was told two to three times: Funds are en route; funds are en route. I even provided a copy of the contract for [Mr. F]'s partner to look at the contract to make sure that it was going to be legit, as opposed to doing things like I used to do them, and more official, and the funds never arose despite how many times I was told that they were sent.
>
> And unfortunately, throughout this entire process, if somebody tells me they're going to do this, I believe them, and unfortunately, in many instances, I will turn around and convey that message to somebody else.

[148] This answer is typical of many of Mr. McErlean's responses. His explanation for his seemingly deceitful actions were either his signature was forged, someone changed documents without his knowledge, or his inability to pay was someone else's fault.

[149] Mr. Britton concluded his cross-examination by obtaining confirmation of payments made by Mr. McErlean to a number of relatives and friends from whom he borrowed money, and, in addition, to former clients from CIBC Wood Gundy who loaned him money.

[150] Finally, it was put to Mr. McErlean that IIROC commenced a proceeding against him alleging he personally compensated two of his clients for losses in their accounts without knowledge or approval of his member firm, CIBC Wood

Gundy. IIROC further alleged he made discretionary trades in the account of a client without first having the client's written authorization or having the account approved as discretionary by CIBC Wood Gundy. The IIROC Panel found the allegations were established.

[151] In response, Mr. McErlean gave a long explanation why he was unable to mount a proper defence because CIBC Wood Gundy had lost a hard drive. He is currently intending to appeal IIROC's decision.

[152] The matter was adjourned to Thursday, April 5, 2012 for Mr. McErlean's re-examination.

[153] Mr. McErlean began his re-examination of himself by offering an explanation of why it appeared he was misleading LK as to transfer of her funds in Securus to her. He said his intentions were sincere but the timing of the extension of the cease-trade orders that froze the Securus bank account made it seem as if he was misleading LK. He offered an explanation for signing a Securus Fund document indicating he was an officer. He explained that he was excited. He acknowledged he should not have signed it based on some of the wording in the document.

[154] He then referred to Vol. 1, Tab 1, p. 67, a bank account of Aquiesce. The document shows a series of transfers into the account via email. These transfers, Mr. McErlean said, were examples of funds that were deposited by individuals who were providing him some of the capital he needed up front, which he would later be repaying. These investors were mainly family and friends. The information was produced to show that the funds from the sale of a house property by the McErleans were used to pay business expenses. The proceeds of the house sale were ultimately intended to build a swimming pool.

[155] There then followed a series of payments identified by Mr. McErlean in Vol. 3, Tab 3, p. 49 and following, which he described as repayments of loans made to him or investments in the various businesses, most of which were operated by family members. He acknowledged that his business accounts and personal accounts were "co-mingled". This concluded Mr. McErlean's evidence.

B. John Ford

[156] In 2000, Mr. Ford graduated from the International Academy of Design and worked in Toronto building websites.

[157] Following a meeting with Mr. McErlean, Mr. Ford's company, 33rd Design, was formed with Right Step having a partial interest. The new company does all the design for the companies that Right Step has an interest in. While the company was getting off the ground, the McErleans proposed that Mr. Ford live with them in lieu of salary. In addition, he was provided with the necessary equipment to produce print design, video and marketing. Mr. Ford described the work he did for Radical Rods, RT Wood and Warrior One, among others. It was Mr. Ford's opinion that all of the companies that Right Step was involved in were doing well.

[158] In cross-examination, Mr. Britton drew his attention to numerous payments going into his bank account from Securus in varying amounts. Mr. Ford was extremely vague as to the reason for these payments, but he assumed they represented salary and sometimes dividends from Right Step. Mr. Ford's evidence only confirmed what we already knew – that funds from Securus were supporting Mr. McErlean's investment enterprises.

C. Shande Alexi Mizzi

[159] Ms. Mizzi started working with Right Step in February of 2011. Her current responsibilities include the day-to-day operations for R3 Auto and Finance. She also does any day-to-day activities that need to be done as far as administration for Right Step. She estimates she puts in 37 hours a week.

[160] Ms. Mizzi was shown a document that set out all the R3 Auto and Finance clients, their monthly payments, the registration numbers for their liens and the total loans each client maintains. There were approximately 70 loans outstanding.

[161] Ms. Mizzi was asked about Right Step Renovations, which as it turned out, was operated by her boyfriend with whom she has been together for seven years. Evidently, the boyfriend, Allan Rewega, originally worked on the renovations for Radical Rods.

[162] In cross-examination, Mr. Britton asked one question – was Allan Rewega related to Mr. McErlean. She replied that Sarah McErlean, Mr. McErlean's wife, is Allan Rewega's sister. That concluded the cross-examination.

D. Joni Rewega

[163] Ms. Rewega is Mr. McErlean's sister-in-law. She has recently taken on some bookkeeping duties for Right Step. She works with the Barrie Core Wellness Center and has been there for approximately five years. She confirmed previous testimony about Right Step's purchase from MD and AD and Right Step's acquisition of a partial ownership in the wellness centre.

[164] Ms. Rewega also did volunteer work for Warrior One and its attempts to get off the ground.

[165] In cross-examination, Mr. Britton asked if she knew the net revenue of Barrie Core Wellness Center – she replied she did not.

E. Gary Nicholls

[166] Mr. Nicholls is Mr. McErlean's father-in-law and is in charge of Radical Rods. He described in considerable detail the acquisition of the property in Barrie and the renovations and additions undertaken to enlarge the building to 17,000 square feet. An email sent by Mr. McErlean to Mr. Britton with attached photographs dated August 26, 2010 was introduced as Exhibit 98. Mr. Nicholls described the work that was carried out as indicated in the photographs.

[167] Mr. Nicholls attention was drawn to a number of payments to various entities which he described as directly connected with the renovations and equipment required for the operation of Radical Rods.

[168] Mr. Nicholls concluded his evidence by acknowledging that the operation of Radical Rods was "breaking even".

F. Sarah McErlean

[169] Ms. McErlean graduated from Humber College in the fitness and health promotion program and worked in that area until October 2009. She has worked for Right Step and in the latter five months has also been working with Lululemon Athletica. She confirmed Mr. McErlean's evidence that Right Step was intended to help people follow their dreams and to inspire others to do great things with their lives. She said that Right Step was not taking on new clients for the present. Right Step is focusing on the people and its companies in which it currently has an interest.

[170] Ms. McErlean confirmed that Right Step operates out of the McErlean home in Newmarket and that, currently, John Ford and Shande Alexi Mizzi work out of that location. Mr. McErlean also confirmed the agreement whereby Mr. Ford lived in the house for a while and recently moved. Ms. McErlean described her role with Right Step as recruiting staff, managing the day-to-day operations, marketing, event planning and preparing administrative documents. In addition, she prepares the content, writing and copy writing for the websites. She works with Mr. Ford to make sure the marketing strategies are prepared for each of the businesses.

[171] Ms. McErlean described the efforts of Right Step to make a success of Warrior One and testified that when the Commission froze the Securus bank account, the business relationship with Jack Bateman dissolved.

[172] The bulk of Ms. McErlean's evidence confirmed the relationships that Right Step had with the various companies in which it had an interest or tried to promote. Her evidence on this topic was of little or no assistance to the Panel since it merely confirmed what previous witnesses had said. In cross-examination, Mr. Britton questioned her about the personal bank accounts operated by Ms. McErlean and her husband and the source of the funds for those bank accounts. This evidence was not particularly helpful for the Panel, inasmuch as Mr. McErlean already conceded that the source of the funds for the support of the various businesses, the payments to Mr. Nicholls and Mr. Ford and the payment of the McErlean's personal expenses all came from the Securus bank account.

[173] Staff counsel chose not to call any evidence in reply and that concluded the hearing on the merits.

IV. THE APPLICABLE LAW

A. Standard of Proof

[174] The standard of proof in this proceeding is the civil standard of proof of the balance of probabilities. The Panel must scrutinize the evidence with care and be satisfied whether it is more likely than not that the allegations occurred (*F.H. v. McDougall*, [2008] 3 S.C.R. 4, at para. 40).

B. The Use of Hearsay Evidence

[175] Some of the evidence introduced during the merits hearing was hearsay evidence. Subsection 15(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "**SPPA**") allows for the admission of hearsay evidence in Commission proceedings. Subsection 15(1) of the SPPA provides:

> *What is admissible in evidence at a hearing*
>
> 15.(1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

> (a) any oral testimony; and
>
> (b) any document or other thing,
>
> relevant to the subject matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

[176] In *The Law of Evidence*, it is stated that:

> In proceeding before most administrative tribunals and labour arbitration boards, hearsay evidence is freely admissible and its weight is a matter for the tribunal or board to decide, unless the receipt would amount to a clear denial of natural justice. So long as hearsay evidence is relevant it can serve as the basis for the decision, whether or not it is supported by other evidence which would be admissible in a court of law.
>
> (John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence Canada*, 2d ed. (Markham, Ont: LexisNexis Butterworths, 1999) at p. 308)

[177] In *Rex Diamond*, the Divisional Court dismissed an appeal of a Commission decision based on the ground that the panel's decision relied upon unreliable hearsay. In dismissing the appeal, Nordheimer J. observed that:

> (i) the Commission is expressly entitled by statute to consider hearsay evidence;
>
> (ii) hearsay evidence is not, in law, necessarily less reliable than direct evidence...
>
> (*Rex Diamond Mining v. (Ontario Securities Commission)*, [2010] O.J. No. 3422 ("Rex Diamond") at para. 4)

[178] Although hearsay is admissible pursuant to subsection 15(1) of the SPPA, the Panel must determine the appropriate weight to be given to the evidence. The Panel must take a careful approach and avoid undue reliance upon uncorroborated evidence that lacks sufficient indicia of reliability (*Re Maple Leaf Investment Corp.* (2011), 34 O.S.C.B 11551 at para. 46).

C. Securities Act Fraud

[179] Subsection 126.1(b) of the *Act* prohibits conduct relating to securities that a person or company knows or reasonably ought to know would perpetrate a fraud. Subsection 126.1(b) of the *Act* states:

> **126.1 Fraud and Market Manipulation** – A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities […] that the person or company knows or reasonably ought to know […]
>
> (b) perpetrates a fraud on any person or company.

[180] In previous decisions, this Commission has adopted the interpretation of the fraud provision in provincial securities legislation as set out by the British Columbia Court of Appeal in the Anderson decision. In *Anderson*, the British Columbia Court of Appeal held that the fraud provision in the British Columbia *Securities Act*, which is similar to the Ontario provision, requires proof of the same elements of fraud as in a prosecution under the *Criminal Code*. The fraud provision in the *Act* merely broadens the ambit of liability to those who knew or reasonably ought to have known that a person or company engaged in conduct that perpetrated a fraud. The words "knows or reasonably ought to know" do not diminish the requirement of Staff to prove subjective knowledge of the facts concerning the dishonest act by someone accused of fraud. As McKenzie J. stated at para. 26:

> … I find that it is clear that s. 57(b) [the fraud provision in the British Columbia *Securities Act*] does not dispense with proof of fraud, including proof a guilty mind. *Derry v. Peak* (1889), 14 A.C. 337 (H.L.) confirmed that a dishonest intent is required for fraud. Section 57(b) simply widens the prohibition against those who know or ought to know that a fraud is being perpetrated by others, as well as those who participate in perpetrating the fraud. It does not eliminate proof of fraud, including proof of subjective knowledge of the facts concerning the dishonest act by someone involved in the transaction.
>
> (*Anderson v. British Columbia (Securities Commission)* (2004), 192 B.C.C.A. 7 at para. 26; leave to appeal to the Supreme Court of Canada denied [2004], S.C.C.A. No. 81 (S.C.C.))

[181] In previous decisions, this Commission has also referred to the legal test for fraud set out in the leading case of *Théroux*. In this decision, McLachlin J. (as she then was) summarized he elements of fraud:

> …the *actus reus* of the offence of fraud will be established by proof of:
>
> 1. the prohibited act be it an act of deceit, a falsehood or some other fraudulent means; and
>
> 2. deprivation caused by the prohibited act, which may consist in actual loss or putting of the victim's pecuniary interests at risk.
>
> Correspondingly, the *mens rea* of fraud is established by proof of:
>
> 1. subjective knowledge of the prohibited act; and
>
> 2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist of knowledge that the victim's pecuniary interest are put at risk).
>
> (*R v. Théroux*, [1993] 2 S.C.R. 5 (S.C.C.) ("***Théroux***") at para. 27)

[182] The act of fraud is established by two elements: a dishonest act and deprivation. The dishonest act is established by proof of deceit, falsehood or other fraudulent means. Deprivation is established by proof of detriment, prejudice or risk of prejudice to the economic interests of the victims caused by the dishonest act.

[183] A dishonest act may be established by proof of "other fraudulent means." Other fraudulent means encompasses all other means other than deceit or falsehood which can properly be characterized as dishonest. The courts have included within the meaning of "other fraudulent means" the unauthorized diversion of funds and the unauthorized arrogation of funds or property. The use of investors' funds in an unauthorized manner has been determined to be "other fraudulent means" (*R. v. Currie*, [1984] O.J. No. 147 (Ont. CA) pp. 3-4).

[184] The second element of the *actus reus* of fraud is deprivation. Actual economic loss suffered by the victim may establish deprivation but it is not required. Prejudice or risk of prejudice to an economic interest is sufficient.

[185] The mental element of fraud is established by proof of subjective knowledge of the prohibited act and subjective knowledge that the prohibited act would have the deprivation of another as a consequence. The subjective knowledge can be inferred from the totality of the evidence (*Théroux*, above, at para. 27).

D. Trading Without Registration

[186] Between January 22, 2009 and September 28, 2009, subsection 25(1)(a) of the *Act* prohibited trading in securities without being registered with the Commission. Subsection 25(1)(a) of the *Act* provided:

> No person or company shall,
>
> (a) trade in a security […] unless the person or company is registered as a dealer, or is registered as a salesperson or as a partner or as an officer of a registered dealer and is acting on behalf of the dealer,
>
> […]
>
> and the registration has been made in accordance with Ontario securities law […]

[187] On September 28, 2009, subsection 25(1)(a) of the *Act* was repealed and was replaced by subsection 25(1) which provides that:

> Unless a person or company is exempt under Ontario securities law from the requirement to comply with this subsection, the person or company shall not engage in or hold himself, herself or itself out as engaging in the business of trading in securities unless the person or company
>
> (a) is registered in accordance with Ontario securities law as a dealer; or
>
> (b) is a representative registered in accordance with Ontario securities law as a dealing representative of a registered dealer and is acting on behalf of the registered dealer.

(a) Trade in Security

[188] With respect to the phrase "trade in a security" used in s. 25(1)(a) and s. 53(1) of the *Act* or "trading in securities" used in s. 25(1) of the *Act*, the definition of "trade" or "trading" under subsection 1(1) of the *Act* provides for a broad definition that includes any sale or disposition of a security for valuable consideration, including any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of such a sale or disposition.

(b) Acts in Furtherance of Trade

[189] The jurisprudence in this area reflects a contextual approach to determine whether non-registered individuals or companies have engaged in acts in furtherance of a trade. A contextual approach examines the totality of the conduct and the setting in which the acts have occurred, as well as the proximity of the acts to an actual or potential trade in securities. The primary consideration of the contextual approach is the effect the acts had on those to whom they were directed (*Re Momentas Corp*. (2006), 29 O.S.C.B. 7408 at para. 77).

[190] The Ontario Court of Justice stressed the broadly-framed definition of "trade" stating that "the legislature has chosen to define the term and they have chosen to define it broadly in order to encompass almost every conceivable transaction in securities" (*R. v. Sussman*, [1993] O.J. No. 4359, at paras. 46-48).

[191] In addition, taking steps to facilitate the mechanical, or logistical, aspects of trading has also been found by the Commission to be an act in furtherance of a trade. In *Re Lett*, investors transferred, deposited or caused to be deposited funds into the accounts of the corporate respondents, which had been opened by an individual respondent. The Commission found that the investors' funds were deposited into the accounts and accepted by the respondents for the purpose of selling securities. By accepting investors' funds which were to be invested, the Commission held that all of the respondents had carried out acts in furtherance of trades (*Re Lett* (2004), 27 O.S.C.B. 3215 at para. 60).

(c) Not Necessary to Complete Trade

[192] The respondent does not have to have direct contact or make a direct solicitation of an investor for an act to constitute an act in furtherance of a trade. An act in furtherance of a trade does not require that an investment contract be completed or that an actual trade otherwise occur. Any claim that an actual trade must occur for there to be an act in furtherance of a trade would necessarily limit the effectiveness and negate the purpose of the *Act*, which is to regulate those who trade, or who purport to trade, in securities (*Re First Federal Capital (Canada) Corp.* (2004), 27 O.S.C.B. 1603 at paras. 46-47 and 51).

(d) Definition of Security

[193] The definition of a security provided for in subsection 1(1)(n) of the *Act* includes any investment contract. "Investment contract" is not a term defined in the *Act* but its interpretation has been the subject of a long line of established jurisprudence.

[194] In the leading case, *Pacific Coast Coin*, the Supreme Court of Canada considered and reviewed the test established by the United States Supreme Court in Howey: "Does the scheme involve an investment of money in a common enterprise, with profits to come solely from the efforts of others?" (*Pacific Coast Coin Exchange of Canada v. Ontario (Securities Commission)*, [1978] 2 S.C.R. 112 ("***Pacific Coast Coin***") at pp. 10-11; (*Securities and Exchange Commission v. W.J. Howey Co.*, 328 U.S. 293 (1946) ("***Howey***") at pp. 289-299).

[195] In deciding *Pacific Coast Coin*, *supra*, the Supreme Court of Canada relied upon a decision of the Supreme Court of Hawaii to craft a risk capital approach to defining an investment contract. The Hawaiian Court stated that:

> [T]he salient feature of securities sales is the public solicitation of venture capital to be used in a business enterprise … This subjection of the investor's money to the risks of an enterprise over which he exercises no managerial control is the basic economic reality of a security transaction.
>
> (*State of Hawaii, Commissioner of Securities v. Hawaii Market Center, Inc.* 485 P. 2d 105 (1971) at p. 3)

[196] As formulated by the Supreme Court of Canada, the test for the existence of an "investment contract" thus requires:

(1) an investment of money;

(2) with an intention or expectation of profit;

(3) in a common enterprise, in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties; and

> (4) where the efforts made by those other than the investor are undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.
>
> (*Pacific Coast Coin*, above, at p. 11 (Q.L.))

[197] The application of the investment contract test formulated by the Supreme Court of Canada in *Pacific Coast Coin* must be consonant with the important public policy goals and mandate of the Commission. To achieve the purposes of the *Act*, the definition of "investment contract" must embody a flexible rather than a static principle, one that adapts to the countless investment schemes devised by those who seek to use others' money on the promise of profits (*Pacific Coast Coin*, above, at p. 10 (Q.L.)).

(e) Meaning of Distribution of Securities

[198] Subection 53 (1) of the *Act* provides that no person or company shall trade in a security if the trade would be a distribution of the security unless a preliminary prospectus and a prospectus have been filed and receipted by the Director.

[199] A distribution is defined in subsection 1(1)(a) of the *Act* to mean a "trade in securities of an issuer that have not been previously issued."

[200] The meaning of distribution flows from the policy of the *Act* which is to provide full disclosure relating to a security to an investor before the security is purchased:

> Distributions are trades in securities in which the information asymmetry between the buyer and the seller is likely to be at its greatest, with the buyers having the greatest risk of being taken advantage of. If a trade constitutes a distribution, the issuer is required to assemble, publicly file and distribute to all buyers an informational document known as a prospectus.
>
> (Jeffrey G. MacIntosh and Christopher C. Nichols, *Securities Law* (Toronto, Ontario: Irwin Law, 2002) at p. 59)

(f) Advising Without Registration

[201] Between January 22, 2009 and September 28, 2009, subsection 25(1)(c) of the *Act* provided that:

> No person or company shall,
>
> (c) act as an adviser unless the person or company is registered as an adviser, …
>
> … and the registration has been made in accordance with Ontario securities law …

[202] On September 28, 2009, the *Act* was amended. Subsection 25(1)(c) was repealed and replaced with subsection 25(3). It provides:

> Unless a person or company is exempt under Ontario securities law from the requirement to comply with this subsection, the person or company shall not engage in the business of, or hold himself, herself or itself out as engaging in the business of advising anyone with respect to investing in, buying or selling securities unless the person or company,
>
> (a) is registered in accordance with Ontario securities law as an adviser; …

[203] In *Doulis*, the Commission set out the law respecting advising in a Staff application for a Temporary Order:

> A person is acting as an adviser if the person (i) offers an opinion about an issuer or its securities, or makes a recommendation about an investment in an issuer or its securities, and (ii) if the opinion or recommendation is offered in a manner that reflects a business purpose [...]
>
> … As the Commission stated in *Costello, Re* (2003), 26 O.S.C.B. 1617 (Ont. Sec. Comm.), [t]he trigger for registration as an adviser is not doing one or more acts that constitute the giving of advice, but engaging in the business of "advising" […]
>
> It is because advising involves offering an opinion or recommendation to others that the Act requires advisers to be registered with the Commission and to meet certain conditions as to their

education and experience. In *Gregory & Co. v. Quebec Sec. Commission* (1961), 28 D.L.R. (2d) 721 (S.C.C.), at p. 725, the Supreme Court of Canada held that:

> The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the Province or elsewhere, from being defrauded as a result of certain activities initiated in the Province by persons therein carrying on such a business.

(*Re Doulis* (2011), 24 O.S.C.B. 9597 at paras. 28-30)

V. ANALYSIS

(a) The Fraud Allegation

[204] Mr. McErlean's fraudulent activities flow from his interaction with three sets of investors – the Aquiesce investors, the German investors and Ms. LK. We find that Mr. McErlean represented to all the investors that their money would be segregated in a separate account and would be used as collateral for investments in guaranteed, high-return trading. None of the money from the three sets of investors was used for that purpose. None of the money was kept separate and apart from the Securus bank account as was represented to the investors. Steps were taken by Mr. McErlean through the use of fake screenshots and fake bank account numbers to deceive investors into thinking their funds were separate and secure. All of the investor funds were used by Mr. McErlean to pay personal expenses, to repay previous investors and to invest in private companies in which he or his family members had a financial interest.

[205] These dishonest acts caused investors' funds to be placed at risk or lost entirely. Funds were used to pay off personal expenses and repay previous investors. Other funds were used to make capital contributions into high-risk enterprises. It matters not whether these investments were successful, which they were not. His actions exposed the investors to risk. These actions constitute the *actus reus* of fraud.

[206] We infer from the totality of the evidence and find that Mr. McErlean's dishonest acts were deliberate and intentional. His actions were designed to deceive investors and were carried out with the knowledge that his dishonest acts could have the consequences of depriving the investors.

[207] We find Mr. McErlean to be an unreliable and untrustworthy witness. We agree with Staff's submission that he had to be aware of the terms upon which investors advanced their funds. Our ordinary life experience and common sense tells us that the investors would not surrender their funds to Mr. McErlean for the purposes to which they were put. Overseas investors, whether from the United States, Germany or Dubai, are highly unlikely to forward vast sums to someone whom they do not know without having been provided with the varied guarantees that Mr. McErlean dishonestly provided to them.

[208] We find no evidence of the viability of any of the businesses in which Mr. McErlean invested. Gary Nicholls said Radical Rods was breaking even. Warrior One folded due to the freeze order. No financial statements for any of the "viable businesses" were produced. As Staff points out, even if the businesses were flourishing, the acts of fraud took place by putting the investors' funds at risk and in deceiving investors by saying their funds were in a segregated account.

[209] In his written submissions, Mr. McErlean submits that the amounts he received from investors were loans. We reject this submission. None of the normal indicia of a loan can be found in the evidence. All Mr. McErlean's efforts were directed to persuading the investors their funds were safely segregated in a separate account to which only they had access.

[210] We reject entirely Mr. McErlean's evidence that the German intermediaries concocted fake evidence and forged his signature to implicate him in wrongdoing. We find he attempted to deceive the Panel. Nothing in the documentary evidence supports his claim that he is the victim of fraudulent conduct. We find the mental element of fraud to have been established.

(b) Trading Allegations

[211] We find that Mr. McErlean engaged in trading securities. The agreements between Aquiesce and investors and Securus and investors were investment contracts which are included in the definition of a security under the *Act*. Investors advanced the funds with the intention or expectation of profit. Fortunes of the investors depended upon the efforts of Mr. McErlean. His efforts affected the success or failure of those investments.

[212] Mr. McErlean traded in securities, including the agreements involving Ms. LK and ED, which amounted to a direct act of trading. He also acted in furtherance of a trade by controlling the accounts into which investor funds were deposited. He forwarded the account opening documentation to the intermediaries for investors to complete. He provided the necessary instructions to arrange for the transfer of funds to the bank accounts under his control, while generating fictitious sub-account

numbers for the investors. He was not registered to trade securities nor was he exempted from the dealer registration requirement. He acted contrary to s. 25(1)(a) of the *Act* (pre-September 28, 2009) and s. 25(1) (on and post-September 28, 2009). We find Securus acted contrary to s. 25(1) of the *Act* on and post-September 28, 2009. We find the Respondents engaged in or held themselves out to be engaged in, the business of advising with respect to investing in buying or selling securities. Mr. McErlean did so, while not registered, nor exempt in accordance with Ontario securities law, contrary to s. 25(1)(c) of the *Act* (pre-September 28, 2009) and to s. 25(3) (on and post-September 28, 2009).

(c) Advising Allegations

[213] Mr. McErlean held himself out to be engaged in the investment business, invited investors to advance money to Aquiesce and Securus on the understanding that the money would be pooled and used to enable him to trade securities. Investors advanced funds to him which Mr. McErlean pooled and made investment decisions on behalf of those investors. Part of the funds invested in Aquiesce were transferred to the TD Waterhouse trading account 72YJ94 where he engaged in discretionary equities trading. Part of the Securus funds were invested in private companies following a discretionary investment decision made by Mr. McErlean.

(d) Trading without Prospectus Allegations

[214] The trades with investors were in securities which had not previously been issued. There was a distribution of securities, contrary to s. 53 of the *Act*. Investors were entitled to know that their funds were going to be used to pay Mr. McErlean's relatives, his personal expenses, repay previous investors and invest in private companies in which Mr. McErlean or his family members had a financial interest. This knowledge would have possibly affected their investment decisions. Securus was obliged to file a prospectus with the Commission providing investors full, true and plain disclosure of all material facts relating to the securities. We find Securus held itself out to be engaged in the business of advising with respect to investing in buying or selling securities contrary to s. 25(3) (on and post-September 28, 2009).

(e) Securus Liability

[215] Mr. McErlean was the directing mind of Securus, thus rendering Securus in breach of trading and advising allegations. In addition, Mr. McErlean's direction of Securus rendered him in breach of trading and advising allegations as well.

VI. CONCLUSION

[216] We find that:

(a) the Respondents engaged in or participated in an act, practice or course of conduct relating to securities that the Respondents knew, or reasonably ought to have known, perpetrated a fraud on any person or company, contrary to s. 126.1(b) of the *Act*;

(b) Mr. McErlean traded securities without being registered to trade securities and without an exemption from the dealer registration requirement, contrary to s. 25(1)(a) of the *Act*;

(c) between September 29, 2009 and August 12, 2010, without an exemption from the dealer registration requirement, the Respondents engaged in or held themselves out to be engaged in the business of trading securities without being registered in accordance with Ontario securities law, contrary to s. 25(1) of the *Act*;

(d) Mr. McErlean acted as an adviser without registration and without an exemption from the adviser registration requirement, contrary to s. 25(1)(c) of the *Act*;

(e) the Respondents, without an exemption from the adviser registration requirement, engaged in the business of, or held themselves out as engaging in the business of, advising with respect to investing in, buying or selling securities without being registered in accordance with Ontario securities law, contrary to s. 25(3) of the *Act*;

(f) the Respondents traded securities which was a distribution of securities without having filed a preliminary prospectus or a prospectus with the Director or having an exemption from the prospectus requirement, contrary to s. 53(1) of the *Act*;

(g) Mr. McErlean, as a director of Securus authorized, permitted or acquiesced in the conduct of Securus contrary to s. 129.2 of the *Act* and Ontario securities law.

Dated at Toronto this 19th day of July, 2012.

"Vern Krishna"

"James D. Carnwath"

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Chapter 4

Cease Trading Orders

4.1.1 Temporary, Permanent & Rescinding Issuer Cease Trading Orders

Company Name	Date of Temporary Order	Date of Hearing	Date of Permanent Order	Date of Lapse/Revoke
Valucap Investments Inc.	03 Aug 12	15 Aug 12		

4.2.2 Outstanding Management & Insider Cease Trading Orders

Company Name	Date of Order or Temporary Order	Date of Hearing	Date of Permanent Order	Date of Lapse/ Expire	Date of Issuer Temporary Order

THERE ARE NO ITEMS FOR THIS WEEK.

4.2.2 Outstanding Management & Insider Cease Trading Orders

Company Name	Date of Order or Temporary Order	Date of Hearing	Date of Permanent Order	Date of Lapse/ Expire	Date of Issuer Temporary Order

THERE ARE NO ITEMS FOR THIS WEEK.

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Chapter 7

Insider Reporting

This chapter is available in the print version of the OSC Bulletin, as well as as in Carswell's internet service SecuritiesSource (see www.carswell.com).

This chapter contains a weekly summary of insider transactions of Ontario reporting issuers in the System for Electronic Disclosure by Insiders (SEDI). The weekly summary contains insider transactions reported during the seven days ending Sunday at 11:59 pm.

To obtain Insider Reporting information, please visit the SEDI website (www.sedi.ca).

Chapter 8

Notice of Exempt Financings

REPORTS OF TRADES SUBMITTED ON FORMS 45-106F1 AND 45-501F1

Transaction Date	No. of Purchasers	Issuer/Security	Total Purchase Price ($)	No. of Securities Distributed
06/28/2012	1	Abingworth Bioventures VI LP - Limited Partnership Interest	24,025,500.00	N/A
07/17/2012	4	Advanced Explorations Inc. - Flow-Through Units	1,203,120.00	5,013,000.00
07/17/2012	5	Advanced Explorations Inc. - Units	589,250.00	2,805,952.00
06/06/2012	3	AGL Energy Limited - Common Shares	3,554,416.15	301,023.00
06/26/2012	2	Ally Financial Inc. - Notes	3,058,251.45	N/A
05/31/2012	1	AppHero, Inc. - Preferred Shares	499,999.43	733,651.00
10/01/2011	2	Archipelago Holdings Ltd. - Common Shares	6,264,000.00	307,673.37
07/09/2012	1	Banco Davivienda S.A. - Note	202,859.64	1.00
07/16/2012	3	Beazer Homes USA, Inc. - Common Shares	1,829,000.00	620,000.00
07/16/2012	5	Beazer Homes USA, Inc. - Units	382,500.00	15,000.00
06/22/2012 to 06/25/2012	10	Bison Income Trust II - Trust Units	756,175.00	75,617.50
06/26/2012 to 07/06/2012	7	Bison Income Trust II - Trust Units	276,320.00	27,632.00
06/01/2012	1	Black Eagle Mining Corporation - Common Shares	12,501,000.00	6,945,000.00
06/12/2012	7	Caledonian Royalty Corporation - Units	580,000.00	58,000.00
06/26/2012	21	CareVest Blended MIC Fund Inc. - Preferred Shares	936,413.00	N/A
06/26/2012	1	CareVest Blended Mortgage Investment Corporation - Preferred Shares	16,000.00	16,000.00
06/14/2012	9	CareVest First MIC Fund Inc. - Preferred Shares	868,517.00	N/A
06/26/2012	6	CareVest First MIC Fund Inc. - Preferred Shares	331,101.00	N/A
07/18/2012	16	Carlisle Goldfields Limited - Flow-Through Shares	3,341,000.00	20,881,250.00
06/29/2012	14	Clear Sky Capital US Real Estate Opportunity Limited Partnership - Limited Partnership Units	692,988.00	6,800.00
09/30/2011 to 06/29/2012	1	Commonfund Emerging Markets Investors Company - Common Shares	1,284,639.14	75,214.88
09/29/2011 to 06/28/2012	3	Commonfund Institutional All Cap Equity Fund LLC - Investment Trust Interests	9,438,512.16	575,596.98
07/06/2011 to 06/28/2012	1	Commonfund Institutional Core Equity Fund LLC - Investment Trust Interests	5,048,597.00	406,519.74

Transaction Date	No. of Purchasers	Issuer/Security	Total Purchase Price ($)	No. of Securities Distributed
09/29/2011 to 06/28/2012	1	Commonfund Institutional International Equity Fund LLC - Investment Trust Interests	200,439.81	18,136.34
07/01/2011 to 06/29/2012	1	Commonfund Institutional Multi-Strategy Commodities Fund Ltd. - Common Shares	2,373,230.46	222,617.17
07/01/2011 to 01/31/2012	3	Commonfund Strategic Solutions Diversifying Company - Common Shares	14,485,393.39	N/A
07/01/2011	3	Commonfund Strategic Solutions Relative Value & Event Driven Company - Common Shares	46,656,627.72	4,501,525.21
07/01/2011	3	Coomonfund Strategic Solutions Global Hedged Equity Company - Common Shares	37,103,299.99	3,736,947.47
06/13/2012	15	EurOmax Resources Ltd. - Common Shares	6,300,099.90	42,000,666.00
04/03/2012	1	GMO Emerging Markets Equity Fund - Units	3,932,288.00	115,766.13
06/29/2012	1	GMO Emerging Markets Fund-V - Units	10,191,000.00	950,570.34
05/31/2012	1	GMO World Opportunities Equity Alloc Fund- III - Units	1,508,893.86	79,716.20
07/01/2011 to 06/30/2012	101	GS+A Canadian Equity Fund - Limited Partnership Units	29,075,724.39	257,857.32
07/01/2011 to 06/30/2012	1	GS+A Growth Fund - Limited Partnership Units	118,594.10	1,897.70
07/01/2011 to 06/30/2012	534	GS+A Premium Income Fund - Limited Partnership Units	183,290,613.97	1,049,136.46
06/08/2012	18	Guyana Frontier Mining Corp. - Units	328,080.00	5,568,000.00
07/23/2012	16	Harte Gold Corp. - Units	507,500.00	750,000.00
07/20/2012	5	Huldra Silver Inc. - Flow-Through Shares	66,000.00	55,000.00
06/15/2012	3	InvestPlus Vantage LP - Limited Partnership Units	1,210,275.00	12.36
05/31/2012	137	KingSett Canadian Real Estate Income Fund LP - Units	18,785,205.75	15,381.07
07/15/2012	1	Kingwest Avenue Portfolio - Units	2,000,000.00	70,148.12
07/15/2012	3	Kingwest High Income Fund - Units	200,000.00	34,364.85
07/15/2012	1	Kingwest US Equity Portfolio - Units	6,005,309.00	407.71
07/19/2012	68	Kirkland Lake Gold Inc. - Debentures	57,500,000.00	57,500.00
07/22/2011 to 06/29/2012	8	Large Cap Disciplined Equity Fund - Units	10,998,616.97	N/A
06/01/2011 to 05/31/2012	32	Magenta II Mortgage Investment Corporation - Common Shares	6,107,374.24	6,107,374.24
06/01/2011 to 05/31/2012	187	Magenta III Mortgage Investment Corporation - Common Shares	13,304,405.85	13,304,905.85
06/01/2011 to 05/31/2012	46	Magenta Mortgage Investment Corporation - Common Shares	9,056,994.30	9,056,994.30

Transaction Date	No. of Purchasers	Issuer/Security	Total Purchase Price ($)	No. of Securities Distributed
07/18/2012	105	MEG Energy Corp. - Notes	805,960,000.00	N/A
07/26/2012	1	Metallum Resources Inc. - Common Shares	252,806.15	3,370,749.00
05/20/2012	9	NADG Town Centre (Canadian) Limited Partnership - Units	2,947,345.00	11.80
07/16/2012 to 07/25/2012	1	Newport Canadian Equity Fund - Trust Units	10,000.00	N/A
07/16/2012 to 07/25/2012	3	Newport Global Equity Fund - Units	105,000.00	N/A
06/11/2012 to 06/20/2012	64	OmniArch Capital Corporation - Bonds	1,195,774.00	N/A
07/13/2012	2	Puma Exploration Inc. - Units	750,000.00	2,500,000.00
07/30/2012	22	Rockhaven Resources Ltd. - Flow-Through Shares	2,016,000.00	5,600,000.00
06/19/2012 to 06/25/2012	3	Sinclair-Cockburn Mortgage Investment Corporation - Common Shares	2,200,000.00	2,200,000.00
10/21/2011 to 03/30/2012	5	Small/Mid Cap Equity Fund - Units	3,152,819.72	N/A
07/30/2012	1	Solarvest BioEnergy Inc. - Common Shares	100,000.00	500,000.00
07/01/2011 to 06/29/2012	3	State Street Institutional US Government Money Market Fund - Common Shares	55,980,508.80	55,707,447.12
07/17/2012	1	Technicolor SA - Rights	0.00	11,386,038.00
07/05/2012	3	The ADT Corporation - Notes	16,682,479.62	3.00
07/16/2012 to 07/25/2012	11	The Newport Balanced Fund - Trust Units	168,881.13	N/A
07/16/2012 to 07/25/2012	10	The Newport Fixed Income Fund - Trust Units	597,069.28	N/A
07/16/2012 to 07/25/2012	7	The Newport Yield Fund - Trust Units	763,269.99	N/A
06/20/2012	1	Thomas S. Caldwell/Dorothy A. Caldwell/J. Dennis Freeman- The Caldwell Financial Ltd. - Common Shares	1,575,000.00	700,000.00
06/29/2012	12	TopHatMonocle Corp. - Preferred Shares	7,365,314.95	4,735,714.00
06/22/2012	12	UMC Financial Management Inc. - N/A	1,575,000.00	N/A
07/12/2012	3	Unit Corporation - Notes	7,405,150.00	7,341.77
06/29/2012	37	Vertex Fund - Trust Units	3,597,130.96	N/A
06/29/2012	4	Vertex Managed Value Portfolio - Trust Units	106,412.41	N/A
07/26/2012	1	Victory Gold Mines Inc. - Common Shares	140,000.00	1,000,000.00
05/30/2012	32	VW Credit Canada, Inc./Credit VW Canada, Inc. - Notes	225,000,000.00	225,000,000.00

Transaction Date	No. of Purchasers	Issuer/Security	Total Purchase Price ($)	No. of Securities Distributed
05/30/2012	39	VW Credit Canada, Inc./Credit VW Canada, Inc. - Notes	224,968,500.00	225,000,000.00
07/25/2012	26	Waldron Energy Corporation - Common Shares	3,250,026.00	5,701,800.00
05/31/2012	8	Walton NC Westlake Investment Corporation - Common Shares	219,470.00	21,947.00
06/11/2012	16	WGS Aggregator LP - Limited Partnership Units	44,105,709.25	44,105,709.25
06/08/2012	2	White Tiger Mining Corp - Common Shares	962,000.00	6,012,500.00
07/22/2011 to 06/29/2012	10	World Equity Ex-US Fund - Units	24,680,039.91	N/A

Chapter 11

IPOs, New Issues and Secondary Financings

Issuer Name:
Aegean Metals Group Inc.
Principal Regulator - British Columbia
Type and Date:
Preliminary Long Form Prospectus dated August 1, 2012
NP 11-202 Receipt dated August 2, 2012
Offering Price and Description:
$1,500,000.00 - 6,000,000 Units at $0.25 per unit Per Unit: $0.25
Underwriter(s) or Distributor(s):
Haywood Securities Inc.
Promoter(s):
-
Project #1939018

Issuer Name:
AH Capital Corp.
Principal Regulator - Ontario
Type and Date:
Preliminary CPC Prospectus dated July 31, 2012
NP 11-202 Receipt dated July 31, 2012
Offering Price and Description:
Minimum Offering: $200,000.00 or 2,000,000 Common Shares
Maximum Offering: $300,000.00 or 3,000,000 Common Shares
Price: $0.10 per Common Share
Underwriter(s) or Distributor(s):
Hampton Securities Limited
Promoter(s):
Martin Bernholtz
Project #1938371

Issuer Name:
American Express Canada Credit Corporation
Principal Regulator - Ontario
Type and Date:
Preliminary Base Shelf Prospectus dated July 30, 2012
NP 11-202 Receipt dated July 31, 2012
Offering Price and Description:
Cdn $3,500,000,000.00
Medium Term Notes (unsecured)
Unconditionally guaranteed as to principal, premium (if any), interest and certain other amounts by AMERICAN EXPRESS CREDIT CORPORATION,
Underwriter(s) or Distributor(s):
BMO Nesbitt Burns Inc.
CIBC World Markets Inc.
Merrill Lynch Canada Inc.
RBC Dominion Securities Inc.
TD Securities Inc.
Promoter(s):
-
Project #1937608

Issuer Name:
Cominar Real Estate Investment Trust
Principal Regulator - Quebec
Type and Date:
Preliminary Short Form Prospectus dated August 3, 2012
NP 11-202 Receipt dated August 3, 2012
Offering Price and Description:
$250,013,400.00 - 10,122,000 units
Price: $24.70 per unit
Underwriter(s) or Distributor(s):
National Bank Financial Inc.
BMO Nesbitt Burns Inc.
Desjardins Securities Inc.
CIBC World Markets Inc.
Scotia Capital Inc.
RBC Dominion Securities Inc.
TD Securities Inc.
Canaccord Genuity Corp.
Dundee Securities Ltd.
Macquarie Capital Markets Canada Ltd.
Promoter(s):
-
Project #1939808

Issuer Name:
Doca Capital Corp.
Principal Regulator - British Columbia
Type and Date:
Preliminary Long Form Prospectus dated August 2, 2012
NP 11-202 Receipt dated
Offering Price and Description:
$1,500,000.00 to $2,500,000
$10,000,000.00 to16,666,666 Common Shares
Price: $0.15 per Common Share
Underwriter(s) or Distributor(s):
Canaccord Genuity Corp.
Promoter(s):
-
Project #1939798

Issuer Name:
Front Street DCA Special Opportunities Class
Principal Regulator - Ontario
Type and Date:
Preliminary Simplified Prospectus dated July 30, 2012
NP 11-202 Receipt dated August 1, 2012
Offering Price and Description:
Series A, B and F Shares
Underwriter(s) or Distributor(s):
-
Promoter(s):
Front Street Capital 2004
Project #1938594

Issuer Name:
Horizons Enhanced Income Energy ETF
Horizons Enhanced Income Equity ETF
Horizons Enhanced Income Financials ETF
Horizons Enhanced Income Gold Producers ETF
Horizons Enhanced Income International Equity ETF
Horizons Enhanced Income US Equity (USD) ETF
Principal Regulator - Ontario
Type and Date:
Amended and Restated Long Form Prospectus dated July 27, 2012
NP 11-202 Receipt dated August 2, 2012
Offering Price and Description:
Class E Units and Advisor Class Units
Underwriter(s) or Distributor(s):
-
Promoter(s):
Alphapro Management Inc.
Project #1856438

Issuer Name:
Hydrogenics Corporation
Principal Regulator - Ontario
Type and Date:
Preliminary Based Shelf Prospectus dated August 1, 2012
NP 11-202 Receipt dated August 1, 2012
Offering Price and Description:
US$25,000,000.00 - Common Shares, Preferred Shares, Debt Securities, Subscription Receipts, Warrants, Share Purchase Contracts, Units
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #1938595

Issuer Name:
RMP Energy Inc. (formerly Orleans Energy Ltd.)
Principal Regulator - Alberta
Type and Date:
Preliminary Short Form Prospectus dated August 3, 2012
NP 11-202 Receipt dated August 3, 2012
Offering Price and Description:
$10,001,250.00 - 4,445,000 Flow Through Common Shares
Price: $2.25 per flow through share
Underwriter(s) or Distributor(s):
GMP Securities L.P.
Cormark Securities Inc.
National Bank Financial Inc.
Peters & Co. Limited
FirstEnergy Capital Corp.
Scotia Capital Inc.
Promoter(s):
-
Project #1939722

Issuer Name:
Sentry Bond Plus Fund
Sentry Enhanced Corporate Bond Capital Yield Class
Sentry Enhanced Corporate Bond Fund
Principal Regulator - Ontario
Type and Date:
Preliminary Simplified Prospectus dated August 1, 2012
NP 11-202 Receipt dated August 2, 2012
Offering Price and Description:
Series A, F and I Securities
Underwriter(s) or Distributor(s):
Sentry Investments Inc.
Promoter(s):
Sentry Investments Inc.
Project #1939197

Issuer Name:
Trez Capital Mortgage Investment Corporation
Principal Regulator - British Columbia
Type and Date:
Preliminary Long Form Prospectus dated August 3, 2012
NP 11-202 Receipt dated August 3, 2012
Offering Price and Description:
$100,000,000.00 (* Class A Shares) Maximum $* per Class A Share
Underwriter(s) or Distributor(s):
RBC Dominion Securities Inc.
Promoter(s):
Trez Capital Limited Partnership
Project #1939795

Issuer Name:
407 International Inc.
Principal Regulator - Ontario
Type and Date:
Final Base Shelf Prospectus dated August 3, 2012
NP 11-202 Receipt dated August 3, 2012
Offering Price and Description:
$1,200,000,000.00 - Medium-Term Notes (Secured)
Underwriter(s) or Distributor(s):
BMO Nesbitt Burns Inc.
RBC Dominion Securities Inc.
TD Securities Inc.
Scotia Capital Inc.
National Bank Financial Inc.
Casgrain & Company Limited
CIBC World Markets Inc.
Merrill Lynch Canada Inc.
Promoter(s):
-
Project #1935849

Issuer Name:
Allied Properties Real Estate Investment Trust
Principal Regulator - Ontario
Type and Date:
Final Short Form Prospectus dated August 3, 2012
NP 11-202 Receipt dated August 3, 2012
Offering Price and Description:
$100,020,000.00 - 3,334,000 Units at $30.00 per Unit
Underwriter(s) or Distributor(s):
Scotia Capital Inc.
RBC Dominion Securities Inc.
CIBC World Markets Inc.
BMO Nesbitt Burns Inc.
TD Securities Inc.
Macquarie Capital Markets Canada Ltd.
National Bank Financial Inc.
Canaccord Genuity Corp.
Desjardins Securities Inc.
Dundee Securities Ltd.
GMP Securities L.P.
Promoter(s):
-
Project #1937220

Issuer Name:
Argent Energy Trust
Principal Regulator - Alberta
Type and Date:
Final Long Form Prospectus dated August 1, 2012
NP 11-202 Receipt dated August 1, 2012
Offering Price and Description:
$212,300,000.00 - 21,230,000 Units Price: $10.00 per Unit
Underwriter(s) or Distributor(s):
SCOTIA CAPITAL INC.
CIBC WORLD MARKETS INC.
RBC DOMINION SECURITIES INC.
BMO NESBITT BURNS INC.
TD SECURITIES INC.
CANACCORD GENUITY CORP.
NATIONAL BANK FINANCIAL INC.
ACUMEN CAPITAL FINANCE PARTNERS LIMITED
ALTACORP CAPITAL INC.
CORMARK SECURITIES INC.
DESJARDINS SECURITIES INC.
DUNDEE SECURITIES LTD.
FIRSTENERGY CAPITAL CORP.
GMP SECURITIES L.P.
Promoter(s):
Aston Hill Financial Inc.
Project #1905559

Issuer Name:
BMO Global Tactical ETF Class
BMO U.S. High Yield Bond Fund
Principal Regulator - Ontario
Type and Date:
Amendment #1 dated July 23, 2012 to the Simplified Prospectus and Annual Information Form dated May 28, 2012
NP 11-202 Receipt dated July 31, 2012
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
BMO INVESTMENTS INC.
BMO Investments Inc.
Promoter(s):
BMO INVESTMENTS INC.
Project #1892658

Issuer Name:
BMO Global Tactical ETF Class
BMO Target Enhanced Yield ETF Portfolio
BMO Target Yield ETF Portfolio
Principal Regulator - Ontario
Type and Date:
Amendment #2 dated July 23, 2012 to the Amended and Restated Simplified Prospectus and Annual Information Form dated April 11, 2012
NP 11-202 Receipt dated July 31, 2012
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
BMO Investments Inc.
BMO Investments Inc.
Promoter(s):
BMO Investments Inc.
Project #1862292

Issuer Name:
Canadian Dollar Cash Management Fund
Principal Regulator - Ontario
Type and Date:
Final Simplified Prospectus dated July 30, 2012
NP 11-202 Receipt dated July 31, 2012
Offering Price and Description:
Corporate Series units @ Net Asset Value
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #1917693

Issuer Name:
Canadian Dollar Cash Management Fund
Principal Regulator - Ontario
Type and Date:
Final Simplified Prospectus dated July 30, 2012
NP 11-202 Receipt dated July 31, 2012
Offering Price and Description:
Institutional Series Units @ Net Asset Value
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #1917896

Issuer Name:
Canadian Dollar Cash Management Fund
Principal Regulator - Ontario
Type and Date:
Simplified Prospectus dated July 30, 2012
NP 11-202 Receipt dated July 31, 2012
Offering Price and Description:
The Northern Trust Canada Series Units @ Net Asset Value
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #1918059

Issuer Name:
CC&L Balanced Growth Portfolio
CC&L Diversified Income Portfolio
CC&L Growth Portfolio
Principal Regulator - British Columbia
Type and Date:
Final Simplified Prospectuses dated July 30, 2012
NP 11-202 Receipt dated July 31, 2012
Offering Price and Description:
Series A, Series F, Series I, Series O, Arbour Series and Reserve Series Units
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #1926321

Issuer Name:
CIBC Canadian T-Bill Fund
CIBC Money Market Fund
CIBC U.S. Dollar Money Market Fund
CIBC Short-Term Income Fund (formerly CIBC Mortgage and Short-Term Income Fund)
CIBC Canadian Bond Fund
CIBC Monthly Income Fund
CIBC Global Bond Fund
CIBC Global Monthly Income Fund
CIBC Balanced Fund
CIBC Dividend Income Fund (formerly CIBC Diversified Income Fund)
CIBC Dividend Growth Fund (formerly CIBC Dividend Fund)
CIBC Canadian Equity Fund (formerly CIBC Core Canadian Equity Fund)
CIBC Canadian Equity Value Fund (formerly Canadian Imperial Equity Fund)
CIBC Canadian Small-Cap Fund
CIBC Disciplined U.S. Equity Fund
CIBC U.S. Small Companies Fund
CIBC Global Equity Fund
CIBC Disciplined International Equity Fund
CIBC European Equity Fund
CIBC Emerging Markets Fund (formerly CIBC Emerging Economies Fund)
CIBC Asia Pacific Fund (formerly CIBC Far East Prosperity Fund_
CIBC Latin American Fund
CIBC International Small Companies Fund
CIBC Financial Companies Fund
CIBC Canadian Resources Fund
CIBC Energy Fund
CIBC Canadian Real Estate Fund
CIBC Precious Metals Fund
CIBC Global Technology Fund
CIBC Canadian Short-Term Bond Index Fund
CIBC Canadian Bond Index Fund
CIBC Global Bond Index Fund
CIBC Balanced Index Fund
CIBC Canadian Index Fund
CIBC U.S. Broad Market Index Fund (formerly CIBC U.S. Equity Index Fund)
CIBC U.S. Index Fund (CIBC U.S. Index RRSP Fund)
CIBC International Index Fund
CIBC European Index Fund
CIBC Emerging Markets Index Fund
CIBC Asia Pacific Index Fund
CIBC Nasdaq Index Fund
CIBC Managed Income Portfolio
CIBC Managed Income Plus Portfolio
CIBC Managed Balanced Portfolio
CIBC Managed Monthly Income Balanced Portfolio
CIBC Managed Balanced Growth Portfolio (formerly, CIBC Managed Balanced Growth RRSP Portfolio)
CIBC Managed Growth Portfolio (formerly, CIBC Managed Growth RRSP Portfolio)
CIBC Managed Aggressive Growth Portfolio (formerly, CIBC Managed Aggressive Growth RRSP Portfolio)
CIBC U.S. Dollar Managed Income Portfolio
CIBC U.S. Dollar Managed Balanced Portfolio
CIBC U.S. Dollar Managed Growth Portfolio
Principal Regulator - Ontario
Type and Date:
Simplified Prospectus dated July 30, 2012
NP 11-202 Receipt dated August 1, 2012
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
CIBC Securities Inc.
Promoter(s):
-
Project #1925369

Issuer Name:
DirectCash Payments Inc.
Principal Regulator - Alberta
Type and Date:
Final Short Form Prospectus dated August 1, 2012
NP 11-202 Receipt dated August 1, 2012
Offering Price and Description:
$65,380,000.00 - 2,800,000 Common Shares Price: $23.35 per Common Share
Underwriter(s) or Distributor(s):
BMO Nesbitt Burns Inc.
Acumen Capital Finance Partners Limited
Scotia Capital Inc.
Promoter(s):
-
Project #1935360

Issuer Name:
Futures Index Fund
Principal Regulator - Ontario
Type and Date:
Final Long Form Prospectus dated July 31, 2012
NP 11-202 Receipt dated August 1, 2012
Offering Price and Description:
Class D Units
Class E Units
Class F Units
Class I Units
Class O Units
Class P Units
Class R Units
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #1927147

Issuer Name:
Trimark Interest Fund
Trimark U.S. Money Market Fund
Trimark Advantage Bond Fund
Trimark Canadian Bond Class
Trimark Canadian Bond Fund
Trimark Floating Rate Income Fund
Trimark Global High Yield Bond Fund
Trimark Government Plus Income Fund
Trimark Diversified Income Class
Trimark Diversified Yield Class
Trimark Global Balanced Fund
Trimark Global Balanced Class
Trimark Income Growth Fund
Trimark Select Balanced Fund
Trimark Canadian Endeavour Fund
Trimark Canadian Fund
Trimark Canadian Class
Trimark Canadian Opportunity Class (formerly, Invesco Core Canadian Equity Class)
Trimark Canadian Plus Dividend Class
Trimark Canadian Small Companies Fund
Trimark North American Endeavour Class
Trimark U.S. Companies Fund
Trimark U.S. Companies Class
Trimark U.S. Small Companies Class
Trimark Europlus Fund
Trimark Fund
Trimark Global Dividend Class
Trimark Global Endeavour Class
Trimark Global Endeavour Fund
Trimark Global Fundamental Equity Class
Trimark Global Fundamental Equity Fund
Trimark Global Small Companies Class
Trimark International Companies Class
Trimark International Companies Fund
Trimark Energy Class
Trimark Resources Fund
Invesco Allocation Fund
Invesco Canada Money Market Fund
Invesco Canadian Balanced Fund
Invesco Canadian Equity Growth Class
Invesco Canadian Premier Growth Class
Invesco Canadian Premier Growth Fund
Invesco Core Canadian Balanced Class
Invesco Emerging Markets Class
Invesco Emerging Markets Debt Fund
Invesco European Growth Class
Invesco Global Equity Fund
Invesco Global Growth Class
Invesco Global Real Estate Fund
Invesco Indo-Pacific Fund
Invesco Intactive 2023 Portfolio
Invesco Intactive 2028 Portfolio
Invesco Intactive 2033 Portfolio
Invesco Intactive 2038 Portfolio
Invesco Intactive Balanced Growth Portfolio
Invesco Intactive Balanced Growth Portfolio Class
Invesco Intactive Balanced Income Portfolio
Invesco Intactive Balanced Income Portfolio Class
Invesco Intactive Diversified Income Portfolio
Invesco Intactive Diversified Income Portfolio Class
Invesco Intactive Growth Portfolio
Invesco Intactive Growth Portfolio Class
Invesco Intactive Maximum Growth Portfolio
Invesco Intactive Maximum Growth Portfolio Class
Invesco Intactive Strategic Capital Yield Portfolio Class
Invesco Intactive Strategic Yield Portfolio
Invesco International Growth Class
Invesco International Growth Fund
Invesco Pure Canadian Equity Class
Invesco Pure Canadian Equity Fund
Invesco Select Canadian Equity Class
Invesco Select Canadian Equity Fund
Invesco Short-Term Income Class
PowerShares 1-5 Year Laddered Corporate Bond Index Fund
PowerShares Canadian Dividend Index Class
PowerShares Canadian Preferred Share Index Class
PowerShares Diversified Yield Fund
PowerShares FTSE RAFI® Canadian Fundamental Index Class
PowerShares FTSE RAFI® Emerging Markets Fundamental Class
PowerShares FTSE RAFI® Global+ Fundamental Fund
PowerShares FTSE RAFI® U.S. Fundamental Fund
PowerShares Global Agriculture Class
PowerShares Global Clean Energy Class
PowerShares Global Dividend Achievers Fund
PowerShares Global Gold and Precious Metals Class
PowerShares Global Water Class
PowerShares Golden Dragon China Class
PowerShares High Yield Corporate Bond Index Fund
PowerShares India Class
PowerShares QQQ Class
PowerShares Real Return Bond Index Fund
PowerShares Tactical Bond Capital Yield Class
PowerShares Tactical Bond Fund
PowerShares Tactical Canadian Asset Allocation Fund
Principal Regulator - Ontario

Type and Date:
Simplified Prospectus dated July 30, 2012
NP 11-202 Receipt dated July 31, 2012

Offering Price and Description:
Offering Series A shares or units and offering Series B, Series D, Series DCA, Series DCA Heritage, Series DSC, Series F, Series FH, Series F4, Series F6, Series F8, Series H, Series I, Series P, Series PF, Series PF4, Series PF6, Series PH, Series PT4, Series PT6, Series PT8, Series T4, Series T6, Series T8 and Series SC shares or units @ Net Asset Value

Underwriter(s) or Distributor(s):

Promoter(s):
-

Project #1916961

Issuer Name:
KEYreit (formerly Scott's Real Estate Investment Trust)
Principal Regulator - Ontario
Type and Date:
Final Short Form Prospectus dated July 31, 2012
NP 11-202 Receipt dated July 31, 2012
Offering Price and Description:
$10,004,000.00 - 1,640,000 Units PRICE: $6.10 PER UNIT
Underwriter(s) or Distributor(s):
National Bank Financial Inc.
Canaccord Genuity Corp.
Dundee Securities Ltd.
Macquarie Capital Markets Canada Ltd.
Promoter(s):
-
Project #1934917

Issuer Name:
Manulife Canadian Equity Index Fund
Manulife International Equity Index Fund
Manulife Private Canadian Equity Portfolio
Manulife Private Canadian Fixed Income Portfolio
Manulife Private International Equity Portfolio
Manulife Private U.S. Equity Portfolio
Manulife U.S. Equity Index Fund
Principal Regulator - Ontario
Type and Date:
Final Simplified Prospectus dated July 26, 2012
NP 11-202 Receipt dated July 31, 2012
Offering Price and Description:
Series M Securities
Underwriter(s) or Distributor(s):
Manulife Asset Management Limited
Manulife Asset Management Limited
Promoter(s):
Manulife Asset Management Limited
Project #1923401

Issuer Name:
Niagara Ventures Corporation
Principal Regulator - Ontario
Type and Date:
Final CPC Prospectus dated August 2, 2012
NP 11-202 Receipt dated August 3, 2012
Offering Price and Description:
MINIMUM OFFERING: $1,200,000.00 or 6,000,000 Common Shares; MAXIMUM OFFERING: $2,375,000.00 or 11,875,000 Common Shares PRICE: $0.20 per Common Share
Underwriter(s) or Distributor(s):
Macquarie Private Wealth Inc.
Promoter(s):
Larry Phillips
Project #1925204

Issuer Name:
Nordea International Equity Fund
Principal Regulator - Ontario
Type and Date:
Final Simplified Prospectus dated July 31, 2012
NP 11-202 Receipt dated August 1, 2012
Offering Price and Description:
Class I Units, Class O Units and Class P Units
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #1929060

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Chapter 12

Registrations

12.1.1 Registrants

Type	Company	Category of Registration	Effective Date
Reinstatement	Brook Capital Corporation	Exempt Market Dealer	August 2, 2012
Change of Registration Category	Clearwater Capital Management Inc.	From: Portfolio Manager Exempt Market Dealer To: Portfolio Manager	August 2, 2012

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Chapter 13

SROs, Marketplaces and Clearing Agencies

13.3 Clearing Agencies

13.3.1 CDS – Notice and Request for Comments – Material Amendments to CDS Procedures – Enhancements to the CNS Allotment Process

CDS CLEARING AND DEPOSITORY SERVICES INC. (CDS®)

MATERIAL AMENDMENTS TO CDS PROCEDURES

ENHANCEMENTS TO THE CNS ALLOTMENT PROCESS

REQUEST FOR COMMENTS

A. DESCRIPTION OF THE PROPOSED CDS PROCEDURE AMENDMENTS

The proposed amendments to the CDS Participant Procedures will amend functionality of the allotment process in the Continuous Net Settlement Service (CNS). This change is made at the request of the Debt and Equity Subcommittee of the Strategic Development Review Committee (SDRC). The CNS allotment process refers to (i) the creation of non-exchange trades with a settlement mode of trade-for-trade (TFT) from outstanding CNS positions by assigning or allotting buyers to sellers against outstanding CNS positions, and (ii) trade conversion activities whereby exchange and non-exchange trades with a settlement mode of CNS are converted to settle TFT. This process is initiated in the case of corporate actions that would result in a participant receiving either a non-CNS eligible security or cash.

Background

CNS is a central counterparty service designed to clear and settle primarily equity trades initiated on a Canadian exchange, a quotation and trade reporting system (QTRS) or an alternative trading system (ATS). Transactions targeted to CNS may also originate as non-exchange trades with a settlement mode of CNS, manually setup in CDSX® by participants.

Novation and netting of CNS trades

When an exchange or non-exchange trade with a settlement mode of CNS reaches value date, the original buyer and seller obligations (to receive securities and deliver payment, and vice versa) are extinguished and replaced with settlement obligations between each party and CDS (i.e., novation). Each time another trade for the same security is processed, the new novated obligations are netted with the existing settlement obligations for that security. These netted obligations are the "to receive" and "to deliver" positions that are settled in the overnight batch net settlement process, and continuously in CDSX in the real-time CNS settlement process that runs from system start-up through to the start of payment exchange.

Allotment of CNS positions and trade conversion activities for corporate actions

When a corporate action is scheduled to occur on a CNS-eligible security that would result in a participant receiving either a non-CNS eligible security or cash, existing CNS positions are restricted from settling, and new trades targeted to CNS are restricted from novation and netting. This is accomplished in the following manner:

(i) existing CNS outstanding settlement obligations are allotted from CNS and converted into TFT non-exchange trades,

(ii) CNS non-exchange trades are converted into TFT non-exchange trades, and

(iii) CNS exchange trades are converted into TFT exchange trades.

The allotment process removes CDS as the central counterparty by assigning buyers and sellers to the outstanding CNS obligations and replacing those obligations with non-exchange trades targeted to settle TFT. In addition, exchange and non-exchange trades that are targeted to settle CNS are converted to a TFT settlement mode. Subsequent corporate action activity is then applied to these allotted and converted trades.

The process of changing the mode of settlement on CNS exchange trades to TFT often results in participants being left with a large number of trades over which they have no control. The result is that participants are unable to effectively prioritize their settlement activity in the affected security.

Proposed Amendments

The SDRC Debt and Equity Subcommittee requested that CDS review the current trade allotment process and propose an approach whereby they would be afforded greater flexibility to manage their settlement activities. The approved proposal will amend the process such that exchange and non-exchange trades involving a security with a CNS settlement-related restriction, due to an upcoming corporate action, will be novated and netted. Once the netted obligations are determined, those outstanding CNS settlement positions will be allotted into non-exchange TFT trades, per the current process.

This change will (i) eliminate the TFT exchange trades created by the conversion process, and (ii) potentially reduce the number of TFT non-exchange trades due to additional netting activities. This amendment will result in participants having fewer trades to manage.

B. NATURE AND PURPOSE OF THE PROPOSED CDS PROCEDURE AMENDMENTS

The proposed procedure amendments are enhancements to current functionality of the allotment process which will provide greater processing efficiencies and improved trade settlement management flexibility.

CDS participants will benefit from the proposed enhancements to the trade allotment process because:

- The number of transactions that require monitoring and settlement management activities will be reduced, thereby reducing operational risk1
- The novation and netting process will reduce the quantity to be settled.

Currently, when a CNS settlement restriction exists on a security, all new trades with a settlement mode of CNS received from an exchange or entered by participants are prevented from being picked up in the CNS novation and netting processes. The settlement mode of the trades is automatically changed to TFT, and participants must manage these transactions manually. However, participants are restricted from placing the trades that originated at an exchange on hold, which prevents settlement until such time as they are ready for the movement of securities or cash to be completed from their CDSX ledgers. This has often resulted in a large number of trades which participants have no ability to manage, and which may have used funds or securities for small value trades that participants would have preferred to first target toward larger value trades.

A change will be made to the CNS novation and netting process to disregard the CNS settlement restriction if it has been automatically created by a corporate action. This will allow all CNS trades reaching value date to be netted each day during the corporate action period. Settlement of outstanding obligations will still be restricted, and these settlement obligations will then be allotted out each day to minimal numbers of non-exchange trades over which settlement can be managed.

CNS settlement restrictions that have been placed on a security manually or automatically for reasons other than a corporate action will continue to be processed as they are today. That is, the mode of settlement on exchange and non-exchange trades will be converted from CNS to TFT.

C. IMPACT OF THE PROPOSED CDS PROCEDURE AMENDMENTS

The proposed procedure amendments will provide processing efficiencies and trade settlement management flexibility. The impact of these changes will be limited to those CDS participants that utilize the CNS function within CDSX.

C.1 Competition

The proposed procedure amendments apply to all CDS participants who currently use, or may choose to use, the CNS service. Consequently, no CDS participant will be disadvantaged with the introduction of these enhancements.

C.2 Risks and Compliance Costs

CDS Risk Management has determined that the proposed amendments will improve the risk profile of its participants due to the novation and netting process. It will not change the risk profile of CDS.

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[1] A participant experienced the creation of approximately 50,000 TFT exchange trades due to the allotment process, which took a three month period for completion of all settlements.

The introduction of the proposed enhancement to the CNS allotment process will not result in any changes to the existing CDSX settlement process. The method of (i) applying non-entitlement related CNS settlement restrictions to securities, (ii) placing holds on non-exchange transactions, and (iii) the settlement of exchange and non-exchange trades remain unchanged. The prioritization of settlements is also not impacted by this initiative.

There are no compliance costs to the participants associated with the proposed enhancements to the CNS allotment process.

C.3 Comparison to International Standards – (a) Committee on Payment and Settlement Systems of the Bank for International Settlements, (b) Technical Committee of the International Organization of Securities Commissions, and (c) the Group of Thirty

As stated in Principle #21 – Efficiency and effectiveness – of the new international standards for payment, clearing and settlement systems set out in the CPSS/IOSCO report Principles for Financial Market Infrastructures2, a financial market infrastructure such as CDS "should be designed to meet the needs of its participants and the markets it serves, in particular, with regard to choice of a clearing and settlement arrangement; operating structure; scope of products cleared, settled, or recorded; and use of technology and procedures".

This development, requested by some of CDS's participants, supports greater flexibility for managing the settlement of transactions.

No other comparisons to international standards were identified.

D. DESCRIPTION OF THE PROCEDURE DRAFTING PROCESS

D.1 Development Context

The development request was tabled at the SDRC Debt and Equity Subcommittee as an opportunity to increase efficiencies in the settlement of trades systematically allotted from the CNS service. Once approved by the SDRC for further analysis, CDS developed a requirements document that was reviewed with the SDRC Debt and Equity Subcommittee. Their input was incorporated into the final design which was subsequently approved by the SDRC.

D.2 Procedure Drafting Process

The CDS procedure amendments were drafted by CDS's Business Systems Development and Support group, and subsequently reviewed and approved by the SDRC. The SDRC determines or reviews, prioritizes and oversees CDS-related systems development and other changes proposed by participants and CDS. The SDRC's membership includes representatives from a cross-section of the CDS participant community, and it meets on a monthly basis.

These amendments were reviewed and approved by the SDRC on July 26, 2012.

D.3 Issues Considered

During the processing of an entitlement or corporate action where the received item is a new security, the quantity amounts of any existing trades in the original security are converted to the corresponding equivalent amount of the new security. When the rate of the received item includes a fractional amount (e.g. receive 1.33 shares of a new security for each 1 share of the original security), the resulting quantity amounts on the converted trades may contain a decimalized quantity. As trade quantities must be in whole numbers, the new quantity is truncated. When a large number of trades are processed in this manner, it can result in a significant loss of shares of the new security to a participant. These fractional shares are accumulated by CDS and must be reclaimed by the participant. By allowing CNS exchange trades to remain with the CNS settlement mode and be included in the netting process, the number of trades requiring truncation will be significantly reduced.

D.4 Consultation

This development was requested by the SDRC Debt and Equity Subcommittee. CDS reviewed the requirements document with that group and received their final approval for the development of the described enhancement.

CDS's Customer Service account managers provide continuous communication and status updates of all proposed changes to their clients, as well as soliciting input on those changes.

CDS facilitates consultation through a variety of means, including regularly scheduled SDRC subcommittee meetings which provide a forum for detailed requirement review, and monthly meetings with service bureaus to discuss development impacts to

[2] The report can be found at http://www.bis.org/publ/cpss101.htm

them. All development initiatives are also presented to the Investment Industry Regulatory Organization of Canada's (IIROC) Financial Administrators Section (FAS) working group.

D.5 Alternatives Considered

Initially, the SDRC Debt and Equity Subcommittee requested that CDS enable participants to manage the settlement control indicator on exchange trades converted from CNS to TFT. During the review and analysis phase, it was determined that this approach would be insufficient to achieve maximum potential efficiencies in the management of these trades as large volumes would continue to exist. Consequently, the SDRC Debt and Equity Subcommittee and the SDRC agreed that CDS's proposal to net CNS trades prior to allotment was a more complete solution.

D.6 Implementation Plan

The proposed procedure amendments and the scheduled date of implementation have been communicated regularly to CDS participants through the SDRC and its subcommittees, as well as through Customer Service relationship meetings. The Customer Service account managers will provide their clients with details of the upcoming changes, and provide customer-related training during the months of October and November 2012. CDS will distribute a bulletin to all CDS participants the week before implementation reminding them of the upcoming changes and confirming the effective date of those changes.

CDS is recognized as a clearing agency by the Ontario Securities Commission pursuant to section 21.2 of the Ontario Securities Act. The Autorité des marchés financiers has authorized CDS to carry on clearing activities in Québec pursuant to sections 169 and 170 of the Québec Securities Act. In addition CDS is deemed to be the clearing house for CDSX®, a clearing and settlement system designated by the Bank of Canada pursuant to section 4 of the *Payment Clearing and Settlement Act.* The Ontario Securities Commission, the Autorité des marchés financiers and the Bank of Canada will hereafter be collectively referred to as the "Recognizing Regulators".

The amendments to Participant Procedures may become effective upon approval of the amendments by the Recognizing Regulators following public notice and comment. Implementation of this initiative is planned for November 17, 2012.

E. TECHNOLOGICAL SYSTEMS CHANGES

E.1 CDS

CDSX functionality will be impacted by these changes as follows:

a) Allow for novation and netting of CNS trades (exchange and non-exchange) when a CNS settlement restriction exists on a security. CNS positions will not be settled when this restriction is applied, per the current process.

b) Eliminate the change to the settlement mode of existing trades from CNS to TFT during the allotment process. Trades will remain as CNS and be available for extraction.

c) Newly entered exchange and non-exchange CNS trades will be populated with a mode of settlement as CNS when a CNS settlement restriction exists. Trades will remain as CNS and be available for novation.

d) Automate additional allotments of CNS positions. Existing CNS trades will remain intact. New process to be triggered upon completion of CNS netting where an allotment has previously taken place on the event.

E.2 CDS Participants

There are no technological system changes required by CDS Participants.

E.3 Other Market Participants

There are no technological system changes required by CDS Participant service bureaus.

F. COMPARISON TO OTHER CLEARING AGENCIES

A similar CNS trade allotment and conversion process is provided by the National Securities Clearing Corporation (NSCC) as outlined in the NSCC Rules and Procedures dated June 28, 2012. Reference to conversion and allocation as it pertains to corporate actions is made, however CDS is not aware of any impending rule changes in this regard.

No comparable or similar procedures were available for other clearing agencies in order to conduct an analysis.

G. PUBLIC INTEREST ASSESSMENT

CDS has determined that the proposed amendments are not contrary to the public interest.

H. COMMENTS

Comments on the proposed amendments should be in writing and submitted within 30 calendar days following the date of publication of this notice in the Ontario Securities Commission Bulletin or the Autorité des marchés financiers Bulletin to:

Elaine Spankie
Senior Business Analyst, Business Systems Development and Support
CDS Clearing and Depository Services Inc.
85 Richmond Street West
Toronto, Ontario M5H 2C9

Phone: 416-365-3595
Email: espankie@cds.ca

Copies should also be provided to the Autorité des marchés financiers and the Ontario Securities Commission by forwarding a copy to each of the following individuals:

Me Anne-Marie Beaudoin
Secrétaire générale
Autorité des marchés financiers
800, square Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal (Québec) H4Z 1G3

Télécopieur: (514) 864-6381
Courrier électronique: consultation-en-cours@lautorite.qc.ca

Manager, Market Regulation
Capital Markets Branch
Ontario Securities Commission
Suite 1903, Box 55,
20 Queen Street West
Toronto, Ontario, M5H 3S8

Fax: 416-595-8940
email: marketregulation@osc.gov.on.ca

CDS will make available to the public, upon request, all comments received during the comment period.

I. PROPOSED CDS PROCEDURE AMENDMENTS

Access the proposed amendments to the CDS Procedures on the User documentation revisions web page (http://www.cds.ca/cdsclearinghome.nsf/Pages/-EN-blacklined?Open) and to the CDS Forms (if applicable) on Forms online (Click View by Form Category and in the Select a Form Category list, click External review) on the CDS Services web page (www.cdsservices.ca).

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Chapter 25

Other Information

25.1 Approvals

25.1.1 Noumena Capital Partners Ltd. – s. 213(3)(b) of the LTCA

Headnote

Clause 213(3)(b) of the Loan and Trust Corporations Act – application by manager, with no prior track record acting as trustee, for approval to act as trustee of pooled funds and future pooled funds to be managed by the applicant and offered pursuant to a prospectus exemption.

Statutes Cited

Loan and Trust Corporations Act, R.S.O. 1990, c. L.25, as am., s. 213(3)(b).

July 27, 2012

Noumena Capital Partners Ltd.
141 Adelaide Street West
Suite 1001
Toronto, ON M5H 3L5

Attention: Aly Kachra

Dear Sirs/Medames:

Re: Noumena Capital Partners Ltd. (the "Applicant")

Application pursuant to clause 213(3)(b) of the *Loan and Trust Corporations Act* (Ontario) for approval to act as trustee

File No. 2012/0287

Further to your application dated May 7, 2012 (the "Application") filed on behalf of the Applicant, and based on the facts set out in the Application and the representation by the Applicant that the assets of Noumena Multi-Strategy Fund and any other future mutual fund trusts that the Applicant may establish and manage from time to time will be held in the custody of a trust company incorporated and licensed or registered under the laws of Canada or a jurisdiction, or a bank listed in Schedule I, II or III of the *Bank Act* (Canada), or an affiliate of such bank or trust company, the Ontario Securities Commission (the "Commission") makes the following order:

Pursuant to the authority conferred on the Commission in clause 213(3)(b) of the *Loan and Trust Corporations Act* (Ontario), the Commission approves the proposal that the Applicant act as trustee of Noumena Multi-Strategy Fund and any other future mutual fund trusts which may be established and managed by the Applicant from time to time, the securities of which will be offered pursuant to prospectus exemptions.

Yours truly,

"Sarah B. Kavanaugh"

"Mary Condon"

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Index