IN THE SUPREME COURT
OF THE STATE OF NEVADA

MICHAEL PATRICK LATHIGEE,

Appellant,

— *vs.* —

BRITISH COLUMBIA SECURITIES COMMISSION,

Respondent.

Case No. 78833

JOINT APPENDIX
Volume 1, Bates Nos. JAX1–211

Appeal from Case No. A-18-771407-C
Eighth Judicial District Court For Clark County
Hon. Adriana Escobar

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DOCUMENT DESCRIPTION	LOCATION
Reply in Support of Defendant Lathigee's Motion for Summary Judgment (filed 11/21/18)	Vol. 7, Bates Nos. JAX1218–1235
Reply to Defendant's Opposition to Plaintiff's Countermotion for Summary Judgment (filed 11/30/18)	Vol. 7, Bates Nos. JAX1236–1392 through Vol. 8, Bates Nos. JAX1393–1409
Transcript of December 4, 2018 Hearing on Motions for Summary Judgment	Vol. 8, Bates Nos. JAX1410–1431
Statement of Facts in Support of Defendant Lathigee's Motion for Summary Judgment (filed 12/18/18)	Vol. 8, Bates Nos. JAX1432–1460
[British Columbia Securities Commission's Proposed] Findings of Fact, Conclusions of Law and Judgment (submitted 12/18/18)	Vol. 8, Bates Nos. JAX1461–1482
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DISTRICT COURT

CLARK COUNTY, NEVADA

-*-

BRITISH COLUMBIA SECURITIES COMMISSION,

Plaintiffs,

vs.

MICHAEL PATRICK LATHIGEE,

Defendant.

CASE NO.: A-18-771407-C
DEPT. NO.: Department 14

COMPLAINT FOR RECOGNITION OF FOREIGN-COUNTRY MONEY JUDGMENT

Exempt From Arbitration Pursuant To NAR 3(a)
Amount in Controversy Exceeds $50,000

COMES NOW Plaintiff BRITISH COLUMBIA SECURITIES COMMISSION (the Commission"), by and through its attorneys of record, Alverson, Taylor, Mortensen & Sanders, and complains, avers and alleges as follows:

PARTIES

1. At all times relevant herein, the Commission has been a corporation continued in British Columbia pursuant to the British Columbia *Securities Act*, R.S.B.C. 1996, c. 418 (the "*Act*"). The Commission is an agent of government and has the authority under the *Act* to investigate and prosecute, among other things, violations of the *Act*.

2. The Commission is informed and believes and thereon alleges that, Defendant MICHAEL PATRICK LATHIGEE ("Lathigee"), is a resident of Las Vegas, Clark County, Nevada.

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RELATED NON-PARTIES

3. The following Parties are subject to the Judgment cited to herein; however, they are not believed to be located in Nevada, so at this time Plaintiff does not yet seek to domesticate this foreign country judgment against them. But Plaintiff identifies them for context and reserves the right to amend this Complaint, or bring a new one, should it become necessary to enforce the judgment against these other Parties in Nevada.

4. The Commission is informed and believes and thereon alleges that, Defendant EARLE DOUGLAS PASQUILL ("Pasquill"), is a resident of Vancouver, British Columbia, Canada.

5. FIC FORECLOSURE FUND LTD. is an entity formed under the laws of Canada with its principle place of business in North Vancouver, British Columbia, Canada.

6. FIC REAL ESTATE PROJECTS LTD. is an entity formed under the laws of Canada with its principle place of business in North Vancouver, British Columbia, Canada.

7. WBIC CANADA LTD. is an entity formed under the laws of Canada with its principle place of business in Vancouver, British Columbia, Canada.

STATEMENT OF FACTS

8. In a decision dated July 8, 2014 (the "Liability Findings"), the Commission found that Mr. Lathigee, together with others, perpetrated a fraud, contrary to section 57(b) of the Act when:

(a) he raised $21.7 million (CDN) from 698 investors without disclosing to those investors important facts about FIC Group's financial condition; and

(b) he raised $9.9 million (CDN) from 331 investors for the purpose of investing in foreclosure properties, and instead used most of the funds to make unsecured loans to other FIC Group companies, the proceeds of which were used at least in part to pay salaries and other overhead expenses of the FIC Group.

9. On March 16, 2015, the Commission issued a Sanctions Decision arising out of the Liability Findings in the following amounts against the following parties:

a. FIC REAL ESTATE PROJECTS LTD. $9,800,000

b. FIC FORECLOSURE FUND LTD. $9,900,000

c. WBIC CANADA LTD $2,000.000

d. MICHAEL PATRICK LATHIGEE, EARLE DOUGLAS PASQUILL, FIC REAL ESTATE PROJECTS LTD., jointly and severally $9,800,000

e. MICHAEL PATRICK LATHIGEE, EARLE DOUGLAS PASQUILL, FIC FORECLOSURE FUND LTD., jointly and severally $9,900,000

f. MICHAEL PATRICK LATHIGEE, EARLE DOUGLAS PASQUILL, WBIC CANADA LTD., jointly and severally $2,000,000

10. On April 15, 2015, the Sanctions Decision was registered in the Vancouver Registry as a judgment of the British Columbia Supreme Court in court file no. L-150117, pursuant to section 163 of the *Act* (the "Judgment"). [1]

11. The amount of the Judgment payable by Michael Patrick Lathigee, jointly and severally with other defendants, excluding administrative penalties, is $21,700,000 CDN.

12. The judgment amounts stated herein were granted for disgorgement of funds fraudulently obtained from investors, pursuant to section 161(1)(g) of the *Securities Act*.

FIRST CLAIM FOR RELIEF

(Recognition of Foreign-Country Judgment Pursuant to NRS 17.700-17.820, et. al.)

13. The Commission repeats and re-alleges the allegations set forth in all preceding paragraphs of this Complaint, inclusive, as though each such paragraph were set forth in full in this Claim.

14. The Judgment[2] attached hereto grants the recovery of a sum of money in favor of the Commission and against the Defendants.

[1] Ex A, Exemplified Judgment.

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15. The Judgment amount, excluding administrative penalties, against Michael Patrick Lathigee is $21,700,000.

16. Pursuant to the laws of the province of British Columbia, the Judgment is final, conclusive and enforceable.

17. The Judgment amount claimed in this proceeding is not for taxes, a fine or penalty, or for domestic relations such as support or maintenance.

18. As a further result of Defendants' conduct in failure to pay the Judgment, the Commission had to retain the services of an attorney, for which the Commission has incurred and will continue to incur attorneys' fees and costs.

SECOND CLAIM FOR RELIEF

(Comity)

19. The Commission repeats and re-alleges the allegations set forth in all preceding paragraphs of this Complaint, inclusive, as though each such paragraph were set forth in full in this Claim.

20. Full and fair proceedings having been given Defendants in the courts of British Columbia, after due citation or voluntary appearance by the Defendants, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, the Judgments of such court are entitled to comity by this court.[3]

21. As a further result of Defendants' conduct in failing to pay the Judgment, the Commission had to retain the services of an attorney, for which the Commission has incurred and will continue to incur attorneys' fees and costs.

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[2] *Id.*
[3] *See Hilton v. Guyot*, 159 U.S. 113 (1895).

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WHEREFORE, the Commission prays for judgment against Defendants where applicable as follows:

1. Entering of the Judgment attached hereto in the State of Nevada;
2. Entering of Judgment specifically against Michael Patrick Lathigee in the amount of $21,700,000 (CDN);
3. For the granting of comity toward the Judgment attached hereto;
4. For pre and post judgment interest at the statutory rate as may be applicable;
5. For reasonable attorney's fees;
6. For costs of suit incurred herein; and
7. For such other and further relief as the Court may deem just and proper in the premises.

DATED this 19th day of March, 2018.

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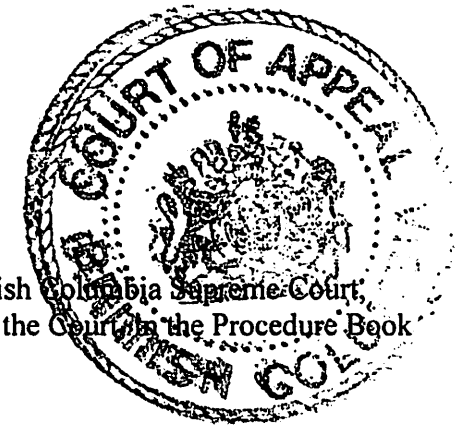
JAX6

EXHIBIT 1

JAX6
JAX6

JAX7

CERTIFICATE



CANADA, Province of British Columbia

It is hereby certified that, among the records enrolled in the British Columbia Supreme Court, Vancouver Registry, before the Honourable the Chief Justice of the Court, in the Procedure Book there is record of an action, numbered as No. L-150117

BETWEEN:

BRITISH COLUMBIA SECURITIES COMMISSION — Petitioner

and

MICHAEL PATRICK LATHIGEE;
EARLE DOUGLAS PASQUILL;
FIC REAL ESTATE PROJECTS LTD.;
FIC FORECLOSURE FUND LTD., and
WBIC CANADA LTD.

Respondents

1. On March 16, 2015, the Petitioner rendered a decision against the Respondents, pursuant to a hearing under s. 161(1) and 162 of the *Securities Act*, R.S.B.C. 1996, c. 418 (the "**Securities Act**"), under 2105 BCSECCOM 78 (the "**Decision**").

2. Pursuant to section 163 of the *Securities Act*, the Petitioner registered the Decision with the British Columbia Supreme Court, as a judgment of this court (the "**Judgment**").

3. The Decision was entered as a Judgment on April 1, 2015.

4. The Time for appeal has expired and no appeal is pending under s. 167 of the *Securities Act.*

REGISTRAR
BC COURT OF APPEAL
18-JAN-2018

5. Further details if any: None.

6. Particulars:

Amounts Owing, Standing as Judgment by each of the Respondents under S. 161(1)(g) of the Securities Act:

JAX7
JAX7

FIC Real Estate Projects Ltd.,	$9,800,000
FIC Foreclosure Fund Ltd.,	$9,900,000
WBIC Canada Ltd.	$2,000,000
Michael Patrick Lathigee, Earle Douglas Pasquill, FIC Real Estate Projects Ltd., jointly and severally	$9,800,000
Michael Patrick Lathigee, Earle Douglas Pasquill, FIC Foreclosure Fund Ltd.., jointly and severally	$9,900,000
Michael Patrick Lathigee, Earle Douglas Pasquill, WBIC Canada Ltd.., jointly and severally	$2,000,000

With no payments being made, and the full amount remaining due on the Judgment, as noted above.

All and singular which premises by the tenor of these presents we have commanded to be certified.

IN TESTIMONY WHEREOF we have caused the Seal of our Court at Vancouver, B.C. to be hereunto affixed.

At Vancouver, B.C. this 23 day of January, 2018.

A Registrar of the British Columbia Supreme Court, Vancouver Registry

E. AU
DEPUTY DISTRICT REGISTRAR

~~Clerk of the British Columbia Supreme Court, Vancouver Registry~~

22798.131136.KAR.14538534.2

SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY
APR 01 2015

FORM 17.2 (RULE 2-2 (3))

L-150117

Court File No.:

Court Registry: Vancouver Registry

In the Supreme Court of British Columbia

Between

British Columbia Securities Commission — Plaintiff(s) Petitioner(s) Applicant(s) Solicitor(s)

and

Michael Patrick Lathigee, Earle Douglas Pasquill, FIC Real Estate Projects Ltd., FIC Foreclosure Fund Ltd. and WBIC Canada Ltd. — Defendant(s) Respondent(s) Client(s) Defendant(s) by Counterclaim Third Party(ies)

REQUISITION

Filed by: British Columbia Securities Commission
[party(ies)]

Required: The filing of the attached tribunal award made under the Securities Act, RSBC 1996, c.418, section 163 and Rule 17.1 of the Supreme Court Rules.
[name of Act]

My address for service is:

Address for Service: PO Box 10142, Pacific Centre, 701 West Georgia Street, Vancouver, BC V7Y 1L2
Fax number address for service (if any)
E-mail address for service (if any)

Date 30-Mar-2015
[dd/mmm/yyyy]

Michele Cook
Signature of ☒ filing party
☐ lawyer for filing party(ies)
Michele Cook, Assistant Secretary to the Commission
[type or print name]

L-150117

VANCOUVER

Citation: 2015 BCSECCOM 78

Michael Patrick Lathigee and Earle Douglas Pasquill, FIC Real Estate Projects Ltd., FIC Foreclosure Fund Ltd., WBIC Canada Ltd.

***Securities Act*, RSBC 1996, c. 418**

Hearing

Panel

	Audrey T. Ho	Commissioner
	Judith Downes	Commissioner
Hearing Date	February 13, 2015	
Date of Decision	March 16, 2015	
Appearing		
Derek Chapman	For the Executive Director	
H. Roderick Anderson	For the Respondents	
Owais Ahmed		

Decision

I Introduction

¶ 1 This is the sanctions portion of a hearing pursuant to sections 161(1) and 162 of the *Securities Act*, RSBC, 1996, c.418. The Findings on liability, made on July 8, 2014 (2014 BCSECCOM 264), are part of this decision. Since the Findings, the panel chair, Vice Chair Brent W. Aitken, retired and did not participate in the sanctions hearing or any deliberations regarding sanctions.

¶ 2 The Findings panel found that:

a) all the respondents perpetrated a fraud, contrary to section 57(b) of the Act, when they raised $21.7 million from 698 investors without disclosing to them the important fact of FIC Group's financial condition; and

b) Michael Patrick Lathigee, Earle Douglas Pasquill and FIC Foreclosure Fund Ltd. perpetrated a second fraud, contrary to section 57(b), when they raised $9.9 million from 331 investors in FIC Foreclosure for the purpose of investing in foreclosure properties and instead used most of the funds to make unsecured loans to other FIC Group companies.

¶ 6 In *Re Eron Mortgage Corporation* [2000] 7 BCSC Weekly Summary 22, the Commission identified factors relevant to sanction as follows (at page 24):

> In making orders under sections 161 and 162 of the Act, the Commission must consider what is in the public interest in the context of its mandate to regulate trading in securities. The circumstances of each case are different, so it is not possible to produce an exhaustive list of all of the factors that the Commission considers in making orders under sections 161 and 162, but the following are usually relevant:
>
> - the seriousness of respondent's conduct,
> - the harm suffered by investors as a result of the respondent's conduct,
> - the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct,
> - the extent to which the respondent was enriched,
> - factors that mitigate the respondent's conduct,
> - the respondent's past conduct,
> - the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia,
> - the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers,
> - the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
> - the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
> - orders made by the Commission in similar circumstances in the past.

B Application of the Factors

Seriousness of the conduct

¶ 7 The Commission has consistently held that fraud is the most serious misconduct prohibited by the Act. In *Manna Trading Corp Ltd.*, 2009 BCSECCOM 595, the Commission, at paragraph 18, said, "Nothing strikes more viciously at the integrity of our capital markets than fraud."

¶ 8 The magnitude of the fraud perpetrated in this case is among the largest in British Columbia history. The respondents raised $21.7 million from 698 investors without telling them that the FIC Group had a severe cash flow problem. A relatively small number of potential events could have triggered its insolvency in a very short time frame. Three of the respondents led FIC Foreclosure's 331 investors to believe that the $9.9 million raised from them would be invested in foreclosure properties and soon. Instead, FIC Foreclosure used most of the funds to make unsecured loans to other FIC Group companies.

the Act. Lathigee and Pasquill were directors and officers of each company at the time.

b) In June 2007, Lathigee, Pasquill, WBIC and China Dragon entered into a settlement agreement with the Commission and admitted to certain securities law violations. Lathigee agreed to pay a $60,000 fine and Pasquill agreed to pay a $30,000 fine.

¶ 19 In addition, on September 2, 2008 (after the fund raising period in this case), the executive director issued a further cease trade order against WBIC. This order was related to inadequate disclosure in WBIC's offering memoranda dated June 1, 2007 and February 1, 2008 regarding: risk factors related to the investments, investments made by WBIC in related companies, and material agreements entered into by WBIC including loan guarantees. Lathigee and Pasquill were directors and officers of WBIC at the time.

Risk to investors and markets

¶ 20 For the reasons discussed below, we find the respondents to be a serious ongoing risk to the capital markets and permanent market bans are warranted.

¶ 21 First, those who commit fraud represent the most serious risk to our capital markets. Here, the fraud is significant.

¶ 22 Second, WBIC and the individual respondents' multiple past infractions show they do not respect securities laws. They were not deterred by orders and sanctions from prior infractions.

¶ 23 Third, Lathigee remained active in the capital markets after his involvement in the FIC Group, co-founding an investment club in Las Vegas with a mandate that resembles the FIC Group's mandate. When talking about his background, he was not forthcoming about his regulatory history.

¶ 24 The executive director submitted a video posted on YouTube in April 2014. This was a year after the issuance of the Notice of Hearing in this case but before the liability hearing.

¶ 25 According to the video, entitled "Experts of Southern Nevada", which is in the format of an interview of Lathigee:

a) Lathigee now lives in Las Vegas and is a co-founder and leader of an investment club called the Las Vegas Investment Club;

b) The mandate of the club appears quite similar to the mandate of the FIC Group;

c) Lathigee talked about the strategy of investing in tax liens and tax deeds, and claimed a lot of success in the past with investing in these liens and deeds;

¶ 32 For the reasons already stated, we conclude that it is not in the public interest to allow the respondents to operate in the capital markets. We find that a permanent market ban against the respondents is necessary to protect the markets and the investing public, subject to two carve-outs:

a) We are prepared to allow Lathigee and Pasquill to trade for their own accounts through a registered dealer. We do not see any risk to the investing public by doing so.

b) We are also prepared to allow Lathigee to act as a director and officer of one private issuer whose securities are owned solely by him or by him and his immediate family. He is currently the director and officer of such a company, and we see no risk to the investing public by allowing him to continue. We are not granting this carve-out to Pasquill as he indicated that he has no need for it.

b) Orders under section 161(1)(g)

¶ 33 Section 161(1)(g) states that the Commission may order:

> "(g) if a person has not complied with this Act, ... that the person pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the failure to comply or the contravention;" (emphasis added)

¶ 34 The respondents challenged our authority to make a section 161(1)(g) order (sometimes referred to as a "disgorgement order") against the individual respondents. They argued that, for section 161(1)(g) to apply, the respondent against whom the order is issued must have obtained a payment or avoided a loss, directly or indirectly, as a result of the contravention of the Act. They said there is no evidence that Lathigee and Pasquill obtained any payment or avoided any loss as a result of their contraventions of the Act.

¶ 35 The respondents argued that to order disgorgement against a respondent who has not obtained any money as a result of a contravention would improperly punish the respondent or, alternatively, wrongly duplicate the purpose of an administrative penalty. They relied on *Manna Trading*, which stated (in paragraph 36) that the purpose behind section 161(1)(g) orders is to remove "the incentive of profiting from illegal misconduct" and to return money obtained by contravening the Act.

¶ 36 The executive director disagreed. He argued that it is clear from a plain reading of section 161(1)(g) that it is not limited to requiring payment of the amount obtained by a respondent. He cited *Oriens Travel & Hotel Management Ltd.* 2014 BCSECCOM 91 and *Michaels*.

¶ 37 The Commission in *Oriens* and *Michaels* held that an order against a respondent for payment of the full amount obtained as a result of his contravention of the Act is possible without having to establish that the amount obtained through the contravention was obtained by that respondent. We agree.

¶ 42 We agree with the principles articulated and approaches taken in the illegal distribution and fraud cases canvassed above. They are even more compelling in cases of fraud. We should not read section 161(1)(g) narrowly to shelter individuals from that sanction where the amounts were obtained by the companies that they directed and controlled.

¶ 43 We find we have the authority to order disgorgement against the individual respondents in this case, up to $21.7 million, the full amount obtained by fraud.

¶ 44 We next considered whether we should exercise our discretion to make section 161(1)(g) orders against each respondent and in what amount.

¶ 45 With respect to the individual respondents, they submitted that the panel should not make such an order against them even if we have the authority, because they were not personally enriched and they only received reasonable compensation from the FIC Group.

¶ 46 The principles articulated in the cited cases apply equally to this case. Lathigee and Pasquill, personally and with the corporate respondents that they directed, committed fraud on close to 700 investors. They were the directing and controlling minds of the corporate respondents. They should not be protected or sheltered from sanctions by the fact that the illegal actions they orchestrated were carried out through corporate vehicles. The amounts obtained from investors need not be traced to them specifically and we find that $21.7 million was obtained, directly or indirectly, as a result of their individual contraventions of the Act.

¶ 47 With respect to the corporate respondents, they obtained the amount raised by them respectively as a result of their individual contraventions of the Act. But, they submitted that a section 161(1)(g) order should not be made against them as they have no ability to pay, and such an order may result in their entering into bankruptcy to the prejudice of the investors.

¶ 48 A respondent's ability to pay is not a relevant consideration. Even if it were, the respondents did not provide any evidence that the corporate respondents would have the money to pay the investors if we decline to make a section 161(1)(g) order.

¶ 49 Each respondent's misconduct contributed to the raising of the $21.7 million fraudulently. We find that it is in the public interest to order the respondents to pay the full amount obtained as a result of their fraud. Accordingly, we order the respondents to pay to the Commission, jointly and severally, the respective amounts set out in paragraph 62(d) below.

c) Administrative Penalty

¶ 50 Under section 162 of the Act, where the Commission has determined that a person has contravened a provision of the Act, it "may order the person to pay the commission an administrative penalty of not more than $1 million for each contravention".

¶ 59 Here, the misconduct is greater in magnitude and seriousness than that in *IAC*, and not as egregious as that in *Michaels*. In our view, an administrative penalty of $21.7 million (in addition to the $21.7 million disgorgement) against each individual respondent as requested by the executive director is not necessary for meaningful specific and general deterrence. We find $15 million to be proportionate to the harm done, making it appropriate for the respondents personally and sufficient to serve as a meaningful and substantial general deterrence to others. A $15 million administrative penalty against each respondent is in line with the penalties ordered in *IAC* and *Michaels*.

¶ 60 We do not draw any material distinction between the responsibility that Lathigee and Pasquill have for the misconduct. The administrative penalty should be the same with respect to both of them.

¶ 61 We do not find it serves the public interest or any useful purpose to impose an administrative penalty against the corporate respondents. They were controlled by Lathigee and Pasquill and did not act independently of the directions from the two individuals. There is no need for specific deterrence against them. In our opinion, general deterrence can be achieved through administrative penalties against the individual respondents.

IV Orders

¶ 62 Considering it to be in the public interest, and pursuant to sections 161 and 162 of the Act, we order that:

a) FIC Real Estate Projects Ltd., FIC Foreclosure Fund Ltd., WBIC Canada Ltd. (the "corporate respondents")

i. under section 161(1)(b)(i), all persons permanently cease trading in, and be permanently prohibited from purchasing, any securities or exchange contracts of the corporate respondents;

ii. under section 161(1)(d)(v), the corporate respondents are permanently prohibited from engaging in investor relations activities;

iii. under section 161(1)(c), on a permanent basis, none of the exemptions set out in the Act, the regulations or decisions (as those terms are defined by the Act), will apply to any of the corporate respondents; and

iv. subject to paragraph 62(d) below, under section 161(1)(g), the corporate respondents pay to the Commission the amounts obtained, directly or indirectly, as a result of their contraventions of the Act, as follows:

- FIC Projects - $9.8 million
- FIC Foreclosure - $9.9 million
- WBIC - $2 million;

b) Lathigee

i. subject to the exception in paragraph 62(b)(ii)(b) below, under section 161(1)(d)(i), Lathigee resign any position he holds as a director or officer of an issuer or registrant;

d) Section 161(1)(g) payments

i. The respondents' respective obligations to pay under paragraphs 62(a)(iv), 62(b)(iv) and 62(c)(iv) above shall not exceed the following:

(a) $9.8 million (distributions relating to FIC Projects) – FIC Projects, Lathigee and Pasquill only, on a joint and several basis;

(b) $9.9 million (distributions relating to FIC Foreclosure) - FIC Foreclosure, Lathigee and Pasquill only, on a joint and several basis; and

(c) $2 million (distributions relating to WBIC) - WBIC, Lathigee and Pasquill only, on a joint and several basis.

¶ 63 March 16, 2015

¶ 64 **For the Commission**

Audrey T. Ho
Commissioner

Judith Downes
Commissioner

JAX17

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Steven D. Grierson
CLERK OF THE COURT

ANS

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Counsel for Defendant,
Michael Patrick Lathigee

STATE OF NEVADA
EIGHTH JUDICIAL DISTRICT COURT AT CLARK COUNTY
Hon. Adriana Escobar, District Judge

BRITISH COLUMBIA SECURITIES COMMISSION, Plaintiff, — *vs.* — MICHAEL PATRICK LATHIGEE, *et al.* Defendants.	Case No. A-18-771407-C {Dept. 14} **ANSWER OF DEFENDANT MICHAEL PATRICK LATHIGEE**

Defendant, Michael Patrick Lathigee ("Lathigee"), by and through his undersigned counsel, hereby submits his ANSWER to the Complaint For Recognition of Foreign-Country Money Judgment filed by Plaintiff, British Columbia Securities Commission ("BCSC"), as follows (paragraph references are to those in the Complaint):

¶ 1. Admits.

¶ 2. Admits.

¶ 3. Lathigee is without knowledge or information sufficient to form a belief as to the truth of this averment.

¶ 4. Lathigee is without knowledge or information sufficient to form a belief as to the truth of this averment.

¶ 5. Lathigee is without knowledge or information sufficient to form a belief as to the truth of this averment.

¶ 6. Lathigee is without knowledge or information sufficient to form a belief as to the truth of this averment.

¶ 7. Lathigee is without knowledge or information sufficient to form a belief as to the truth of this averment.

¶ 8. Lathigee admits only to the fact of the "Liability Findings", which speaks for itself; Lathigee otherwise denies the averments in this paragraph, including the BCSC's characterization thereof.

¶ 9. Lathigee admits only to the fact of the "Sanctions Decision", which speaks for itself; Lathigee otherwise denies the averments in this paragraph, including the BCSC's characterization thereof.

¶ 10. Lathigee is without knowledge or information sufficient to form a belief as to the truth of this averment.

¶ 11. Lathigee admits only to the fact of the "Judgment", which speaks for itself; Lathigee otherwise denies the averments in this paragraph, including the BCSC's characterization thereof; further, the Judgment does not contain any finding that Lathigee personally received any money such that he would be subject to disgorgement.

¶ 12. Lathigee admits only to the fact of the "Judgment", which speaks for itself; Lathigee otherwise denies the averments in this paragraph, including the BCSC's characterization thereof; further, the Judgment does not contain any finding that Lathigee personally received any money such that he would be subject to disgorgement.

FIRST CLAIM FOR RELIEF

¶ 13. Denied as set forth above.

¶ 14. Lathigee admits only to the fact of the "Judgment", which speaks for itself; Lathigee otherwise denies the averments in this paragraph, including the BCSC's characterization thereof; further, the Judgment does not contain any finding that Lathigee personally received any money such that he would be subject to disgorgement.

¶ 15. Lathigee admits only to the fact of the "Judgment", which speaks for itself; Lathigee otherwise denies the averments in this paragraph, including the BCSC's characterization thereof;

further, the Judgment does not contain any finding that Lathigee personally received any money such that he would be subject to disgorgement.

¶ 16. Lathigee is without knowledge or information sufficient to form a belief as to the truth of this averment.

¶ 17. Denied.

¶ 18. Denied, as the BCSC is attempting to enforce a judgment which is non-recognizable under the laws of the Nevada and the United States.

SECOND CLAIM FOR RELIEF

¶ 19. Denied, as set forth above.

¶ 20. Denied.

¶ 21. Denied, as the BCSC is attempting to enforce a judgment which is not recognizable under the laws of the Nevada and the United States.

FIRST AFFIRMATIVE DEFENSE

The Judgment was originally rendered by a tribunal of the BCSC hearings its own complaint, and therefore was inherently biased and did not comport with Nevada or United States standards of due process.

SECOND AFFIRMATIVE DEFENSE

The Judgment for disgorgement was without any proof or determination that the Lathigee personally received any money, much less $21.7 million CDN, and therefore is repugnant to the public policy of Nevada and the United States.

THIRD AFFIRMATIVE DEFENSE

The Judgment was rendered in circumstances that raise substantial doubts about the integrity of the BCSC with respect to the Judgment.

FOURTH AFFIRMATIVE DEFENSE

The specific proceeding of the BCSC leading to the judgment was not compatible with Nevada and United States requirements of due process of law.

FIFTH AFFIRMATIVE DEFENSE

The BCSC has delayed this action such that witnesses and documents may not be found, materially harming Lathigee's ability to fully mount a defense, and so therefore the BCSC's action is barred by laches.

DEMAND FOR JURY TRIAL

Lathigee demands that this matter by tried by a jury.

PRAYER

WHEREFORE, Lathigee prays this Court determine that the Judgment is not recognized, that the BCSC take nothing by way of its Complaint, for Lathigee's reasonable attorney's fees and costs associated in his defense of this matter, and for such other and further relief as the Court may deem just and proper under the circumstances.

//

Respectfully submitted this 9th day of April, 2018, by:

/s/ Jay D. Adkisson
Jay D. Adkisson
Counsel for Defendant
Michael Patrick Lathigee

CERTIFICATE OF SERVICE

The following signature certifies that on the date of e-filing, a full, true, and correct copy of the above and foregoing document was deposited in the U.S. Mail, with correct first-class postage affixed thereto, and address to counsel for the Plaintiff, British Columbia Securities Commission, to wit:

Kurt R. Bonds, SBN 6228
Matthew M. Pruitt, SBN 12474
ALVERSON TAYLOR *et al.*
6602 Grand Montecito Parkway, Suite 200
Las Vegas, NV 89149

/s/ Jay D. Adkisson
Jay D. Adkisson

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Counsel for Defendant,
Michael Patrick Lathigee

STATE OF NEVADA
EIGHTH JUDICIAL DISTRICT COURT AT CLARK COUNTY
Hon. Adriana Escobar, District Judge

BRITISH COLUMBIA SECURITIES COMMISSION, Plaintiff, — *vs.* — MICHAEL PATRICK LATHIGEE, *et al.* Defendants.	Case No. A-18-771407-C {Dept. 14} **FIRST AMENDED ANSWER OF DEFENDANT MICHAEL PATRICK LATHIGEE**

Defendant, Michael Patrick Lathigee ("Lathigee"), by and through his undersigned counsel, hereby submits his ANSWER to the Complaint For Recognition of Foreign-Country Money Judgment filed by Plaintiff, British Columbia Securities Commission ("BCSC"), as follows (paragraph references are to those in the Complaint):

¶ 1. Admits.

¶ 2. Admits.

¶ 3. Lathigee is without knowledge or information sufficient to form a belief as to the truth of this averment.

¶ 4. Lathigee is without knowledge or information sufficient to form a belief as to the truth of this averment.

¶ 5. Lathigee is without knowledge or information sufficient to form a belief as to the truth of this averment.

¶ 6. Lathigee is without knowledge or information sufficient to form a belief as to the truth of this averment.

¶ 7. Lathigee is without knowledge or information sufficient to form a belief as to the truth of this averment.

¶ 8. Lathigee admits only to the fact of the "Liability Findings", which speaks for itself; Lathigee otherwise denies the averments in this paragraph, including the BCSC's characterization thereof.

¶ 9. Lathigee admits only to the fact of the "Sanctions Decision", which speaks for itself; Lathigee otherwise denies the averments in this paragraph, including the BCSC's characterization thereof.

¶ 10. Lathigee is without knowledge or information sufficient to form a belief as to the truth of this averment.

¶ 11. Lathigee admits only to the fact of the "Judgment", which speaks for itself; Lathigee otherwise denies the averments in this paragraph, including the BCSC's characterization thereof; further, the Judgment does not contain any finding that Lathigee personally received any money such that he would be subject to disgorgement.

¶ 12. Lathigee admits only to the fact of the "Judgment", which speaks for itself; Lathigee otherwise denies the averments in this paragraph, including the BCSC's characterization thereof; further, the Judgment does not contain any finding that Lathigee personally received any money such that he would be subject to disgorgement.

FIRST CLAIM FOR RELIEF

¶ 13. Denied as set forth above.

¶ 14. Lathigee admits only to the fact of the "Judgment", which speaks for itself; Lathigee otherwise denies the averments in this paragraph, including the BCSC's characterization thereof; further, the Judgment does not contain any finding that Lathigee personally received any money such that he would be subject to disgorgement.

¶ 15. Lathigee admits only to the fact of the "Judgment", which speaks for itself; Lathigee otherwise denies the averments in this paragraph, including the BCSC's characterization thereof;

further, the Judgment does not contain any finding that Lathigee personally received any money such that he would be subject to disgorgement.

¶ 16. Lathigee is without knowledge or information sufficient to form a belief as to the truth of this averment.

¶ 17. Admitted that the Judgment amount claimed in this proceeding is not for taxes, or for domestic relations such as support or maintenance; otherwise, denied because the Judgment is in the nature of a fine or penalty which is not subject to recognition.

¶ 18. Denied, as the BCSC is attempting to enforce a judgment which is non-recognizable under the laws of the Nevada and the United States.

SECOND CLAIM FOR RELIEF

¶ 19. Denied, as set forth above.

¶ 20. Denied. The Judgment is in the nature of a fine or penalty which is not entitled to comity.

¶ 21. Denied, as the BCSC is attempting to enforce a judgment which is not recognizable under the laws of the Nevada and the United States.

FIRST AFFIRMATIVE DEFENSE

The Judgment was originally rendered by a tribunal of the BCSC hearings its own complaint, and therefore was inherently biased and did not comport with Nevada or United States standards of due process.

SECOND AFFIRMATIVE DEFENSE

The Judgment for disgorgement was without any proof or determination that the Lathigee personally received any money, much less $21.7 million CDN, and therefore is repugnant to the public policy of Nevada and the United States.

THIRD AFFIRMATIVE DEFENSE

The Judgment was rendered in circumstances that raise substantial doubts about the integrity of the BCSC with respect to the Judgment.

FOURTH AFFIRMATIVE DEFENSE

The specific proceeding of the BCSC leading to the judgment was not compatible with Nevada and United States requirements of due process of law.

FIFTH AFFIRMATIVE DEFENSE

The BCSC has delayed this action such that witnesses and documents may not be found, materially harming Lathigee's ability to fully mount a defense, and so therefore the BCSC's action is barred by laches.

SIX AFFIRMATIVE DEFENSE

The Judgment is clearly denoted as a "sanction" and is otherwise a fine and/or penalty that is not subject to recognition or to comity.[1]

DEMAND FOR JURY TRIAL

Lathigee demands that this matter by tried by a jury.

PRAYER

WHEREFORE, Lathigee prays this Court determine that the Judgment is not recognized, that the BCSC take nothing by way of its Complaint, for Lathigee's reasonable attorney's fees and costs associated in his defense of this matter, and for such other and further relief as the Court may deem just and proper under the circumstances.

//

Respectfully submitted this 6th day of June, 2018, by:

/s/ Jay D. Adkisson
Jay D. Adkisson
Counsel for Defendant
Michael Patrick Lathigee

[1] Lathigee does not believe that this allegation is correctly in the nature of an affirmative defense, but rather that the burden is on the BCSC to prove that the Judgment is not in the nature of a fine and/or penalty, but Lathigee lists it as an affirmative defense only in an abundance of precaution.

CERTIFICATE OF SERVICE

The following signature certifies that on the date of e-filing, a full, true, and correct copy of the above and foregoing document was deposited in the U.S. Mail, with correct first-class postage affixed thereto, and address to counsel for the Plaintiff, British Columbia Securities Commission, to wit:

Kurt R. Bonds, SBN 6228
Matthew M. Pruitt, SBN 12474
ALVERSON TAYLOR *et al.*
6602 Grand Montecito Parkway, Suite 200
Las Vegas, NV 89149

/s/ Jay D. Adkisson
Jay D. Adkisson

DSO

DISTRICT COURT

CLARK COUNTY, NEVADA

BRITISH COLUMBIA SECURITIES COMMISSION,

Plaintiff(s),

v.

MICHAEL PATRICK LATHIGEE,

Defendant(s).

CASE NO. A-18-771407-C
DEPT NO. XIV

SCHEDULING ORDER

(Discovery/Dispositive Motions/Motions to Amend or Add Parties)

NATURE OF ACTION: **Foreign judgment**

DATE OF FILING JOINT CASE CONFERENCE REPORT(S): **6/7/18**

TIME REQUIRED FOR TRIAL: **1-2 days**

DATES FOR SETTLEMENT CONFERENCE: **None requested**

Counsel for Plaintiff(s):
Matthew M. Pruitt, Esq., Alverson Taylor Mortensen & Sanders

Counsel for Defendant(s):
Jay D. Adkisson, Esq., Riser Adkisson

Counsel representing all parties have been heard and after consideration by the Discovery Commissioner,

IT IS HEREBY ORDERED:

. . .

DISCOVERY COMMISSIONER
EIGHTH JUDICIAL DISTRICT COURT

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1. all parties shall complete discovery on or before 10/12/18.

2. all parties shall file motions to amend pleadings or add parties on or before 6/15/18.

3. all parties shall make initial expert disclosures pursuant to N.R.C.P. 16.1(a)(2) on or before 7/13/18.

4. all parties shall make rebuttal expert disclosures pursuant to N.R.C.P. 16.1(a)(2) on or before 8/15/18.

5. all parties shall file dispositive motions on or before 11/13/18.

Certain dates from your case conference report(s) may have been changed to bring them into compliance with N.R.C.P. 16.1.

Within 60 days from the date of this Scheduling Order, the Court shall notify counsel for the parties as to the date of trial, as well as any further pretrial requirements in addition to those set forth above.

Unless otherwise directed by the court, all pretrial disclosures pursuant to N.R.C.P. 16.1(a)(3) must be made at least 30 days before trial.

Motions for extensions of discovery shall be made to the Discovery Commissioner in strict accordance with E.D.C.R. 2.35. Discovery is completed on the day responses are due or the day a deposition begins.

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Unless otherwise ordered, all discovery disputes (except disputes presented at a pre-trial conference or at trial) must first be heard by the Discovery Commissioner.

Date: July 16, 2018

DISCOVERY COMMISSIONER

CERTIFICATE OF SERVICE

I hereby certify that on the date filed, I placed a copy of the foregoing SCHEDULING ORDER in the attorney folder(s), mailed or e-served as follows:

Matthew M. Pruitt, Esq.
Jay D. Adkisson, Esq.

COMMISSIONER DESIGNEE

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OSCJC

DISTRICT COURT

CLARK COUNTY, NEVADA

BRITISH COLUMBIA SECURITIES COMMISSION, Plaintiff(s), vs. MICHAEL PATRICK LATHIGEE, Defendant(s).	CASE NO. A-18-771407-C DEPT. NO. XIV

ORDER SETTING CIVIL JURY TRIAL

IT IS HEREBY ORDERED THAT:

A. The above-entitled case is set to be tried to a jury on a **Five week stack** to begin **Monday, February 04, 2019, at 9:30 a.m.**, in Department 14, located at 200 Lewis Avenue, Las Vegas, Nevada in Courtroom 14C.

B. A Calendar Call will be held on **Thursday, January 17, 2019, at 9:30 a.m.** Trial Counsel (and any party in proper person) must appear. Please note, Department 14 does not conduct Pretrial Conferences. Parties must bring to **Calendar Call** the following:

(1) Typed Exhibit lists, with all stipulated exhibits marked;
(2) Jury instructions in two groups, unopposed and opposed;
(3) Proposed voir dire questions;
(4) List of depositions;
(5) List of equipment needed for trial, including audiovisual equipment; [1]
(6) Courtesy copies of any legal briefs on trial issues.

[1] If counsel anticipates the need for audio visual equipment or appearance(s) during the trial, a request must be submitted to the District Courts AV department following the calendar call. Please visit http://www.clarkcountycourts.us/ for instructions on Audio/Visual Appearance Request Instructions.

ADRIANA ESCOBAR
DISTRICT JUDGE
DEPARTMENT XIV
LAS VEGAS, NEVADA 89155

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C. **Pre-Trial Memorandum** – The Pre-Trial Memorandum must be filed no later than **4:00 p.m. 10 days** prior to **Calendar Call**, with a courtesy copy delivered or emailed to Department XIV. All parties (attorneys and parties in proper person), **MUST** comply with **ALL REQUIREMENTS** of EDCR 2.67, 2.68 and 2.69. Counsel should include in the Memorandum an identification of orders on all motions in limine or motions for partial summary judgment previously made, a summary of any anticipated legal issues remaining, a brief summary of the opinions to be offered by any witness to be called to offer opinion testimony as well as any objections to the opinion testimony.

D. **Motions in Limine** – All motions in limine must be in writing and filed no later than **8 weeks before Trial. Orders Shortening Time will not be signed except in extreme emergencies.**

E. **Discovery Issues** – All discovery deadlines, deadlines for filing dispositive motions, and motions to amend the pleadings or add parties are controlled by the previously issued Scheduling Order.

F. Stipulations to continue a trial date will not be considered by the Court. Pursuant to EDCR 2.35, a motion to continue trial due to any discovery issues or deadlines must be made before the Discovery Commissioner.

Failure of the designated trial attorney or any party appearing in proper person to appear for any court appearances or to comply with this Order shall result in any of the following: (1) dismissal of the action (2) default judgment; (3) monetary sanctions; (4) vacation of trial date; and/or any other appropriate remedy or sanction.

Counsel is asked to notify the Court Recorder Sandra Anderson via telephone (702) 641-4422 or email at AndersonS@clarkcountycourts.us at least one month in advance if they are going to require daily copies of the transcripts of this trial. Failure to do so may result in a delay in the production of the transcripts.

ADRIANA ESCOBAR
DISTRICT JUDGE
DEPARTMENT XIV
LAS VEGAS, NEVADA 89155

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Counsel must advise the Court immediately when the case settles or is otherwise resolved prior to trial. A stipulation which terminates a case by dismissal shall indicate whether a Scheduling Order has been filed and, if a trial date has been set, the date of that trial. A copy should be provided to Chambers.

DATED this 9th day of August, 2018

A. Escobar

ADRIANA ESCOBAR
DISTRICT COURT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on or about the date signed, a copy of this Order was electronically served to all registered parties in the Eighth Judicial District Court Electronically Filing Program and/or placed in the attorney's folder maintained by the Clerk of the Court and/or transmitted via facsimile and/or mailed, postage prepaid, by the United States mail to the proper parties as follow:

Kurt R. Bonds, Esq.
Matthew M. Pruitt, Esq.
ALVERSON TAYLOR MORTENSEN
& SANDERS
Email: efile@alversontaylor.com
Attorneys for Plaintiffs

Jay D. Adkisson, Esq.
RISER ADKISSON LLP
Email: jay@risad.com
Attorney for Defendant

Diana D. Powell

Diana D. Powell, Judicial Assistant

ADRIANA ESCOBAR
DISTRICT JUDGE
DEPARTMENT XIV
LAS VEGAS, NEVADA 89155

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Steven D. Grierson
CLERK OF THE COURT

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Counsel for Defendant,
Michael Patrick Lathigee

STATE OF NEVADA
EIGHTH JUDICIAL DISTRICT COURT AT CLARK COUNTY
Hon. Adriana Escobar, District Judge

BRITISH COLUMBIA SECURITIES COMMISSION, Plaintiff, — *vs.* — MICHAEL PATRICK LATHIGEE, Defendant.	Case No. A-18-771407-C {Dept. 14} **MOTION FOR SUMMARY JUDGMENT BY DEFENDANT LATHIGEE**

Defendant, Michael Patrick Lathigee ("Lathigee"), hereby moves, per NRCP 56(b), for summary judgment on the case of the plaintiff, British Columbia Securities Commission ("BCSC") in its entirety, on the grounds that the undisputed material facts of this case demonstrate that:

(1) The Disgorgement Order that the BCSC seeks to recognize under the Nevada Uniform Foreign-Country Money Judgment Act, is not subject to registration as a "fine or penalty" under NRS 17.740; and

(2) Likewise, the Disgorgement Order is a "fine or penalty" such that is not subject to recognition under comity.

Concurrently herewith, defendant Lathigee is filing a Memorandum of Law supporting this Motion.

//

Respectfully submitted this 19th day of October, 2018, by:

/s/ Jay D. Adkisson
Jay D. Adkisson
Counsel for Defendant
Michael Patrick Lathigee

CERTIFICATE OF SERVICE

The following signature certifies that on the date of e-filing, a full, true, and correct copy of the above and foregoing document was deposited in the U.S. Mail, with correct first-class postage affixed thereto, and address to counsel for the Plaintiff, British Columbia Securities Commission, to wit:

Kurt R. Bonds, SBN 6228
Matthew M. Pruitt, SBN 12474
ALVERSON TAYLOR *et al.*
6602 Grand Montecito Parkway, Suite 200
Las Vegas, NV 89149
Ph: 702-384-7000

/s/ Jay D. Adkisson
Jay D. Adkisson

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Steven D. Grierson
CLERK OF THE COURT

MEMO

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E-Mail: jay@jayad.com

Counsel for Defendant,
Michael Patrick Lathigee

STATE OF NEVADA
EIGHTH JUDICIAL DISTRICT COURT AT CLARK COUNTY
Hon. Adriana Escobar, District Judge

BRITISH COLUMBIA SECURITIES COMMISSION, Plaintiff, — *vs.* — MICHAEL PATRICK LATHIGEE, Defendant.	Case No. A-18-771407-C {Dept. 14} **MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY DEFENDANT LATHIGEE**

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TABLE OF AUTHORITIES

STATUTORY LAWS AND RULES

COURT OPINIONS

OTHER AUTHORITIES

LIST OF EXHIBITS

I. INTRODUCTION

This is the second case brought by the British Columbia Securities Commission ("BCSC") against defendant Lathigee seeking recognition of a Canadian order (hereinafter the "Disgorgement Order"), Ex. 1, causing Lathigee to disgorge $21.7 million to the BCSC, based on a prior finding by the BCSC that Lathigee had violated British Columbia securities laws.

The BCSC's first case, Clark County No. A-18-769386-F (Dept. 12), was filed on February 12, 2018, and sought recognition of the Canadian order under the Nevada Uniform Enforcement of Foreign Judgments Act ("NUEFJA"), NRS 17.330 *et seq.*, which is limited to judgments from other U.S. jurisdictions that are entitled to Full Faith & Credit under the U.S. Constitution, *i.e.*, "foreign" in the NUEFJA means "other states". After some minor prodding by Lathigee's counsel, the BCSC stipulated to dismiss that improvidently-filed action, which dismissal was ordered by Judge Leavitt on March 21, 2018.

The day before, on March 20, 2018, the BCSC had filed the instant lawsuit, seeking recognition of the Disgorgement Order under two causes of action: First, under the Nevada Uniform Foreign-Country Money Judgments Recognition Act ("NUF-CMJRA"), NRS 17.700 *et seq.*, and, second, under comity. The parties each conducted some very limited discovery — no witnesses were deposed — which discovery has now been concluded. Though the parties have each engaged an expert witness who, though they squabble about certain *extant* things, appear to agree on the salient issues. Thus, the bottom line is that there are no material facts in dispute, and this matter is ripe for summary adjudication.

Defendant Lathigee asserts but a single defense that is common to both the NUF-CMJRA and to comity, which is that the Disgorgement Order is in the nature of a fine or penalty, and is thus not subject to recognition under either the NUF-CMJRA or comity. That is, quite literally, the $21.7 million question before this Court. Resolution of this single issue determines entirely the outcome of this case: If the Disgorgement Order is in the nature of a fine or penalty, then judgment should be for Lathigee; if not, then judgment should be for the BCSC.

As will be discussed, the historic and also contemporary test for whether a judgment is in the nature of a fine or penalty is whether the judgment is meant to further some public interest by the government of jurisdiction where the judgment was originally entered, as opposed to a purely compensatory private judgment for damages between private individuals. The BCSC contends that the Disgorgement Order is the latter, *i.e.*, are in the nature of damages meant to compensate the victims of Lathigee's violation of the British Columbia Securities Act. Lathigee contends the former, *i.e.*, the Disgorgement Order is meant to fulfill public purposes, such as protecting the British Columbia capital markets and to prevent Lathigee from using the funds to run another investment scheme, and that there might also be compensation to victims does not change the fundamentally public interest nature of the Disgorgement Order.

It is that controversy which this Court must resolve, one way or the other, based on the undisputed facts and discussion of the law that follows.

II. UNDISPUTED FACTS

1. Section 161(1)(g) of the British Columbia Securities Act ("BCSA") provides *in toto*:

> 161(1) If the commission or the executive director **considers it to be in the public interest**, the commission or the executive director, after a hearing, may order one or more of the following: … (g) if a person has not complied with this Act, the regulations or a decision of the commission or the executive director, that the person pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the failure to comply or the contravention;" Ex. 2, pg. 27 at ¶ 83 (emphasis added).

2. On March 16, 2015, during the "sanctions portion of a hearing", the BCSC obtained an order (hereinafter the "Disgorgement Order") against Lathigee that "under section 161(1)(g) [of the British Columbia Securities Act, RSBC, 1996, c. 418], Lathigee pay to

the Commission $21.7 million, being the total amount obtained, directly or indirectly, as a result of his contraventions of the Act . . .."[1] Ex. 1 at ¶ 62(b)(iv), pg. 12.

3. The Disgorgement Order was subsequently entered as a judgment of the British Columbia court on or about April 1, 2015. *See* Complaint, Ex. 1 at ¶ 4.

4. On May 31, 2017, the Court of Appeal for British Columbia issued its opinion in *Poonian v. BCSC (including Lathigee v. BCSC)*, 2017 BCCA 207 (2017). Ex. 2.[2]

III. DISCUSSION

A. PROCEDURAL ISSUES

1. The Summary Judgment Standard

Summary judgment is appropriate where "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." NRCP 56(c); *Wood v. Safeway, Inc.*,

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[1] The BCSC also ordered that "under section 162, Lathigee pay an administrative penalty of $15 million". Ex. 1 at ¶ 62(b)(v) [sic], pg. 12. The BCSC has not sought to register this part of its judgment against Lathigee.

[2] The Court may consider the *Poonian* opinion, and other matters of Canadian, including British Columbia law, by way of NRCP 44.1 provides *in toto*:

> DETERMINATION OF FOREIGN LAW. A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The court's determination shall be treated as a ruling on a question of law.

"Once an issue of foreign law has been properly raised, this court may make a determination of that law, and subsequently 'may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43.' NRCP 44.1. Further, this court's determination is treated as ruling on a question of law. See id. Thus, foreign law should be argued and briefed in the same manner as domestic law, and as with domestic law, judges should use both their own research and the evidence submitted by the parties to determine foreign law." *Dahya v. Second Judicial Dist. Court ex rel. Cty. of Washoe*, 17 Nev. 208, 214, 19 P.3d 239, 244, at fn. 21 (2001).

121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005) (discussing the summary judgment standard in considerable depth).[3]

3. Conflict-Of-Laws And Characterization

The Nevada Supreme Court has looked to the Restatement (Second) of Conflict of Laws to resolve conflict issues. *See, e.g., Dictor v. Creative Mgt. Services, LLC,* 126 Nev. 41, 45-46, 223 P.3d 332, 335 (2010) (tort liability).

Under the Restatement § 5, Nevada applies its own choice of law rules. See Restatement (Second) Conflict of Laws at *Cmt.* B ("A court applies the law of its own state, as it understands it, including its own conception of Conflict of Laws. It derives this law from the same sources which are used for determining all its law: from constitutions, treaties and statutes, from precedent, from considerations of ethical and social need and of public policy in general, from analogy, and from other forms of legal reasoning.").

For the instant case, the most important provision is Restatement § 7, which provides the rules for what is known as "classification",[4] i.e., which forum's laws apply to characterize certain things, such as the instant Disgorgement Order. *Comment* b to § 7 explains the concept of characterization:

> Characterization is an integral part of legal thinking. In essence, it involves two things: (1) classification of a given factual situation under the appropriate legal categories and specific rules of law, and (2) definition or interpretation of the terms employed in the legal categories and rules of law. The factual situation must be

---

[3] This Court's substantial familiarity with summary judgment standards is presumed.

[4] "[T]he nature of the conflicts of laws is a dismal swamp, filled with quaking quagmires and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon. The ordinary court or lawyer is quite lost when engulfed or entangled in it." ~ Prof. David C. Baldus as quoted in K. Lipstein, PRINCIPLES OF THE CONFLICT OF LAWS NATIONAL AND INTERNATIONAL, pg. 1 (Matrinus Nijhoff Publishers, 1981).

> classified to determine under what legal categories and rules of law it belongs. Likewise, the terms employed in the legal categories and rules of law must be interpreted in order that the factual situation may be placed under the appropriate categories and that the rules of law may properly be applied.

Under § 7(2), "[t]he classification and interpretation of Conflict of Laws concepts and terms are determined in accordance with the law of the forum, except as stated in § 8."[5] In other words, and as applied here, § 7(2) requires that Nevada law — and not British Columbia law — governs the characterization of the Disgorgement Order at issue here. *See, e.g., Contreras v. Am. Family Mut. Ins. Co.*, 135 F. Supp. 3d 1208, 1226 at fn. 2 (D. Nev. 2015) ("Nevada law governs whether this claim is classified as being based in tort or contract. Restatement (Second) of Conflict of Laws § 7(2) ('Generally, "[t]he classification and interpretation of Conflict of Laws concepts and terms are determined in accordance with the law of the forum").').[6]

B. Introduction To Substantive Argument: The Public v. Private Interest Rule

1. The U.S Follows The Public v. Private Interest Rule Of *Huntington*

The BCSC asserts only two causes of action seeking recognition of the Disgorgement Order, being: (1) Recognition under the Nevada Uniform Foreign-Country Money Judgment Recognition Act ("NUF-CMJRA"), NRS 17.700 *et seq.*; (2) Recognition under comity. Although the legal constructs for these causes of action are different -- the NUF-CMJRA arises by statute while comity is a common-law doctrine -- the critical rule for this case is exactly the same: A foreign-

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[5] Section 8 of the Restatement deals with the subject of *renvoi*, *i.e.*, what happens when local law directs the court to apply the law of the foreign forum, and which is not an issue here.

[6] Since nearly all of the Nevada conflict opinions deal with torts, mostly automobile and related insurance cases, and which state rules that are particular to tort cases and not at all applicable to the instant conflict, great caution is advised in the reading of those opinions.

country judgment may not be recognized if it seeks to further a public interest as opposed to redress a private injury.

The genesis of American law on the subject arises in 1825 in a statement by Justice Marshall that: "The Courts of no country execute the penal laws of another . . .." *The Antelope*, 23 U.S. 66, 1825 WL 3130, 10 Wheat. 66, 123 (1825). The meaning of "penal" in this context was the subject of a later U.S. Supreme Court opinion in *Huntington v. Attrill*, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed., 1123 (1892), a case where one private individual (Huntington) obtain a securities fraud judgment against another private individual (Attrill), wherein it was stated that:

> Penal laws, strictly and properly, are those imposing punishment for an offense committed against the state, and which, by the English and American constitutions, the executive of the state has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal.
>
> 146 U.S. at 667, 13 S.Ct. at 227.

And later in the same opinion:

> The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public or a wrong to the individual, according to the familiar classification of Blackstone: ‘Wrongs are divisible into two sorts or species: private wrongs and public wrongs. The former are an infringement or privation of the private or civil rights belonging to individuals, considered as individuals, and are thereupon frequently termed ‘civil injuries;’ the latter are a breach and violation of public rights and duties, which affect the whole community, considered as a community, and *669 are distinguished by the harsher appellation of ‘crimes and misdemeanors.” 3 Bl. Comm. 2.
>
> 146 U.S. at 668-9, 13 S.C. at 228.

Thus, the rule of *Huntington* is this: The U.S. courts may only enforce judgments that are based on the purely private rights belonging to individuals, and cannot enforce judgments from a foreign nation that seek to protect the public interests of that nation; the latter are simply unenforceable by the U.S. courts and may not be recognized.

That *Huntington* was decided 126 years ago in 1892 does not mean that it is no longer "good law". To the contrary, as will be shown *infra*., the *Huntington* decision has become the seminal opinion and remains the basis for U.S. law on the subject, as was discussed at length and followed as late as 2017 in an opinion by Justice Sotomayor in *Kokesh*[7] that is on all fours with the case at bar and which opinion will be the subject of lengthy examination below, and by Justice Cherry as late as 2011 in the *City of Oakland* decision that will next be discussed.

2. Nevada Also Follows The Public v. Private Interest Rule of *Huntington*

The Nevada Supreme Court also adopted the *Huntington* rule in *City of Oakland v. Desert Outdoor Advertising, Inc.*, 127 Nev. 533, 267 P.3d 48 (2011), which involved a billboard fine issued by the City of Oakland, and that municipality's attempt to register the judgment in California as a sister-state judgment.[8] Writing for the majority, Justice Cherry held that:

> Recognizing that *Huntington v. Attrill*, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123 (1892), provides an exemption to the Full Faith and Credit Clause of the United States Constitution, such that other states' penal judgments are unenforceable in the State of Nevada, we conclude that the California judgment in this case was penal in nature and, as such, is not enforceable in Nevada.

Beginning at 127 Nev. 539, 267 P.3d 52, Justice Cherry discusses the *Huntington* opinion at considerable length, and then *Huntington's* progeny as those later cases related to recognition of a

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[7] *Kokesh v. SEC*, ___ U.S. ____, 137 S.Ct. 1635, 198 L.Ed.2d 86 (2017).

[8] Uniform Enforcement of Foreign Judgments Act (UEFJA). NRS 17.330 *et seq.*

judgment under the U.S. Constitution's Full Faith & Credit clause, which is not at issue in the case at bar.

Justice Cherry rejected the City of Oakland's assertion that it was asserting a private right to halt a private harm, and instead noted that the salient issue is not how some statute characterizes the relief granted in the judgment:

> The test is not by what name the statute is called by the legislature ..., but whether it appears ... to be in its essential character and effect, a punishment of an offence against the public, or a grant of a civil right to a private person.[9]
>
> Thus, here, the central question is whether the statute provided civil penalties as a means to punish a violator for an offense against the public or whether the statute created a private right of action to compensate a private person or entity.
>
> 127 Nev. at 542, 267 P.3d at 54.

Looking at the City of Oakland's underlying lawsuit, Justice Cherry concluded that City of Oakland was not enforcing any private right, but was instead acting towards Oakland's public interest. Thus, under *Huntington*, Nevada would not recognize the City of Oakland's judgment. 127 Nev. at 543, 267 P.3d at 54.

With the "public v. private interest" rule expressed in *Huntington* and approved by *City of Oakland* fresh in mind, we now turn to how the instant Disgorgement Order falls into that rule.

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[9] *Quoting Huntington*, 146 U.S. at 683, 13 S.Ct. at 224 (internal quotation marks and citation omitted).

C. THE BCSC'S FIRST CAUSE OF ACTION: RECOGNITION UNDER NUF-CMJRA

1. Applicability of NUF-CMJRA

The BCSC's first cause of action seeks the recognition of the Disgorgement Order pursuant to the Nevada Uniform Foreign-Country Money Judgment Recognition Act ("NUF-CMJRA"), NRS 17.700 *et seq.*

The application of NUF-CMRJA in any aspect is apparently one of first impression in Nevada. Although NUF-CMJRA was originally enacted in 2007, the courts of this state have apparently not presented with any case that has implicated NUF-CMJRA issues. A Westlaw search for the NUF-CMJRA in Nevada indicates only a single opinion (involving a sister-state judgment under the somewhat analogous Nevada Uniform Enforcement of Foreign Judgment Act, NRS 17.330 *et seq.*) wherein the NUF-CMJRA was mentioned only in passing, being the aforementioned *City of Oakland v. Desert Outdoor Advertising, Inc.*, 127 Nev. 533, 547, 267 P.3d 48, 57 (2011) (Pickering, J., dissenting).

The section of NUF-CMJRA that determines the applicability of NUF-CMJRA is NRS 17.740. For the instant dispute, the salient provision is paragraph 2 of NRS 17.740 which provides in relevant part that the NUF-CMJRA does not apply to foreign-country judgments for taxes, fines or other penalties, and divorce and support judgments and the like. That paragraph 2 provides *in toto*:

> 2. NRS 17.700 to 17.820, inclusive, do not apply to a foreign-country judgment, even if the judgment grants or denies recovery of a sum of money, to the extent that the judgment is:
>
> (a) A judgment for taxes;
>
> (b) A fine or other penalty; or
>
> (c) A judgment for divorce, support or maintenance or other judgment rendered in connection with domestic relations.
>
> NRS 17.740(2).

The inquiry here turns on the meaning of paragraph 2 subpart (b), *i.e.*, whether the Disgorgement Order is a "fine or other penalty". If the Disgorgement Order is in the nature of a "fine or other penalty" then it is not subject to recognition in Nevada under the NUF-CMJRA, *see City of Oakland v. Desert Outdoor Advert., Inc*., *supra*., 127 Nev. at 547, 267 P.3d at 57 (2011) (Pickering, J., dissenting) (The NUF-CMJRA "provides that a foreign-country judgment for a sum of money need not be enforced if it is for a fine or other penalty.").

Finally, and very importantly, NUF-CMJRA at NRS 17.740(3) places the burden of establishing that NUF-CMJRA applies to a judgment on the party seeking recognition, *i.e.*, upon the BCSC. By contrast, NUF-CMJRA as applied here imposes utterly no burden on the party resisting recognition, being Lathigree.

2. A Securities Law Disgorgement Order Is A Penalty

The issue of whether a securities law disgorgement judgment (or any other disgorgement order) is a "penalty" under either the NUF-CMJRA, or even the UF-CMJRA nationwide, also appears to be one of first impression.

Fortuitously, the U.S. Supreme Court has very recently addressed in significant depth the nature of a securities law disgorgement order in *Kokesh v. SEC*, ___ U.S. ____, 137 S.Ct. 1635, 198 L.Ed.2d 86 (2017). The *Kokesh* case involved an SEC enforcement action for an alleged violation of the federal securities laws, wherein the SEC sought a disgorgement judgment against the defendant. At issue in the appeal before the U.S. Supreme Court was whether was a penalty within the five-year limitations period of 28 U.S.C. § 2464, which provides *in toto*:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

The U.S. District Court held that the disgorgement is not a penalty, and that § 2462 did not apply; the U.S. Tenth Court of Appeals for the 10th Circuit affirmed that decision. *SEC v. Kokesh,* 834 F.3d 1158 (2016). The U.S. Supreme Court reversed. 137 S.Ct. at 1646.

Writing for a unanimous court, Justice Sotomayor began her opinion with the Court's holding:

> A 5–year statute of limitations applies to any "action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise." 28 U.S.C. § 2462. This case presents the question whether § 2462 applies to claims for disgorgement imposed as a sanction for violating a federal securities law. The Court holds that it does. *Disgorgement in the securities-enforcement context is a "penalty"* within the meaning of § 2462, and so disgorgement actions must be commenced within five years of the date the claim accrues.
>
> 137 S.Ct. at 1639 (emphasis added).

Going through the history of the SEC's disgorgement powers, Justice Sotomayor noted that beginning in the 1970's, the courts began ordering disgorgement in SEC enforcement proceedings for two reasons: (1) to deprive defendants of their profits and thus remove any perceived reward for violating the securities laws, and (2) to protect the public by providing a deterring to future violations. 137 S.Ct. at 1640 *citing SEC v. Texas Gulf Sulpher Co.,* 312 F.Supp. 77, 92 (S.D.N.Y. 1970).

Justice Sotomayor went on to describe in considerable detail the definition of "penalty":

> A "penalty" is a "punishment, whether corporal or pecuniary, imposed and enforced by the State, for a crime or offen[s]e against its laws." *Huntington v. Attrill,* 146 U.S. 657, 667, 13 S.Ct. 224, 36 L.Ed. 1123 (1892). This definition gives rise to two principles. First, whether a sanction represents a penalty turns in part on "whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual." *Id.*, at 668, 13 S.Ct. 224. Although statutes creating private causes of action against wrongdoers may appear—or even be labeled—penal, in many cases

> "neither the liability imposed nor the remedy given is strictly penal." *Id.*, at 667, 13 S.Ct. 224. This is because "[p]enal laws, strictly and properly, are those imposing punishment for an offense committed against the State." *Ibid.* Second, a pecuniary sanction operates as a penalty only if it is sought "for the purpose of punishment, and to deter others from offending in like manner"—as opposed to compensating a victim for his loss. Id., at 668, 13 S.Ct. 224.
>
> 137 S.Ct. at 1642.

This resulted in the conclusion that disgorgement is a penalty. 137 S.Ct. at 1643. Justice Sotomayor then identified at several factors that characterized disgorgement as a penalty, which shall next be related and applied to the instant undisputed facts.

a. Disgorgement Arises From Public Law And Furthers A Public Interest

First, Justice Sotomayor states that disgorgement is a penalty because it is a public law that gives rise to disgorgement. 137 S.Ct. at 1643. "The violation for which the remedy is sought is committed against the United States rather than an aggrieved individual—this is why, for example, a securities-enforcement action may proceed even if victims do not support or are not parties to the prosecution." *Ibid.*

As applied here, § 161(1)(g) of the British Columbia Securities Act is clearly a public law, which is implicated if, and only if, "the commission or the executive director considers it to be in the public interest". *See* Undisputed Fact No. 1. Thus, the Disgorgement Order at ¶ 49 declares that: "We find that it is in the public interest to order the respondents to pay the full amount obtained as a result of their fraud."Ex. 1 at ¶ 49.

The *Poonian* decision repeatedly states that disgorgement under § 161(1)(g) must further the public interest. Ex. 2, pg. 14 at ¶ 40 ("To be clear, the issue to be resolved on this appeal is not whether a disgorgement order would be in the public interest, nor is the issue whether there has been non-compliance with the *Act*. Those requisite elements of a § 161(1)(g) order are not before this Court."); Ex. 2, pg. 16 at ¶ 49 ("I recognize the Commission's important public interest

mandate that informs the Commission's exercise of discretion to make an order under § 161(1), which provides a host of tools to the Commission to use alone or in combination."); Ex. 2, pg. 36, at ¶ 112 ("Disgorgement is a specific tool, and the Commission must not, in the name of the public interest, use that tool in such a way as to extend it beyond its specific, permissible purpose."); Ex. 2, pg. 47 at ¶ 144 ("I agree with and adopt the two-step approach identified by Vice Chair Cave in *SPYru*[10] at paras. 131–32: * * * [132] The second step of my analysis is to determine if it is in the public interest to make such an order. It is clear from the discretionary language of section 161(1)(g) that we must consider the public interest, including issues of specific and general deterrence."); Ex. 2, pg. 51 at ¶ 165 ("Of course, it is also for the Commission to determine whether it is in the pubic interest to make any order under s. 161(1)(g)."

The BCSC's expert witness, Mr. Gordon R. Johnson, *see Plaintiff's NRCP 16.1(a)(2) Expert Disclosures*, Ex. 3 hereto,[11] included as support for his opinion a long passage from the British Columbia Court of Appeals in *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207 (B.C.App., 2017), which internally quotes a similar opinion, *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 201 SCC 37 at ¶ 42 (CanLII, 2001), arising from a similar law in Ontario:

> "The purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets. * * * The focus of the regulatory law is on the protection of societal interests, not the punishment of an individual's moral faults . . .."
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> Johnson Opinion, Ex. 3 at pp. 3-4.

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[10] *Re SPYru Inc.*, 2015 BSCECCOM 452 (2015).

[11] The Opinion of Lathigee's expert witness, Mr. Patrick Sullivan, is included herewith for completeness as Ex. 4. Importantly, to avoid even the hint of a dispute of material fact on this Motion for Summary Judgment, Lathigee does not herein rely upon Mr. Sullivan's opinion herein.

The bottom line is that there can be no reasonable dispute that disgorgement orders imposed under § 161(1)(g), including the instant Disgorgement Order, arise from a public law, and furthers public interests, not private ones.

b. Disgorgement Is Imposed To Deprive The Defendant Of Wrongful Profits And Deter Future Violations

Second, Justice Sotomayor states that disgorgement is imposed for punitive purposes, to both deprive the defendant of the profits of their activities and to deter future violations. 137 S.Ct. at 1643. "Sanctions imposed for the purpose of deterring infractions of public laws are inherently punitive because deterrence is not a legitimate nonpunitive governmental objective. *Ibid*.[12] [internal quotation marks and citations omitted].

Here, the Disgorgement Order states at ¶ 5 that: "Orders under sections 161(1) and 162 are protective and preventative, intended to be exercised to prevent future harm. See *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)* 2001 SCC 37. Ex. 1 at ¶ 5. The Disgorgement Order states at ¶ 6 that a relevant considerations in determining whether to order sanctions include:

- "the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct";
- "the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets"; and
- "the need to deter those who participate in the capital markets from engaging in inappropriate conduct".

Ex. 1 at ¶ 6.

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[12] Internal quotation mark and citations omitted.

The *Poonian* decision affirms that a purpose of § 161(1)(g) is deterrence. Ex. 2, pg. 27 at ¶ 82 ("The taking away of any amounts obtained or payment or loss avoided deprives a person who fails to comply of any benefit. Therefore, the person is deterred from non-compliance. In that sense, s. 161(1)(g) also has a deterrence purpose. This purpose is consistent with the *Act*'s overarching remedial and protective nature."); Ex. 2, pg. 32 at ¶ 102 ("[S]ummarizing the underlying principles of disgorgement . . . . disgorgement reflects the equitable policy designed to remove all money unlawfully obtained by a respondent so that the respondent does not retain any financial benefit from breaching the Act." (internal emphasis, quotation marks and citation omitted)); Ex. 2, pg. 33 at ¶ 105 (same effect); Ex. 2, pg. 36, at ¶ 112 (Disgorgement's "purpose is to prevent wrongdoers from retaining amounts obtained from their wrongdoing."); Ex. 2, pg. 46 at ¶ 143(1) ("The purpose of s. 161(1)(g) is to deter persons from contravening the *Act* by removing the incentive to contravene, i.e., by ensuring the person does not retain the "benefit" of their wrongdoing.")

The opinion of the BCSC's own expert, Mr. Johnson, repeatedly makes clear that the purpose of the British Columbia law under which disgorgement is authorized is to deprive the defendant of wrongful profits and deter future violations, and thereby force compliance with British Columbia' security laws:

> "The British Columbia Court of Appeal expresses the purpose of the Section 161(1)(g) remedy most clearly at paragraph 111 of the *Poonian* decision. There the Court makes it clear that the purpose is not to punish or to compensate. The purpose of the remedy is to deter non-compliance by removing the prospect of receiving and retaining moneys from non-compliance." Ex. 3, at pp. 2-3.
>
> "Disgorgement is a specific tool, and the Commission must not, in the name of public interest, use that tool in such a way as to extend it beyond its specific, permissible purpose. Its purpose is to prevent wrongdoers from retaining amounts obtained from their wrongdoing."Ex. 3, at pg. 3.

"The 'disgorgement' remedy has the purpose of removing the incentive for non-compliance." Ex. 3, at pg. 4.

The bottom line is that there can be no reasonable dispute that disgorgement orders, imposed under § 161(1)(g), including the instant Disgorgement Order, are imposed to deprive the defendant of wrongful profits and deter future violations.

c. Disgorgement Is Not Compensatory

Justice Sotomayor also states that disgorgement is not compensatory, since courts "have required disgorgement regardless of whether the disgorged funds will be paid to such investors as restitution." 137 S.Ct. at 1644.[13] In the case of the SEC (as with the BCSC), Justice Sotomayor noted that while some of the funds may go to investors, other of the funds may go to the U.S. Treasury, and (as with the BCSC) there is no statutory law that commands the distribution of funds to investors. *Ibid.* "When an individual is made to pay a noncompensatory sanction to the Government as a consequence of a legal violation, the payment operates as a penalty." *Ibid.* "Disgorgement . . . is intended not only to prevent a wrongdoer's unjust enrichment but also to deter others' violations of the securities laws." 137 S.Ct., at 1645.

Here, The *Poonian* decision repeatedly states that the disgorgement under § 161(1)(g) is not punitive or compensatory. Ex. 2, pg. 23 at ¶ 70 ("It is clear, in my opinion, that the purpose of s. 161(1)(g) is neither punitive nor compensatory. This view is held consistently among the various decisions of the Commission and the securities commissions of other provinces". (citations omitted)); Ex. 2, pg. 25 at ¶ 76 ("While “compensation” may well be a possible effect of a s. 161(1)(g) order, I cannot say that is its purpose. Any analysis of restitution would arise under s. 15.1, not s. 161(1)(g)."); Ex. 2, pg. 26 at ¶ 80 ("I also agree with the decisions of securities commissions in British Columbia and across the country concluding s. 161(1)(g), or its

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[13] Internal quotation marks and citations omitted.

counterparts, is not compensatory in nature"); Ex. 2, pg. 32 at ¶ 102 (Disgorgement "is not a compensation mechanism for victims of the wrongdoing." (internal quotation marks and citation omitted)); Ex. 2, pg. 36, at ¶ 112. (Disgorgement "is not to punish or compensate, although those aims are achievable by other means in the *Act*, or in conjunction with other sections of the *Act*."); Ex. 2, pg. 46 at ¶ 143(2) ("The purpose of s. 161(1)(g) is not to punish the contravener or to compensate the public or victims of the contravention.").

The *Poonian* also decision recognizes that any disgorged funds remaining, after all claims have been made, are not returned to the defendant but may be used by the BCSC for educational purposes. *See Poonian*, Ex. 2, pp. 23-4 at ¶ 72 ("Sections 15 and 15.1 of the Act address what the Commission may do with funds received under s. 161(1)(g). * * * After the requisite period of time has expired, the Commission may use any remaining funds only for educating securities market participants and the public about investing, financial matters or the operation or regulation of securities markets (s. 15(3)).").

Finally, the BCSC's own expert, Mr. Johnson, himself points out that the purpose of disgorgement is not — repeat, not — to compensate investors: "Its [disgorgement] purpose is to prevent wrongdoers from retaining amounts obtained from their wrongdoing. It is not to punish or compensate . . .." Ex. 3, at pg. 3. And later, "I disagree with the suggestion that because compensation is not the objective of Section 161(1)(g) therefor disgorgement is not an objective. Disgorgement and compensation are different concepts." Ex. 3, at pg. 5.

The bottom line is that there can be no reasonable dispute that disgorgement orders imposed under § 161(1)(g), including the instant Disgorgement Order, are not compensatory in nature.

d. Disgorgement Can Exceed Wrongful Profits

Justice Sotomayor also rejected the SEC's contention that disgorgement is remedial in nature, since "disgorgement sometimes exceeds the profits gained as a result of the violation." 137 S.Ct. at 1644. Thus, inside traders may be subject to disgorgement even if they do not profit from their

information. *Ibid*. Further, as happened in the case at bar, "disgorgement is sometimes ordered without consideration of a defendant's expenses that reduce the amount of illegal profit." *Ibid*.

This point is also addressed by the *Poonian* court, in response to the Poonians argument (at ¶ 84) that they should be allowed to reduce their disgorgement order by their trading and other expenses incurred, i.e., the disgorgement order should have been limited to their net profits. The *Poonian* court responded:

> I reject this argument. The words of the provision do not support a "profit" interpretation. The words the Legislature chose, "any amount obtained", refer to any amount received. They do not contemplate any deductions. If the Legislature had intended to import a profit element, it could have used the word "profit", or "net", or some other language that connotes allowance for losses or expenses.
>
> *Poonian*, Ex. 2, pg. 28 at ¶ 85.

This point is made crystal-clear by ¶ 93 of the *Poonian* decision: "In sum, I conclude s. 161(1)(g) does not require the amount obtained to be 'profit' or that there be a 'netting' or deduction of expenses, costs, or of amounts paid to the Commission by other persons." Ex. 2, pg. 30 at ¶ 93.

Similarly, the *Poonian* court noted that such deductions would not be allowed in insider trading cases, Ex. 2, pp. 28-29 at ¶¶ 85-86 — exactly as mentioned by Justice Sotomayor.

The bottom line is that there can be no reasonable dispute that disgorgement orders imposed under § 161(1)(g), including the instant Disgorgement Order, can exceed the defendant's wrongful profits and so therefore cannot be considered remedial in nature.

e. That Disgorgement Serves Multiple Purposes Does Not Make It Any Less Of A Penalty

It is anticipated that the BCSC will attempt to make an argument with the flavor of: "Even if the primary purpose § 161(1)(g) is to protect the public interest, there is still the chance that investors will make claims and get some money back, and that is enough to convert § 161(1)(g) to what amounts to a "remedial" sanction that is similar to a private cause of action for damages.

Justice Sotomayor donates an entire section "C" just to nixing this particular argument. 137 S.Ct. at 1644-5.

> As an initial matter, it is not clear that disgorgement, as courts have applied it in the SEC enforcement context, simply returns the defendant to the place he would have occupied had he not broken the law. SEC disgorgement sometimes exceeds the profits gained as a result of the violation. * * * And, as demonstrated by this case, SEC disgorgement sometimes is ordered without consideration of a defendant's expenses that reduced the amount of illegal profit. * * * In such cases, disgorgement does not simply restore the status quo; it leaves the defendant worse off. The justification for this practice given by the court below demonstrates that disgorgement in this context is a punitive, rather than a remedial, sanction: Disgorgement, that court explained, is intended not only to "prevent the wrongdoer's unjust enrichment" but also "to deter others' violations of the securities laws." * * *
>
> True, disgorgement serves compensatory goals in some cases; however, we have emphasized the fact that sanctions frequently serve more than one purpose. * * * A civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment, as we have come to understand the term. * * * Because disgorgement orders "go beyond compensation, are intended to punish, and label defendants wrongdoers" as a consequence of violating public laws, * * * they represent a penalty and thus fall within the 5–year statute of limitations of § 2462.
>
> 137 S.Ct. at 1644-5.

3. Conclusion

There can be no reasonable dispute that the Disgorgement Order satisfies all the elements identified by Justice Sotomayor in *Kokesh*, and thus falls squarely into the public interest prong of the Public vs. Private Interest Test of that opinion, as well as *Huntington* and *City of Oakland*. As such, the Disgorgement Order is in the nature of a penalty, and thus falls squarely into the "fine or penalty" exclusion from registration under NRS 17.740(2)(b).

If there is any doubt as to this conclusion, then it will be further remembered that the NUF-CMJRA at NRS 17.740(3) places the burden of establishing that NUF-CMJRA applies to a judgment on the party seeking recognition, *i.e.*, upon the BCSC. In other words, a "tie" — or anything less than the BCSC satisfying its burden of proof —means that the judgment cannot be recognized under NUF-CMJRA.

D. THE BCSC'S SECOND CAUSE OF ACTION: RECOGNITION UNDER COMITY

In considering issues of comity in the context of international judgments, Nevada courts have looked to the Restatement (Third) of Foreign Relations Law of the United States, *see, e.g.*, *Gonzales-Alpizar v. Griffith*, 130 Nev. 10, 18, 317 P.3d 820, 826 (2014); *Las Vegas Sands v. Eighth Jud. Dist. Ct.*, 130 Nev. 578, 583, 331 P.3d 876, 879 (2014).

Section 483 of the Restatement provides in toto:

> Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states.

The Reporter's Comment to § 483 at ¶ 4 cites to Huntington as the authority supporting this rule, indicating that the analysis of recognition of a foreign judgment under comity is the same as under NRS 17.740, *i.e.*, the Public vs. Private Interest Test of *Huntington*, *Kokesh*, and *City of Oakland* is to be followed.

For example, the U.S. Ninth Circuit Court of Appeals in interpreting § 483 notes that "A civil remedy is penal, as the term is understood in private international law, if it awards a penalty to a member of the public, suing in the interest of the whole community to redress a public wrong.

Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1219 (9th Cir. 2006). The *Yahoo!* court also noted in interpreting § 483 that "Judgments designed to deter conduct that constitutes a threat to the public order are typically penal in nature." *Id*., at 1220.

For brevity, the Public vs. Private Interest Test as applied to the facts of this case, will not be repeated, but in the interests of brevity is instead hereby adopted by incorporation. *See* Section III(C)(2)(a-e), *supra*. at pp. 12-19. Same analysis; same result.

IV. CONCLUSION

Based on the language of the British Columbia Securities Act § 161(g)(1), the nature of an statements contained within the Disgorgement Order, statements made by the British Columbia Court of Appeals in the *Poonian* opinion, and admissions by the BCSC's own expert witness, Mr. Johnson, it is clear that under the decisional trifecta of *Huntington*, *City of Oakland*, and *Kokesh* that the Disgorgement Order must be characterized as a "penalty" under both the NUF-CMJRA and comity, such that the Disgorgement Order is not subject to recognition in Nevada. Summary judgment against the BCSC and in favor of Lathigee is therefore appropriate.

V. PRECAUTIONARY REQUEST

NRS 17.790 provides *in toto*:

> **Stay of proceedings pending appeal of foreign-country judgment.** If a party establishes that an appeal from a foreign-country judgment is pending or will be taken, the court may stay any proceedings with regard to the foreign-country judgment until the appeal is concluded, the time for appeal expires or the appellant has had sufficient time to prosecute the appeal and has failed to do so.

In the event that this Court were to enter summary judgment against Lathigee, Lathigee hereby expresses his intention to appeal, and requests a stay of any further proceedings before this Court, per NRS 17.790 until his appeal has concluded.

Respectfully submitted this ____ day of October, 2018, by:

/s/ Jay D. Adkisson
Jay D. Adkisson
Counsel for Defendant
Michael Patrick Lathigee

CERTIFICATE OF SERVICE

The following signature certifies that on the date of e-filing, a full, true, and correct copy of the above and foregoing document was deposited in the U.S. Mail, with correct first-class postage affixed thereto, and address to counsel for the Plaintiff, British Columbia Securities Commission, to wit:

Kurt R. Bonds, SBN 6228
Matthew M. Pruitt, SBN 12474
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6602 Grand Montecito Parkway, Suite 200
Las Vegas, NV 89149
Ph: 702-384-7000

/s/ Jay D. Adkisson
Jay D. Adkisson

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Exhibit A

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 JAX60

Citation: 2015 BCSECCOM 78

Michael Patrick Lathigee and Earle Douglas Pasquill, FIC Real Estate Projects Ltd., FIC Foreclosure Fund Ltd., WBIC Canada Ltd.

***Securities Act*, RSBC 1996, c. 418**

Hearing

Panel	Audrey T. Ho	Commissioner
	Judith Downes	Commissioner
Hearing Date	February 13, 2015	
Date of Decision	March 16, 2015	
Appearing		
Derek Chapman	For the Executive Director	
H. Roderick Anderson	For the Respondents	
Owais Ahmed		

Decision

I Introduction

¶ 1 This is the sanctions portion of a hearing pursuant to sections 161(1) and 162 of the *Securities Act*, RSBC, 1996, c.418. The Findings on liability, made on July 8, 2014 (2014 BCSECCOM 264), are part of this decision. Since the Findings, the panel chair, Vice Chair Brent W. Aitken, retired and did not participate in the sanctions hearing or any deliberations regarding sanctions.

¶ 2 The Findings panel found that:

a) all the respondents perpetrated a fraud, contrary to section 57(b) of the Act, when they raised $21.7 million from 698 investors without disclosing to them the important fact of FIC Group's financial condition; and

b) Michael Patrick Lathigee, Earle Douglas Pasquill and FIC Foreclosure Fund Ltd. perpetrated a second fraud, contrary to section 57(b), when they raised $9.9 million from 331 investors in FIC Foreclosure for the purpose of investing in foreclosure properties and instead used most of the funds to make unsecured loans to other FIC Group companies.

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II Position of the Parties

¶ 3 The executive director seeks:

a) permanent market prohibitions against the respondents, under sections 161(1)(b), (c) and (d) of the Act;

b) disgorgement orders against the respondents under section 161(1)(g), for the amounts obtained by them, respectively, in contravention of the Act, as follows:

- Lathigee - $21.7 million
- Pasquill - $21.7 million
- FIC Real Estate Projects Ltd. - $9.8 million
- FIC Foreclosure - $9.9 million
- WBIC Canada Ltd. - $2 million; and

c) administrative penalties against the respondents under section 162, in the same amount as the section 161(1)(g) order sought against each of them.

¶ 4 The respondents submitted that the appropriate sanctions are as follows:

a) 10-year market prohibitions against the respondents, under sections 161(1)(b) and (d), subject to two carve-outs:

- Lathigee and Pasquill may trade through a registered dealer in their own RRSP and cash accounts
- Lathigee and Pasquill may each act as a director and officer of an issuer whose shares are solely owned by him or by him and his immediate family;

b) no disgorgement orders against any of the respondents;

c) administrative penalties against each of Lathigee and Pasquill in the amount of $500,000; and

d) no administrative penalties against the corporate respondents.

III Analysis

A Factors

¶ 5 Orders under sections 161(1) and 162 are protective and preventative, intended to be exercised to prevent future harm. See *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)* 2001 SCC 37.

¶ 6 In *Re Eron Mortgage Corporation* [2000] 7 BCSC Weekly Summary 22, the Commission identified factors relevant to sanction as follows (at page 24):

> In making orders under sections 161 and 162 of the Act, the Commission must consider what is in the public interest in the context of its mandate to regulate trading in securities. The circumstances of each case are different, so it is not possible to produce an exhaustive list of all of the factors that the Commission considers in making orders under sections 161 and 162, but the following are usually relevant:
>
> - the seriousness of respondent's conduct,
> - the harm suffered by investors as a result of the respondent's conduct,
> - the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct,
> - the extent to which the respondent was enriched,
> - factors that mitigate the respondent's conduct,
> - the respondent's past conduct,
> - the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia,
> - the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers,
> - the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
> - the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
> - orders made by the Commission in similar circumstances in the past.

B Application of the Factors

Seriousness of the conduct

¶ 7 The Commission has consistently held that fraud is the most serious misconduct prohibited by the Act. In *Manna Trading Corp Ltd.*, 2009 BCSECCOM 595, the Commission, at paragraph 18, said, "Nothing strikes more viciously at the integrity of our capital markets than fraud."

¶ 8 The magnitude of the fraud perpetrated in this case is among the largest in British Columbia history. The respondents raised $21.7 million from 698 investors without telling them that the FIC Group had a severe cash flow problem. A relatively small number of potential events could have triggered its insolvency in a very short time frame. Three of the respondents led FIC Foreclosure's 331 investors to believe that the $9.9 million raised from them would be invested in foreclosure properties and soon. Instead, FIC Foreclosure used most of the funds to make unsecured loans to other FIC Group companies.

Harm to investors; damage to capital markets

¶ 9 The respondents' misconduct has harmed a large number of investors. The respondents provided no evidence that the investors will be able to recover their investments.

¶ 10 The harm to the reputation and integrity of our capital markets is also clear.

Enrichment

¶ 11 The executive director and the respondents each tendered evidence to establish (or refute) if, and to what extent, Lathigee and Pasquill received any of the fraudulently raised funds for their personal benefit.

¶ 12 The FIC Group was run, from a financial point of view, as one entity. The evidence before us indicates that the bulk of the $21.7 million was used for the benefit of the FIC Group of companies.

Mitigating or aggravating factors

¶ 13 There are no mitigating factors. There are no aggravating factors beyond the ones cited below under the heading "Past Conduct".

¶ 14 Lathigee and Pasquill argued that their conduct after 2008, the year in which the funds at issue were raised, is a mitigating factor. They said that they (and Pasquill in particular) have worked to help the FIC Group recover assets through various means including lawsuits against third parties, kept the companies' filings in good standing, worked with the companies' receiver, and communicated with investors to keep them up to date on progress and answer all their questions.

¶ 15 We do not see how Lathigee's and Pasquill's conduct after the funds were raised, as described in paragraph 14, lessens the gravity of their fraudulent acts, and we do not consider it to be a mitigating factor. In addition, we do not consider their co-operation in the other proceedings to be a mitigating factor in considering sanctions in this proceeding. See: *Rashida Samji et al* 2015 BCSECCOM 29 (paragraph 16).

¶ 16 Lathigee and Pasquill also argued that the fact that the fraud was not designed to enrich them is a mitigating factor. We do not agree. If we had found that the fraud was designed to enrich them, that would be an aggravating factor. The absence of an aggravating factor does not equate to the presence of a mitigating factor.

Past conduct

¶ 17 Lathigee, Pasquill and WBIC have a history of regulatory misconduct.

¶ 18 As more particularly described in paragraphs 14-16 of the Findings,

a) In December 2005, Commission staff issued cease trade orders against three FIC Group companies (WBIC, FIC Investments Ltd. and China Dragon Fund Ltd.) for using forms of offering memoranda that did not comply with the requirements of

the Act. Lathigee and Pasquill were directors and officers of each company at the time.

b) In June 2007, Lathigee, Pasquill, WBIC and China Dragon entered into a settlement agreement with the Commission and admitted to certain securities law violations. Lathigee agreed to pay a $60,000 fine and Pasquill agreed to pay a $30,000 fine.

¶ 19 In addition, on September 2, 2008 (after the fund raising period in this case), the executive director issued a further cease trade order against WBIC. This order was related to inadequate disclosure in WBIC's offering memoranda dated June 1, 2007 and February 1, 2008 regarding: risk factors related to the investments, investments made by WBIC in related companies, and material agreements entered into by WBIC including loan guarantees. Lathigee and Pasquill were directors and officers of WBIC at the time.

Risk to investors and markets

¶ 20 For the reasons discussed below, we find the respondents to be a serious ongoing risk to the capital markets and permanent market bans are warranted.

¶ 21 First, those who commit fraud represent the most serious risk to our capital markets. Here, the fraud is significant.

¶ 22 Second, WBIC and the individual respondents' multiple past infractions show they do not respect securities laws. They were not deterred by orders and sanctions from prior infractions.

¶ 23 Third, Lathigee remained active in the capital markets after his involvement in the FIC Group, co-founding an investment club in Las Vegas with a mandate that resembles the FIC Group's mandate. When talking about his background, he was not forthcoming about his regulatory history.

¶ 24 The executive director submitted a video posted on YouTube in April 2014. This was a year after the issuance of the Notice of Hearing in this case but before the liability hearing.

¶ 25 According to the video, entitled "Experts of Southern Nevada", which is in the format of an interview of Lathigee:

a) Lathigee now lives in Las Vegas and is a co-founder and leader of an investment club called the Las Vegas Investment Club;

b) The mandate of the club appears quite similar to the mandate of the FIC Group;

c) Lathigee talked about the strategy of investing in tax liens and tax deeds, and claimed a lot of success in the past with investing in these liens and deeds;

d) Lathigee claimed that he had previously built the largest investment club in North America that grew to $100 million in assets under management; and

e) Lathigee talked about some of his past successes and background but there was no mention of his regulatory history in British Columbia.

Specific and general deterrence

¶ 26 The sanctions we impose must be sufficient to ensure that the respondents and others will be deterred from engaging in similar misconduct.

Previous orders

¶ 27 The executive director referred us to three recent decisions of this Commission that dealt with fraud: *IAC – Independent Academies Canada Inc.* 2014 BCSECCOM 260, *David Michael Michaels et al* 2014 BCSECCOM 457, and *Samji*.

¶ 28 In *IAC*, the respondents raised $5.1 million from investors without filing a prospectus. Of that amount, $1.645 million was raised fraudulently. The respondents did not tell investors that the property to be developed with their money was in foreclosure. The panel ordered permanent market bans, an administrative penalty of $7 million against the individual respondents on a joint and several basis, plus a section 161(1)(g) order against all the respondents for the money that was raised illegally.

¶ 29 In *Michaels*, the panel found that Michaels convinced people to purchase $65 million of securities through fraud, misrepresentation and unregistered advising. Michaels received $5.8 million in commissions and fees from the scheme. The circumstances in *Michaels* are different from the present case in that the investments made by Michaels' clients went into investments in accordance with their intentions. However, the panel found that the seriousness of the misconduct was heightened by Michaels' predatory behavior in targeting seniors. The panel there ordered permanent market bans, an administrative penalty of $17.5 million, plus a section 161(1)(g) order for $5.8 million against Michaels.

¶ 30 In *Samji*, the panel found that Samji operated a $100 million Ponzi scheme and defrauded at least 200 investors. The panel ordered permanent market bans, an administrative penalty of $33 million, plus a section 161(1)(g) order of approximately $11 million representing the difference between the monies deposited by investors under the Ponzi scheme and the monies paid out to them, against Samji and the corporate respondents on a joint and several basis.

C Appropriate Orders

a) Market prohibitions

¶ 31 Fraud is the most serious misconduct prohibited by the Act. Permanent market prohibitions are common for those found to have committed fraud.

¶ 32 For the reasons already stated, we conclude that it is not in the public interest to allow the respondents to operate in the capital markets. We find that a permanent market ban against the respondents is necessary to protect the markets and the investing public, subject to two carve-outs:

a) We are prepared to allow Lathigee and Pasquill to trade for their own accounts through a registered dealer. We do not see any risk to the investing public by doing so.

b) We are also prepared to allow Lathigee to act as a director and officer of one private issuer whose securities are owned solely by him or by him and his immediate family. He is currently the director and officer of such a company, and we see no risk to the investing public by allowing him to continue. We are not granting this carve-out to Pasquill as he indicated that he has no need for it.

b) Orders under section 161(1)(g)

¶ 33 Section 161(1)(g) states that the Commission may order:

> "(g) if a person has not complied with this Act, … that the person pay to the commission <u>any amount obtained</u>, or payment or loss avoided, <u>directly or indirectly, as a result of the failure to comply or the contravention</u>;" (emphasis added)

¶ 34 The respondents challenged our authority to make a section 161(1)(g) order (sometimes referred to as a "disgorgement order") against the individual respondents. They argued that, for section 161(1)(g) to apply, <u>the respondent against whom the order is issued</u> must have obtained a payment or avoided a loss, directly or indirectly, as a result of the contravention of the Act. They said there is no evidence that Lathigee and Pasquill obtained any payment or avoided any loss as a result of their contraventions of the Act.

¶ 35 The respondents argued that to order disgorgement against a respondent who has not obtained any money as a result of a contravention would improperly punish the respondent or, alternatively, wrongly duplicate the purpose of an administrative penalty. They relied on *Manna Trading*, which stated (in paragraph 36) that the purpose behind section 161(1)(g) orders is to remove "the incentive of profiting from illegal misconduct" and to return money obtained by contravening the Act.

¶ 36 The executive director disagreed. He argued that it is clear from a plain reading of section 161(1)(g) that it is not limited to requiring payment of the amount obtained <u>by a respondent</u>. He cited *Oriens Travel & Hotel Management Ltd.* 2014 BCSECCOM 91 and *Michaels*.

¶ 37 The Commission in *Oriens* and *Michaels* held that an order against a respondent for payment of the full amount obtained as a result of his contravention of the Act is possible without having to establish that the amount obtained through the contravention was obtained <u>by that respondent</u>. We agree.

¶ 38 We do not read *Manna Trading* as supporting the respondents' interpretation of section 161(1)(g). The panel there found four individual respondents to have perpetrated a fraud and ordered each of them to pay to the Commission under section 161(1)(g) the full amount obtained by the fraud without regard to the finding that they were personally enriched by different amounts. That panel concluded it was not necessary, in making orders under section 161(1)(g), to trace investor funds into the hands of the respondents. It said (at paragraph 44) that each respondent's individual contraventions, directly or indirectly, resulted in the investment of US$16 million in the Manna Ponzi scheme and ordered each of them to pay that amount under section 161(1)(g), as it was "the amount obtained, directly or indirectly, as a result of their individual contraventions of the Act."

¶ 39 We also find instructive the decision of the Ontario Securities Commission (OSC) in *Limelight Entertainment Inc.* (2008) 31 O.S.C.B. 12030 (cited in *Michaels*).

¶ 40 The Ontario Securities Act contains provisions that are identical in all relevant respects to section 161(1)(g). In *Limelight*, the OSC stated, in paragraph 49:

> "We noted that paragraph 10 of subsection 127(1) of the Act provides that disgorgement can be ordered with respect to "any amounts obtained" as a result of non-compliance with the Act. Thus, the legal question is not whether a respondent "profited" from the illegal activity but whether the respondent "obtained amounts" as a result of that activity. In our view, this distinction is made in the Act to make clear that all money illegally obtained from investors can be ordered to be disgorged, not just the "profit" made as a result of the activity. … In our view, where there is a breach of Ontario securities law that involves the widespread and illegal distribution of securities to members of the public, it is appropriate that a respondent disgorge all the funds that were obtained from investors as a result of that illegal activity. …"

¶ 41 In *Limelight*, the OSC found two individual respondents, Da Silva and Campbell, to be the directing minds and principal shareholders of Limelight, and to have committed illegal acts both personally and through their control and direction over Limelight and its salespersons. The OSC ordered disgorgement jointly from Limelight, Da Silva and Campbell of the entire amount raised. In doing so, the OSC stated, in paragraph 59:

> "In our view, individuals should not be protected or sheltered from administrative sanctions by the fact that the illegal actions they orchestrated were carried out through a corporation which they directed and controlled. In this case, Limelight, Da Silva and Campbell acted in concert with a common purpose in breaching key provisions of the Act."

¶ 42 We agree with the principles articulated and approaches taken in the illegal distribution and fraud cases canvassed above. They are even more compelling in cases of fraud. We should not read section 161(1)(g) narrowly to shelter individuals from that sanction where the amounts were obtained by the companies that they directed and controlled.

¶ 43 We find we have the authority to order disgorgement against the individual respondents in this case, up to $21.7 million, the full amount obtained by fraud.

¶ 44 We next considered whether we should exercise our discretion to make section 161(1)(g) orders against each respondent and in what amount.

¶ 45 With respect to the individual respondents, they submitted that the panel should not make such an order against them even if we have the authority, because they were not personally enriched and they only received reasonable compensation from the FIC Group.

¶ 46 The principles articulated in the cited cases apply equally to this case. Lathigee and Pasquill, personally and with the corporate respondents that they directed, committed fraud on close to 700 investors. They were the directing and controlling minds of the corporate respondents. They should not be protected or sheltered from sanctions by the fact that the illegal actions they orchestrated were carried out through corporate vehicles. The amounts obtained from investors need not be traced to them specifically and we find that $21.7 million was obtained, directly or indirectly, as a result of their individual contraventions of the Act.

¶ 47 With respect to the corporate respondents, they obtained the amount raised by them respectively as a result of their individual contraventions of the Act. But, they submitted that a section 161(1)(g) order should not be made against them as they have no ability to pay, and such an order may result in their entering into bankruptcy to the prejudice of the investors.

¶ 48 A respondent's ability to pay is not a relevant consideration. Even if it were, the respondents did not provide any evidence that the corporate respondents would have the money to pay the investors if we decline to make a section 161(1)(g) order.

¶ 49 Each respondent's misconduct contributed to the raising of the $21.7 million fraudulently. We find that it is in the public interest to order the respondents to pay the full amount obtained as a result of their fraud. Accordingly, we order the respondents to pay to the Commission, jointly and severally, the respective amounts set out in paragraph 62(d) below.

c) Administrative Penalty

¶ 50 Under section 162 of the Act, where the Commission has determined that a person has contravened a provision of the Act, it "may order the person to pay the commission an administrative penalty of not more than $1 million for each contravention".

¶ 51 The respondents first argued that the executive director had only alleged, and the Findings panel had only found, that the respondents committed one act of fraud when they raised the $21.7 million and three respondents committed a second act of fraud when they raised the $9.9 million. Therefore, the respondents argued that this panel has no authority to order any penalty under section 162 in excess of $2 million against the three respondents who committed fraud twice and $1 million against the remaining respondents.

¶ 52 The executive director disagreed. He said the notice of hearing alleged that the fraudulent conduct involved 698 investors who invested $21.7 million, and 331 investors who invested the $9.9 million. Therefore, a separate fraud was perpetrated with respect to each investor, which means the respondents contravened section 57(b) a total of 1,029 times (698 with respect to the FIC Group investors and 331 with respect to the FIC Foreclosure investors).

¶ 53 We agree with the executive director. His interpretation is consistent with the language in the Findings. The Findings panel stated, "We find that the respondents perpetrated a fraud on those investors, contrary to section 57(b) of the Act" [emphasis added], with respect to the 698 FIC Group investors (paragraph 303), and again with respect to the 331 FIC Foreclosure investors (paragraph 357).

¶ 54 Therefore, the respondents perpetrated a fraud each time they traded securities to an investor. As with *Manna Trading* and *Samji*, where a similar argument was advanced, the respondents in this case contravened section 57(b) multiple times in their dealings with hundreds of investors. There are, therefore, hundreds of contraventions for which we could order an administrative penalty.

¶ 55 Much of the parties' submissions focused on the quantum of the administrative penalty against the individual respondents.

¶ 56 Some Commission panels had used a two or three times multiplier on the amount of the fraud as a guide in determining the appropriate sanction. See, for example, *IAC*. There is no hard and fast rule. It is trite to say that each case is different and we must look at the circumstances unique to the case.

¶ 57 The respondents here suggested that the administrative penalty should be $500,000 for each individual respondent. But if the panel applies a multiplier, then it should be based only on the amounts paid by the corporate respondents to the individual respondent personally or to his holding companies.

¶ 58 Even if we consider the amounts paid by all the FIC Group companies to each individual respondent since January 2008, the evidence suggests they totaled less than $400,000, and a three times multiplier would be $1.2 million. In our view, that is far too low for specific and general deterrence in light of the magnitude of the fraud.

¶ 59 Here, the misconduct is greater in magnitude and seriousness than that in *IAC*, and not as egregious as that in *Michaels*. In our view, an administrative penalty of $21.7 million (in addition to the $21.7 million disgorgement) against each individual respondent as requested by the executive director is not necessary for meaningful specific and general deterrence. We find $15 million to be proportionate to the harm done, making it appropriate for the respondents personally and sufficient to serve as a meaningful and substantial general deterrence to others. A $15 million administrative penalty against each respondent is in line with the penalties ordered in *IAC* and *Michaels*.

¶ 60 We do not draw any material distinction between the responsibility that Lathigee and Pasquill have for the misconduct. The administrative penalty should be the same with respect to both of them.

¶ 61 We do not find it serves the public interest or any useful purpose to impose an administrative penalty against the corporate respondents. They were controlled by Lathigee and Pasquill and did not act independently of the directions from the two individuals. There is no need for specific deterrence against them. In our opinion, general deterrence can be achieved through administrative penalties against the individual respondents.

IV Orders

¶ 62 Considering it to be in the public interest, and pursuant to sections 161 and 162 of the Act, we order that:

a) FIC Real Estate Projects Ltd., FIC Foreclosure Fund Ltd., WBIC Canada Ltd. (the "corporate respondents")

i. under section 161(1)(b)(i), all persons permanently cease trading in, and be permanently prohibited from purchasing, any securities or exchange contracts of the corporate respondents;

ii. under section 161(1)(d)(v), the corporate respondents are permanently prohibited from engaging in investor relations activities;

iii. under section 161(1)(c), on a permanent basis, none of the exemptions set out in the Act, the regulations or decisions (as those terms are defined by the Act), will apply to any of the corporate respondents; and

iv. subject to paragraph 62(d) below, under section 161(1)(g), the corporate respondents pay to the Commission the amounts obtained, directly or indirectly, as a result of their contraventions of the Act, as follows:

- FIC Projects - $9.8 million
- FIC Foreclosure - $9.9 million
- WBIC - $2 million;

b) Lathigee

i. subject to the exception in paragraph 62(b)(ii)(b) below, under section 161(1)(d)(i), Lathigee resign any position he holds as a director or officer of an issuer or registrant;

ii. Lathigee be permanently prohibited:
   (a) under section 161(1)(b)(ii), from trading in or purchasing any securities or exchange contracts, except that he may trade and purchase them for his own account through a registrant if he gives the registrant a copy of this decision;
   (b) under section 161(1)(d)(ii), from becoming or acting as a director or officer of any issuer or registrant, except that he may act as a director or officer of one issuer whose securities are solely owned by him or by him and his immediately family members (being: Lathigee's spouse, parent, child, sibling, mother or father-in-law, son or daughter-in-law, or brother or sister-in-law);
   (c) under section 161(1)(d)(iii), from becoming or acting as a promoter;
   (d) under section 161(1)(d)(iv), from acting in a management or consultative capacity in connection with activities in the securities market; and
   (e) under section 161(1)(d)(v), from engaging in investor relations activities;

iii. under section 161(1)(c), except for those exemptions necessary to allow Lathigee to trade or purchase securities and exchange contracts for his own account, on a permanent basis, none of the exemptions set out in the Act, the regulations or decisions (as those terms are defined by the Act), will apply to Lathigee;

iv. subject to paragraph 62(d) below, under section 161(1)(g), Lathigee pay to the Commission $21.7 million, being the total amount obtained, directly or indirectly, as a result of his contraventions of the Act; and

iv. under section 162, Lathigee pay an administrative penalty of $15 million;

c) Pasquill

i. under section 161(1)(d)(i), Pasquill resign any position he holds as a director or officer of an issuer or registrant;

ii. Pasquill be permanently prohibited:
   (a) under section 161(1)(b)(ii), from trading in or purchasing any securities or exchange contracts, except that he may trade and purchase them for his own account through a registrant if he gives the registrant a copy of this decision;
   (b) under section 161(1)(d)(ii), from becoming or acting as a director or officer of any issuer or registrant;
   (c) under section 161(1)(d)(iii), from becoming or acting as a promoter;
   (d) under section 161(1)(d)(iv), from acting in a management or consultative capacity in connection with activities in the securities market; and
   (e) under section 161(1)(d)(v), from engaging in investor relation activities;

iii. under section 161(1)(c), except for those exemptions necessary to allow Pasquill to trade or purchase securities and exchange contracts for his own account, on a permanent basis, none of the exemptions set out in the Act, the regulations or decisions (as those terms are defined by the Act), will apply to Pasquill;

iv. subject to paragraph 62(d) below, under section 161(1)(g), Pasquill pay to the Commission $21.7 million, being the total amount obtained, directly or indirectly, as a result of his contraventions of the Act; and

iv. under section 162, Pasquill pay an administrative penalty of $15 million.

d) Section 161(1)(g) payments

i. The respondents' respective obligations to pay under paragraphs 62(a)(iv), 62(b)(iv) and 62(c)(iv) above shall not exceed the following:

(a) $9.8 million (distributions relating to FIC Projects) – FIC Projects, Lathigee and Pasquill only, on a joint and several basis;

(b) $9.9 million (distributions relating to FIC Foreclosure) - FIC Foreclosure, Lathigee and Pasquill only, on a joint and several basis; and

(c) $2 million (distributions relating to WBIC) - WBIC, Lathigee and Pasquill only, on a joint and several basis.

¶ 63 March 16, 2015

¶ 64 **For the Commission**

Audrey T. Ho
Commissioner

Judith Downes
Commissioner

JAX73

Exhibit B

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JAX74

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Poonian v. British Columbia Securities Commission,* 2017 BCCA 207

Date: 20170531
Docket: CA42714; CA42715; CA42718

Docket: CA42714

Between:

Thalbinder Singh Poonian and Shailu Sharon Poonian

Appellants

And

British Columbia Securities Commission and the Executive Director of the British Columbia Securities Commission

Respondents

- and -

Docket: CA42715

Between:

Manjit Sihota and Perminder Sihota

Appellants

And

British Columbia Securities Commission and the Executive Director of the British Columbia Securities Commission

Respondents

- and -

Docket: CA42718

Between:

Michael Patrick Lathigee and Earle Douglas Pasquill

Appellants

And

British Columbia Securities Commission and the Executive Director of the British Columbia Securities Commission

Respondents

JAX74

JAX75

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice A. MacKenzie
The Honourable Mr. Justice Fitch

On appeal from: Orders of the British Columbia Securities Commission dated March 13, 2015 (*Re Poonian*, 2015 BCSECCOM 96) and March 16, 2015 (*Re Lathigee,* 2015 BCSECCOM 78)

Counsel for the Appellants (CA42714):	J. Narwal and M. Magaril
Counsel for the Appellants (CA42715):	A. C. Luchenko
Counsel for the Appellants (CA42718):	O. Ahmed
Counsel for the Respondent, the Executive Director of the British Columbia Securities Commission:	L. T. Doust, Q.C. and D. A. Hainey
No one appearing for the Respondent, the British Columbia Securities Commission	
Place and Date of Hearing:	Vancouver, British Columbia March 29 and 30, 2017
Place and Date of Judgment:	Vancouver, British Columbia May 31, 2017

Written Reasons by:
The Honourable Madam Justice MacKenzie

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Fitch

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Summary:

The Commission found the appellants contravened s. 57 of the Securities Act, and pursuant to s. 161(1)(g) of that Act, made joint and several orders to disgorge. The appellants appeal from the s. 161(1)(g) orders on these grounds: (1) the statutory language does not permit orders for joint and several liability; (2) the Commission had not established each of the appellants obtained an amount subject to disgorgement; and alternatively (3) the orders were unreasonable and punitive. The Poonians further contend that certain amounts should be deducted from any amount they are ordered to disgorge. HELD: the Lathigee appeal (CA42718) is dismissed; the Poonian (CA42714) and Sihota (CA42715) appeals are allowed and the matter remitted to the Commission. The statutory language only permits s. 161(1)(g) orders where the particular wrongdoer has obtained an amount, or avoided a payment or loss, directly or indirectly, as a result of that wrongdoer's contravention. A wrongdoer may be found to have obtained an amount "indirectly" if he had control and direction over the person(s) with whom he is held jointly and severally liable. Further, the "amount obtained" does not contemplate deductions or import a profit element. The joint and several disgorgement orders imposed upon Lathigee and Pasquill were proper as the Commission found they had control and direction over the corporate entities that obtained the amount ordered disgorged. The Commission made no finding as to what amount each of the Poonians and Sihotas obtained, directly or indirectly. The s. 161(1)(g) orders imposed against them are set aside, and the matter is remitted to the Commission to make the necessary factual findings to determine whether a s. 161(1)(g) order should be made against each of them.

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Introduction

[1] Before this Court are three appeals from orders of the British Columbia Securities Commission (the "Commission") made pursuant to s. 161(1)(g) of the *Securities Act*, R.S.B.C. 1996, c. 418 (the "*Act*"), commonly referred to as disgorgement orders. The central issue on appeal is the interpretation of s. 161(1)(g), which provides:

> 161. (1) If the commission or the executive director considers it to be in the public interest, the commission or the executive director, after a hearing, may order one or more of the following:
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> …
>
> (g) if a person has not complied with this Act, the regulations or a decision of the commission or the executive director, that the person pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the failure to comply or the contravention;

[2] Two of these appeals, *Poonian* (CA42714) and *Sihota* (CA42715), arise from the same facts. The Commission found the Poonians and Sihotas contravened s. 57(a) of the *Act*, commonly referred to as the market manipulation provision. The third appeal, *Lathigee* (CA42718), arises from different facts. There, the Commission found Messrs. Lathigee and Pasquill committed fraud, contravening s. 57(b) of the *Act*. Section 57 provides:

> 57 A person must not, directly or indirectly, engage in or participate in conduct relating to securities or exchange contracts if the person knows, or reasonably should know, that the conduct
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> (a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security or exchange contract, or
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> (b) perpetrates a fraud on any person.

[3] Liability is not in dispute on appeal.

[4] The Commission ordered, *inter alia*, the Poonians and Sihotas to disgorge, pursuant to s. 161(1)(g), $7,332,936 on a joint and several basis: *Re Poonian*, 2015

BCSECCOM 96 ["*Poonian Sanctions*"]. Similarly, the Commission ordered Lathigee and Pasquill to disgorge $21.7 million jointly and severally with certain other corporate entities controlled by them and involved in the fraud: *Re Lathigee*, 2015 BCSECCOM 78 ["*Lathigee Sanctions*"].

[5] Pursuant to s. 167(1) of the *Act*, the appellants sought leave to appeal the respective orders of the Commission. Madam Justice Fenlon only granted leave to appeal the s. 161(1)(g) orders.

[6] All three appeals were heard together and concern principally the interpretation of s. 161(1)(g) of the *Act*, and fundamentally whether the Commission may make joint and several orders pursuant to that subsection.

Background Facts

[7] In that the liability findings are not in dispute, I will only outline the salient facts. The details of the transactions and the other evidence before the Commission are provided in the liability decisions: *Re Poonian*, 2014 BCSECCOM 318 ["*Poonian Liability*"]; and *Re Lathigee*, 2014 BCSECCOM 264 [*"Lathigee Liability*"].

Poonians and Sihotas

[8] The Poonians and Sihotas were involved in the market manipulation of the shares of a publicly traded corporation, OSE Corp. ("OSE"). The Poonians and Sihotas, with a number of acquaintances and relatives (the "Secondary Participants") and a friend, Mr. Leyk, orchestrated, first, the acquisition of a majority position (88%) in OSE (primarily through two private placements in September and November 2007), and secondly, an increase in OSE's share price by trading mostly between the Poonians', the Sihotas', and the Secondary Participants' accounts. OSE's share price increased from $0.29 in November 2007 to $2.00 at the end of January 2008. Nothing else occurred around that time to explain the price increase.

[9] The Phoenix Group is a group of individuals and entities primarily engaged in debt management services helping debtors – often referred by collection agencies or

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creditors – access funds in their locked-in RRSPs and retirement accounts. Generally, the Phoenix Group advised and facilitated these unsophisticated individuals in unlocking their funds and using them to invest in higher-return products. The Phoenix Group recommended OSE shares, and earned commissions from the Poonians and Sihotas for these sales. Essentially, the Phoenix Group facilitated the appellants' offloading of these shares at inflated prices to unsophisticated individuals with financial problems.

[10] OSE's share price continued to close around $2.00 between February and September 2008; from October to December 2008 the share price declined to $1.50; the share price then declined steadily to close at $0.08 on March 31, 2009. Phoenix clients suffered an estimated total book loss of around $7.1 million.

[11] Based on trading records over the relevant period of September 10, 2007 to March 31, 2009, the brokerage accounts of the Poonians, the Sihotas, Mr. Leyk and the Secondary Participants had aggregate net trading gains of $7,332,936.

[12] The Commission made findings on the extent of the involvement of each of the Poonians and Sihotas (*Poonian Liability* at paras. 149–162).

[13] As to Mr. Poonian, the Commission found he was the mastermind. He arranged the private placements to obtain control of a majority of OSE's shares, funded those purchases through various accounts, traded those shares in various accounts, and entered agreements with Phoenix Group members to pay them commissions for inducing Phoenix clients to buy OSE shares.

[14] As to Ms. Poonian, the Commission found she was actively and extensively involved in many aspects of the market manipulation. She acquired OSE shares, sold OSE shares to Phoenix clients, made and received payments to other participants in the scheme, and paid commissions to the Phoenix Group.

[15] Regarding both Sihotas, the Commission found they funded payments to Secondary Participants' accounts, made and received payments to other participants, and indirectly paid commissions to the Phoenix Group.

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[16] As to Mr. Sihota only, the Commission found, as an officer of OSE he signed treasury orders to issue shares in the two private placements, he received OSE shares, traded OSE shares, received a transfer of OSE shares from a Secondary Participant, and received cheques from the Poonians and Mr. Leyk's company.

[17] Respecting Ms. Sihota only, the Commission found she received shares from the second private placement, acquired additional OSE shares by exercising warrants from the private placements, received cheques from Ms. Poonian, and allowed OSE shares to be bought and sold in her accounts as a nominee for Mr. Poonian.

[18] The Commission considered Mr. Poonian's conduct to be the most egregious, and Ms. Poonian's and Mr. Sihota's conduct to be the next most serious, essential to the scheme. It found Ms. Sihota to be the "least involved directly" in the market manipulation, but noted her effort to "cover up for the other respondents" as an aggravating factor.

Lathigee and Pasquill

[19] Lathigee and Pasquill jointly directed a group of companies called the "Freedom Investment Club" (the "FIC Group") which purported to provide members a chance to learn and develop investment skills while presenting them with the opportunity to participate in investments offered by the FIC Group.

[20] The FIC Group's primary business was real estate development, mostly in Alberta, of which the largest project was Genesis on the Lakes, a residential development ("Genesis"). In May 2007, TD Bank provided a $22.1 million credit facility to FIC Group entities for Genesis. As part of the security for the loan, TD required, among other things, that it be assigned an investment portfolio held by 0760838 BC Ltd. ("076"), an FIC Group company. The market value of the portfolio was to be maintained at a minimum value of $9 million for the life of the Genesis project.

[21] Genesis faced difficulties, including $10 million in cost overruns. In February 2008, contractors had filed liens against the development, violating a term of the TD loan prohibiting subsequent encumbrances. By early March 2008, 076 also had a $2.2 million tax bill due. The market value of the 076 portfolio fell well below $9 million – by the end of March it was at $5.9 million, at the end of April its value was $7.9 million, and by the end of May 2008, it fell to only $4.9 million. The Commission found Lathigee and Pasquill knew of the breaches of the terms of the TD credit facility, they knew that FIC would be "doomed" if TD called its loan, and they knew that it was a real possibility that could happen.

[22] Email communications and meeting minutes indicated the FIC Group faced severe cash flow problems. From February 1 through August 21, 2008, the FIC Group, through three of its investment companies, proceeded to raise $21.7 million.

[23] On March 7, 2008, Lathigee held a conference call and webcast, primarily with FIC members, to promote the distribution of promissory notes to investors in FIC Real Estate Projects Ltd. ("FIC Projects"), an FIC Group company which invested in Alberta real estate, and the issuance of shares in WBIC Canada Ltd. ("WBIC"). From the issuance of promissory notes in March, April and July 2008, $9.8 million was raised. An additional $2 million was raised in April and May 2008 through the issuance of the WBIC shares. The Commission found that what Lathigee said in the conference call was untrue and grossly misleading, and that he omitted any mention of the important fact of FIC Group's cash flow problems and financial condition. This dishonesty and failure to disclose FIC Group's financial condition formed the basis for the first finding of fraud against Lathigee and Pasquill.

[24] Another FIC Group investment was FIC Foreclosure Fund Ltd. ("FIC Foreclosure"), which was promoted as investing in foreclosures of residential properties in the United States. In statements contained in a subscription agreement, an offering memorandum, and in another conference call in April 2008, Lathigee promoted his expertise and reasons for investing in U.S. foreclosures through FIC Foreclosure. From February through August 2008, FIC Foreclosure raised $9.9

million. However, instead of making investments in foreclosure properties in the U.S., Lathigee and Pasquill used at least part of these funds to meet their short-term cash needs by extending unsecured loans to other FIC Group companies to pay liabilities that included Genesis's contractors and 076's tax liability. This misuse of funds formed the basis for the second finding of fraud against them.

[25] The Commission noted in *Lathigee Sanctions* at para. 8, "The magnitude of the fraud perpetrated in this case is among the largest in British Columbia history."

Issues

[26] The appellants all advance the argument that s. 161(1)(g) does not permit the Commission to make joint and several orders. The appellants also argue s. 161(1)(g) requires the Commission to establish that the person against whom the order is made in fact obtained the amount ordered to be disgorged. Some of the appellants, namely the Poonians, further submit that amounts related to trading expenses and amounts paid to the Commission by the Secondary Participants under a separate settlement order should be deducted from the amount the Poonians are ordered to pay.

[27] Alternatively, the appellants variously say the Commission's orders were unreasonable, punitive, clearly wrong, inequitable, unsupported by the evidence, or otherwise inappropriate in the circumstances of their cases. For example, the Sihotas argue there was no finding they ever obtained any amount as a result of their failure to comply with or contravention of the *Act*, regulations or decision of the Commission. The Poonians contend they received less than the ordered amount, if anything, and the Commission failed to consider that a substantial sum was recovered from other participants (primarily, members of the Phoenix Group). Lathigee and Pasquill similarly argue they never received any of the amounts ordered, save for a much smaller sum paid to them as salary.

[28] Common to all three appeals are the threshold statutory interpretation issues concerning joint and several disgorgement orders, who obtained any amount, and

whether deductions are allowed. There are also the respective complaints about the particular orders based on the circumstances of each appellant.

[29] Therefore, I find it useful to reframe the issues as follows:

1. Does s. 161(1)(g) of the *Act* permit certain amounts to be deducted from the amount ordered to be disgorged?

2. Does s. 161(1)(g) require the "amount obtained" to be obtained by the person against whom the order is made?

3. Does s. 161(1)(g) permit joint and several orders, and if so, under what circumstances?

4. Were the orders made in these cases otherwise appropriate?

Standard of Review

[30] The parties agree there is a presumption that the reasonableness standard applies where the issue concerns an administrative tribunal's interpretation of its home statute: *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47 at para. 22. The presumption of reasonableness may be rebutted if the context indicates the Legislature intended correctness to apply: *Edmonton (City)* at para. 32.

[31] The appellants submit the presumption of reasonableness is rebutted here, and the applicable standard of review is correctness. They rely on *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, for the proposition that where the legislation provides concurrent jurisdiction to both the tribunal and the court to consider the same legal question at first instance, there is an inference the legislative intent was not to recognize the tribunal's superior expertise in respect of that question.

[32] The appellants point to s. 155.1(b) of the *Act*, which provides:

> 155.1 If the court finds that a person has committed an offence under section 155, the court may make an order that
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> …
>
> (b) the person pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the offence.

[33] The appellants submit the language in s. 155.1(b) is analogous to that in s. 161(1)(g). In essence, s. 155.1(b) is the "court version" of a disgorgement order. The appellants contend it is clear the Legislature conferred jurisdiction on both the court and the Commission to make orders on the same terms. The congruent language used in both sections, central to the question on this appeal ("the person pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of…") suggests the sections should be interpreted consistently. The appellants also note a contravention of s. 57 of the *Act* constitutes an "offence" under s. 155 for the purposes of s. 155.1(b).

[34] The Executive Director of the British Columbia Securities Commission submits the standard of review is reasonableness and *Rogers* is distinguishable. The Executive Director argues the issues raised by s. 161(1)(g) are distinct from those under s. 155.1(b) because an order may be made, in the opening language of s. 161(1), "If the commission or the executive director considers it to be in the public interest…" For its part, s. 155.1 does not require the court to consider the public interest. The Executive Director argues this signals a different "statutory context".

[35] The Executive Director submits *Rogers* addressed a specific situation unique to the Copyright Board's structure. Unlike the Copyright Board, the Commission is a "discrete and special administrative regime", charged under the *Act* to protect the public interest in relation to investors and capital markets. (See *Rogers* at para. 15.)

[36] The Executive Director relies on *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67. The Executive Director submits that Justice Moldaver, for a majority of the Court, confirmed that the Commission has the discretion to

resolve any statutory uncertainty in s. 161(1)(g) by adopting "any interpretation that the statutory language can reasonably bear" (*McLean* at para. 40).

[37] I cannot agree with the Executive Director's characterization of the reasoning in *McLean.* Moldaver J., for the majority, rejected an argument, premised on *Rogers*, that correctness applied to a review of the Commission's interpretation of s. 159 (which concerns limitation periods) as applied to s. 161(6)(d) (which concerns proceedings against persons who have entered settlement agreements) – s. 161(1)(g) was not discussed. In *McLean*, the interpretive exercise involved whether "the events" that trigger the running of the limitation period in the context of settlement agreements are (i) the underlying misconduct giving rise to the settlement agreement, or (ii) the settlement agreement itself (*McLean* at para. 3). Moldaver J. distinguished *Rogers*:

> [24] This case is different. As Rothstein J. made clear in *Rogers*, it was the fact that both the tribunal and the courts "may each have [had] to consider the same legal question at first instance" that "rebutt[ed] the presumption of reasonableness review" (para. 15 [emphasis of Moldaver J.]). Here, **the legal question is the interpretation of s. 159 as it applies to s. 161(6)(d) — and it is *solely* the Commission that is tasked with considering that matter in the first instance. Accordingly, there is no possibility of conflicting interpretations with respect to the question actually at issue**. The logic of *Rogers* is thus inapplicable.
>
> [Emphasis in bold added.]

[38] In my view, the situation in *McLean* is distinguishable from the present one.

[39] The Executive Director takes the emphasized statement in para. 24 of *McLean* to say that here only the Commission is tasked with interpreting the words in s. 161(1)(g). While it is true s. 161(1)(g) only concerns the Commission, and in the same way s. 155.1(b) only concerns the court, what is also true is that virtually the same language – "may order … the person pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of" – appears in both sections and are both intended to provide jurisdiction to order certain persons to surrender ill-gotten amounts. The Legislature expressly chose the same language to delineate the contours of this type of order – whether made by the Commission or

the court – and the issue of what those contours are, as a matter of statutory interpretation, would be before both forums as a matter of first instance. Thus, it is *not* solely the Commission that is tasked with considering that legal interpretive question in the first instance.

[40] To be clear, the issue to be resolved on this appeal is not whether a disgorgement order would be in the public interest, nor is the issue whether there has been non-compliance with the *Act*. Those requisite elements of a s. 161(1)(g) order are not before this Court. The issue before this Court is: what does the statutory language allow and require? Does it allow joint and several orders? Does it require the Commission to establish that the person subject to the order obtained the amount to be disgorged? These questions of statutory interpretation are questions of law.

[41] In other words, the identical interpretive issue arises whether the appeal is, as here, from the Commission's orders under s. 161(1)(g), or from a court's order under s. 155.1(b).

[42] As noted above, the Executive Director submits the "statutory context" of each of these provisions is different because of the public interest requirement in s. 161, and says the tribunal and court "cannot share concurrent jurisdiction over free-floating statutory wording … extracted from various provisions and divorced from its relevant statutory context."

[43] With respect, I cannot agree with the characterization of these words as "free-floating". In my view, it is no coincidence the Legislature expressly used the same language in these two provisions, both of which provide for a particular order that has the same purpose: divesting a wrongdoer of ill-gotten amounts. While it is true the condition precedent of "public interest" is not found in the language of s. 155.1, and there are differences between what constitutes an offence in s. 155.1 and what misconduct may give rise to a s. 161(1)(g) order, those differences are not the issue here. (I note that a breach of s. 57 is captured by both s. 155.1 and s. 161(1)(g).) The question is not about "when" such an order may be made, but about "what" that

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order can contain. Different considerations inform the "when", but the same question of "what" would concern both forums in respect of the same statutory language as a matter of first instance.

[44] I also note that exact language is used in only one other section of the *Act*. Apart from ss. 155.1(b) and 161(1)(g), it is also used in relation to an order for compliance under s. 157(1)(b):

> 157 (1) In addition to any other powers it may have, if the commission considers that a person has contravened or is contravening a provision of this Act or of the regulations, or has failed to comply or is not complying with a decision, and the commission considers it in the public interest to do so, the commission may apply to the Supreme Court for one or more of the following:
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> …
>
> (b) an order that the person pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the failure to comply or the contravention;
>
> [Emphasis added.]

[45] Section 157(1)(b) is another example of where the statutory language in question would be squarely before the court as a matter of first instance. The Supreme Court, on a s. 157(1)(b) application, would be required to interpret that language and determine what it may order. Indeed, the Legislature clearly contemplates the *Commission* putting that interpretive issue before the court for determination at first instance. Further, the "contextual" prerequisite the Executive Director relies on to differentiate s. 161(1)(g) from s. 155.1(b) (public interest consideration) is also present here.

[46] This language does not appear anywhere else in the *Act*. In all three instances where it appears, it confers on the court or the Commission the power to do the same thing: order someone to pay to the Commission ill-gotten amounts. In my view, it is clear the Legislature intended the court to interpret this language as a matter of first instance. It cannot be that, on an appeal to this Court, the Supreme Court's interpretation in making a s. 157(1)(b) order is reviewed on a correctness

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standard while the Commission's interpretation of that same language in making a s. 161(1)(g) order is reviewed on a reasonableness standard.

[47] Rothstein J., for a majority of the Court in *Rogers,* articulates the concern about inconsistency as follows:

> [13] … The court will examine the same legal issues the Board may be required to address in carrying out its mandate. On appeal, questions of law decided by the courts in these proceedings would be reviewed for correctness: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8.
>
> [14] It would be inconsistent for the court to review a legal question on judicial review of a decision of the Board on a deferential standard and decide exactly the same legal question *de novo* if it arose in an infringement action in the court at first instance. It would be equally inconsistent if on appeal from a judicial review, the appeal court were to approach a legal question decided by the Board on a deferential standard, but adopt a correctness standard on an appeal from a decision of a court at first instance on the same legal question.

[48] The same troubling prospect of inconsistency that concerned Rothstein J. in *Rogers* would arise here were this Court to review the Commission's interpretation on a standard of reasonableness. If the Commission determined the language permitted a joint and several order, and this Court were to review that interpretation on a reasonableness standard, the result would not be reconcilable with a case where the court interpreted the language in ss. 155.1(b) or 157(1)(b) as not permitting joint and several orders, and this Court reviewed that interpretation on the correctness standard. The same language in the same statute used in provisions with the same purpose should be read consistently. To this extent, the statutory context is not different just because the body making the order is different, or where the conditions precedent (the "when") are arguably different.

[49] I recognize the Commission's important public interest mandate that informs the Commission's exercise of discretion to make an order under s. 161(1), which provides a host of tools to the Commission to use alone or in combination. I also acknowledge the Commission's superior expertise in determining what would be in the public interest, including how the *Act* should be interpreted to further those policy considerations: *Re Cartaway Resources Corp.,* 2004 SCC 26 at para. 46.

[50] I also agree with the Executive Director that the Copyright Board is in a unique situation distinct from the discrete and specialized nature of the Commission. The Commission is often the preferable arbiter in most issues concerning the *Act*, including having the interpretive upper hand, given its specialized expertise. The role of the court under the *Act* is limited, reflecting the Legislature's assignment of issues and disputes in this specialized area to a specialized body. However, in the very rare instances the *Act* grants the court power to make certain orders, and the language defining the scope of those orders is the same as the language defining the scope of the same type of order the Commission may make, the statutory interpretation exercise defining that scope must be done in a consistent manner.

[51] Unlike the provision and statutory language at issue in *McLean,* the present question is one of those rare instances where the Legislature, through its adoption of express language identical in its material respects, grants both the Commission and the court the ability at first instance to order a person to "pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of" a violation of s. 57 of the *Act*. The situation in *Rogers* arises. Whether that language means such an order – by whichever body making it – can be a joint and several order and whether it requires establishing the person against whom the order is made obtained the amount, are questions of law, reviewable on the correctness standard.

[52] I also recognize the fact this is a statutory appeal requiring leave does not in itself lead to a correctness review: *Edmonton (City)*. Instead, the exercise is to determine whether the Legislature intended the standard of review to be correctness. For the reasons explained, I conclude the Legislature did so intend.

[53] Therefore, I agree with the appellants that *Rogers* is determinative in this case, and the proper standard of review on the statutory interpretation question is correctness.

Interpretation of s. 161(1)(g)

[54] This is a case of statutory interpretation. Therefore, I propose first to review the guiding principles on statutory interpretation generally and in the securities regulation context specifically. I will then turn to the Commission's case law on s. 161(1)(g).

Guiding Principles

[55] This Court recently summarized the seminal principles in *British Columbia v. Philip Morris International, Inc.*, 2017 BCCA 69:

> [23] … The correct approach to statutory interpretation is long settled. It was recently expressed in *B.C. Freedom of Information and Privacy Association v. British Columbia (Attorney General),* 2017 SCC 6:
>
> > [21] …This follows from the application of our long-accepted approach to statutory interpretation, namely that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, quoting both E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.
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> [24] In *Canada Trustco Mortgage Co. v. Canada,* 2005 SCC 54, the Court said at para. 10:
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> > [10] …The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

[56] Although primarily concerned with the definition of "security" in the *Act*, the Court's comments in *Pacific Coast Coin Exchange v. Ontario Securities* Commission, [1978] 2 S.C.R. 112, on the remedial and protective nature of securities legislation and the requirement for broad construction sensitive to economic reality are instructive (at 126–27):

> I have alluded to the policy of the legislation. It is clearly the protection of the public as was said by Hartt J. in *Re Ontario Securities Commission and Brigadoon Scotch Distributors (Canada) Limited* [[1970] 3 O.R. 714] at p. 717:
>
> > …the basic aim or purpose of the Securities Act, 1966, … is the protection of the investing public through full, true and plain disclosure of all material facts relating to securities being issued.
> >
> > * * *
> >
> > Such remedial legislation must be construed broadly, and it must be read in the context of the economic realities to which it is addressed. Substance, not form, is the governing factor. As noted in *Tcherepnin v. Knight* [389 U.S. 332 (1967)], at p. 336:
> >
> > > …in searching for the meaning and scope of the word 'security' in the Act, form should be disregarded for substance and the emphasis should be on economic reality.
> >
> > [Emphasis added.]

The Commission's Jurisprudence on s. 161(1)(g)

[57] The Commission has considered and made s. 161(1)(g) orders in many cases: see e.g., *Re Streamline Properties Inc.*, 2015 BCSECCOM 66; *Re HRG Healthcare Resource Group,* 2016 BCSECCOM 5; *Re SPYru Inc.*, 2015 BCSECCOM 452; *Re Michaels*, 2014 BCSECCOM 457; *Re VerifySmart Corp.,* 2012 BCSECCOM 176; *Re Oriens Travel & Hotel Management Corp.*, 2014 BCSECCOM 352.

[58] The Commission has repeatedly held that s. 161(1)(g) permits joint and several orders without the requirement of establishing the particular wrongdoer was the one who obtained the amount. In *Michaels,* a unanimous panel of the Commission (including Vice Chair Cave) reviewed past cases of the Commission and summarized the principles as follows:

> [42] To summarize, these are the principles that are relevant under section 161(1)(g):
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> a) the focus of the sanction should be on compelling the respondent to pay any amounts obtained from the contravention(s) of the Act;
>
> b) the sanction does not focus on compensation or restitution or act as a punitive or deterrent measure over and above compelling the respondent to pay any amounts obtained from the contravention(s) of the Act;

> c) the section should be read broadly to achieve the purposes set out above and should not be read narrowly to either limit orders:
>
> (i) to amounts obtained, directly or indirectly, *by that respondent*; or
>
> (ii) to a narrower concept of "benefits" or "profits", although that may be the nature of the order in individual circumstances.
>
> [43] Principles that apply to all sanction orders are applicable to section 161(1)(g) orders, including:
>
> a) a sanction is discretionary and may be applied where the panel determines it to be in the public interest; and
>
> b) a sanction is an equitable remedy and must be applied in the individual circumstances of each case.
>
> [Emphasis in original.]

[59] In essence, the Commission is of the view that a broad interpretation of s. 161(1)(g) is required to achieve the purpose of ensuring the respondent does not retain any amount obtained from contravening the *Act*.

[60] Vice Chair Cave has also repeatedly dissented on the s. 161(1)(g) issue: *Streamline* at paras. 70–111; *SPYru* at paras. 126–142.

[61] In the opinion of Vice Chair Cave, joint and several liability is not consistent with the purpose of s. 161(1)(g), which is to divest a wrongdoer of ill-gotten amounts. Further, he opines that an order under s. 161(1)(g) can only follow after a finding that the "amount obtained" was obtained by *the person who failed to comply*. In his view, aside from the situation of, for example, a person and his corporate *alter ego* (e.g., *Michaels*), a joint and several order would result in a person being ordered to pay amounts that person did not obtain (e.g., obtained by another person). This would constitute a punitive order going beyond the scope of s. 161(1)(g).

[62] In Vice Chair Cave's view, the plain reading of s. 161(1)(g) and its ordinary, grammatical sense support this interpretation. In *Streamline*, he put it this way in his dissenting reasons:

> [86] Section 161(1)(g) must be interpreted to mean that an order under that subsection is limited to:
>
> > (a) the amount a person obtained, that was
> > (b) directly or indirectly a result of that person's misconduct.
>
> [87] This is based on the language in the subsection:
>
> > (g) if a person has not complied with this Act, the regulations or a decision of the commission or the executive director, that the person pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the failure to comply or the contravention
>
> The phrase "the failure to comply" can only refer to the opening phrase of the section "if a person has not complied with the Act". The "amount obtained" referred to in the subsection must be based on that person's failure to comply, not the failure of anyone else.
>
> [Emphasis in original.]

[63] Significantly, Vice Chair Cave reconciled his view in *Streamline* with the view he shared with the other panel members in *Michaels* on the basis there was, in effect, only one respondent, explaining:

> [84] The *Michaels* decision provided that an order for disgorgement of the full amount obtained through contraventions of the Act can be made without having to establish that the amount obtained through the contravention was obtained by that respondent.
>
> [85] The *Michaels* case dealt, effectively, with only one respondent (the corporate respondent was the alter ego of the individual respondent). Where there are multiple respondents, as in this case, the principle set out above must be refined.
>
> [Emphasis in original.]

[64] In Vice Chair Cave's view, a s. 161(1)(g) order cannot be made on a joint and several basis, except when the persons being held jointly and severally liable are, in effect, one person, such as where one is the corporate *alter ego* of the other. In either case, Vice Chair Cave was of the opinion that the Commission must establish that the amount ordered to be paid was obtained by the person(s) against whom the order is made. For example, the Commission must establish that either Mr. Michaels or his corporate *alter ego* obtained the amount. Apart from such situations, Vice Chair Cave opined that a joint and several s. 161(1)(g) order is impermissible.

Parties' Positions

[65] The appellants essentially advance Vice Chair Cave's reasoning. In their submission, the plain language of s. 161(1)(g) requires the "amount obtained" be obtained *by the person* who failed to comply. Not having this requirement would result in persons paying amounts they did not obtain, or which other persons obtained. The result, they argue, is a punitive or compensatory order, which is beyond the permissible scope of the purpose of s. 161(1)(g).

[66] The Poonians further argue the Commission failed to consider amounts disgorged from other parties related to the scheme. The Poonians point to a settlement between Phoenix Group entities whereby those entities paid back certain amounts to the Commission (approximately $2.7 million). The Poonians submit those amounts should be deducted from any amount they must disgorge.

[67] The Executive Director essentially advances the opinion of the majority in the Commission's cases. The Executive Director stresses the important and specialized role of the Commission in crafting sanctions that are in the public interest in the particular circumstances of the case before it. The Executive Director contends that limiting s. 161(1)(g) by adding language that is not there (*"by that person"*) is untenable because it would essentially allow wrongdoers to benefit from the complexity and opaqueness of their schemes. In other words, by making it difficult, if not impossible, to trace and prove *that person* actually *got the money*, the Commission's ability to protect the public interest would be unduly limited. The Executive Director points to the use of offshore banking and nominee entities as examples.

[68] The Executive Director argues the Legislature deliberately left the language open to permit the Commission to choose the proper language to fulfill its mandate. Any requirement that *that person* be the one obtaining the amount would be against the Commission's established jurisprudence and jurisprudence from other provinces.

Discussion

[69] I will first review the purpose of s. 161(1)(g). With this purpose in mind, I will then turn to the text of the provision to answer the following questions:

1. Does the provision require the amount to be "profit" or permit deductions?
2. Does the "amount obtained" have to be obtained *by the person against whom the order is made*?
3. Does the provision allow joint and several orders?

Purpose of s. 161(1)(g)

[70] It is clear, in my opinion, that the purpose of s. 161(1)(g) is neither punitive nor compensatory. This view is held consistently among the various decisions of the Commission and the securities commissions of other provinces: *Poonian Sanctions* at para. 80; *Michaels* at paras. 39-40; *Fischer v. IG Investment Management Ltd.,* 2012 ONCA 47 at para. 52; *Re Planned Legacies Inc.*, 2011 ABASC 278 at para 71; *Re Sabourin,* 2010 LNONOSC 385 at para. 65; and *Re Arbour Energy Inc.,* 2012 ABASC 416 at para. 37.

[71] It is noteworthy that in *Michaels* a unanimous panel (including Vice Chair Cave) held:

> [40] We agree that compensation or restitution is not the purpose of an order under section 161(1)(g). Although the Act, in section 15.1, sets out that any monies collected from an order under 161(1)(g) may be subject to a claim by those persons who have suffered loss as a result of the wrongdoer's actions, any analysis of restitution would arise under this section of the Act, not under 161(1)(g).
>
> [Emphasis added.]

[72] Sections 15 and 15.1 of the *Act* address what the Commission may do with funds received under s. 161(1)(g). Subsections 15(3) and 15(3.1) require, in effect, the Commission to put aside moneys received under ss. 155.1(b), 157(1)(b), 161(1)(g) or 162. Section 15.1 and the corresponding regulations (*Securities*

Regulation, B.C. Reg. 196/97, Part 3) provide a notice and claims procedure for persons who have suffered pecuniary loss as a direct result of misconduct that resulted in an order under s. 155.1(b), 157(1)(b) or 161(1)(g); the notice is to be posted until the earlier of three years from the date it is first posted, or the date on which all the money has been paid out. After the requisite period of time has expired, the Commission may use any remaining funds only for educating securities market participants and the public about investing, financial matters or the operation or regulation of securities markets (s. 15(3)).

[73] The Executive Director characterizes this procedure under s. 15.1 as an "expeditious" mechanism for victims to receive compensation for losses suffered as a result of conduct giving rise to a s. 161(1)(g) order. Therefore, the Executive Director says, s. 161(1)(g) has a compensatory purpose: the order produces money that must be used to compensate victims (or if not paid on adjudicated claims, for public education purposes).

[74] The appellants submit s. 15.1 is a financial administration provision setting out how moneys collected under those provisions are used. However, the analysis of the purpose of s. 161(1)(g) should focus on the provision itself.

[75] I agree with the passage from *Michaels* at para. 40, quoted above. In my view, it does not follow that just because moneys collected under certain sections may be used for "compensation", the sections giving rise to orders to pay those moneys (ss. 155.1(b), 157(1)(b), 161(1)(g), and 162) have a compensatory purpose. I recognize the modern approach to statutory interpretation requires consideration of the context and the statute as a harmonious whole, which includes other provisions of the statute relating to the provision at issue, such as s. 15.1. However, considering the extensive case law discussing the purpose of s. 161(1)(g) and its nature as a sanction, I would endorse the view of the Commission in *Michaels* at para. 42, which concluded that: "the sanction does not focus on compensation or restitution or act as a punitive or deterrent measure over and above compelling the respondent to pay any amounts obtained from the contravention(s) of the *Act*".

[76] While "compensation" may well be a possible effect of a s. 161(1)(g) order, I cannot say that is its purpose. Any analysis of restitution would arise under s. 15.1, not s. 161(1)(g). Although not determinative, I note s. 15.1 is contained in "Part 3 – Financial Administration" of the *Act*. Section 161(1)(g) (under "Part 18 – Enforcement") does not refer to "compensation" or "restitution". Nor do ss. 15 and 15.1, or Part 3 of the *Securities Regulation*, refer to "restitution". The only reference to "compensation" is in s. 7.4(3)(a) of the *Securities Regulation*, requiring the Commission to consider, in adjudicating a claim, "whether the applicant received or is entitled to receive compensation *from other sources*" [emphasis added].

[77] This conclusion is also consistent with the observation that generally the power to order a person who has contravened the *Act* to pay compensation or restitution is reserved for the courts (ss. 155.1(a) and 157(1) (i) and (j)). While a victim may receive money from the s. 15.1 mechanism, that is distinct from the power to order restitution. First, notice to the public under this "expeditious" method is only made *after* money has been received through an order. If no money is received, the mechanism is not engaged. Second, the victim has no enforceable order against the wrongdoer, whereas ss. 155.2(1) and (3) give the person to whom the court awards compensation all the usual enforcement tools available for court orders.

[78] I also find persuasive Vice Chair Cave's explanation in *Streamline* (in dissent) as to why compensation or restitution is not the purpose of a s. 161(1)(g) order:

> [77] Compensation or restitution to investors is not the purpose of a disgorgement order. Only the BC Supreme Court can order compensation or restitution under the Act, pursuant to sections 155.1(a) or 157(1)(i). Since these two provisions specifically refer to compensation and restitution, it would be incorrect to interpret section 161(1)(g) as also being a compensation or restitution provision.
>
> [78] The wording of section 161(1)(g) shows it is not a compensation or restitution provision. The goal of restitution is to restore the victim to his or her original position, which requires the court to consider victims' losses. In contrast, section 161(1)(g) requires the panel to consider the amount obtained as a result of misconduct. These are two different things.

> [79] For example, a court order for compensation or restitution may include more than what an investor actually invested (and a respondent obtained), such as interest payments or loss of opportunity. A respondent would not have obtained these amounts as a result of misconduct and consequently an order under section 161(1)(g) that included these amounts would be broader than what that section allows.

I note further the Commission is expressly prohibited from including loss of opportunity and interest on the loss in determining an applicant's loss under the Part 3, s. 15.1 claims mechanism: *Securities Regulation, s.* 7.4(3)

[79] I agree with the following discussion in *Re Limelight Entertainment Inc.* (2008) 31 OSCB 12030 about the origins of the disgorgement remedy in Ontario, and find those observations applicable to interpreting s. 161(1)(g), which is similarly worded:

> [48] The Five Year Review Report referred to the United States Securities and Exchange Commission ("SEC") disgorgement powers and noted that the following principles have been established in SEC decisions:
>
> (a) the SEC has ruled that disgorgement is "an equitable remedy designed to deprive [respondents] of all gains flowing from their wrong, rather than to compensate the victims of the fraud" (*In the Matter of Guy P. Riordan* [Doc. 3-12829 (U.S. S.E.C. July 28, 2008)], Initial Decision, 2008 SEC LEXIS 1754 at p. 68.);
>
> (b) the SEC has ruled that "any risk of uncertainty [in calculating disgorgement] should fall on the wrongdoer whose illegal conduct created that uncertainty" (*In the Matter of Pritchard Capital Partners, LLC et al.* [Doc. 3-12753 (U.S. S.E.C. July 10, 2008)], Initial Decision, 2008 SEC LEXIS 1593 at p. 51); and
>
> (c) the SEC has ruled that once the SEC has established a disgorgement figure, the burden shifts to the respondent to disprove the reasonableness of that number (*In the Matter of Thomas C. Bridge et al.* [Doc. 3-12626 (U.S. S.E.C. March 10, 2008)], Initial Decision, 2008 SEC LEXIS 533 at p. 99).
>
> Although we are not bound by SEC decisions, we agree with these general principles, subject to the comments below.

[80] I also agree with the decisions of securities commissions in British Columbia and across the country concluding s. 161(1)(g), or its counterparts, is not compensatory in nature: *Michaels* at paras. 42–43; *Limelight* at paras. 47–48; *Streamline* at paras. 77–82, 88 (dissent); *Sabourin* at para. 65; *Planned Legacies* at

para. 71; *Poonian Sanctions* at para. 72; *Re Schmidt*, 2013 ABASC 320 at paras. 65–66; *SPYru* at para. 80.

[81] The purpose of s. 161(1)(g) is to compel a wrongdoer to give up any ill-gotten amounts. (While the purpose has been described in the cases as "ill-gotten *gains*", I find it more accurate to refer to them as "amounts", as the statute provides, and because, as discussed below, there is no "profit" element.) In *Streamline,* for example, the majority of the Commission said:

> [55] … The purpose of a section 161(1)(g) payment is to remove from a respondent any amounts obtained through a violation of the Act. Given that, how a respondent spent the funds raised is not relevant for such purpose. Also, a respondent's ability to pay the amount is not relevant for such purpose.

[82] The taking away of any amounts obtained or payment or loss avoided deprives a person who fails to comply of any benefit. Therefore, the person is deterred from non-compliance. In that sense, s. 161(1)(g) also has a deterrence purpose. This purpose is consistent with the *Act*'s overarching remedial and protective nature.

The Statutory Text

[83] It is convenient to repeat the statutory provision at issue:

> 161. (1) If the commission or the executive director considers it to be in the public interest, the commission or the executive director, after a hearing, may order one or more of the following:
>
> …
>
> (g) if a person has not complied with this Act, the regulations or a decision of the commission or the executive director, that the person pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the failure to comply or the contravention;

Profit

[84] I start with the first question of whether the "amount obtained" refers to profits. Another way of putting this question is to ask whether the "amount obtained" is a "net" amount that allows for deductions of losses and expenses. For instance, the

Poonians argue in their factum that buying and selling securities carries "a number of carrying charges and other related expenses; at the very least, the [Poonians] would have had to pay a commission for every trade…" They argue the Commission erred in not allowing deductions for these amounts.

[85] I reject this argument. The words of the provision do not support a "profit" interpretation. The words the Legislature chose, "any amount obtained", refer to any amount received. They do not contemplate any deductions. If the Legislature had intended to import a profit element, it could have used the word "profit", or "net", or some other language that connotes allowance for losses or expenses.

[86] Two further reasons support the interpretation that s. 161(1)(g) is not profit-driven. First, there is the alternative of "payment or loss avoided". This clearly contemplates a contravention that benefits wrongdoers, not by a positive enrichment, but by allowing them to avoid a loss. For example, a person may contravene the *Act* by committing insider trading. The person may have sold securities at a higher price, with knowledge of material non-public information that would negatively affect the security's price. By selling before the price decreases in response to the public dissemination of that information, the person avoids a loss. Clearly, that benefit, being the loss avoided, may be disgorged under s. 161(1)(g), even if the price at which the person sold the shares was lower than the price at which the person bought them (i.e., he did not make money – or "profit" – from the sale).

[87] Nor does it accord with common sense to permit the insider trader to deduct the trading costs associated with illegally selling his shares before the price drops. The payment of such expenses is what enabled the wrongdoer to obtain the benefit in the first place.

[88] Secondly, the purpose of s. 161(1)(g) also has a deterrence component. Deterrence is a proper consideration for imposing administrative sanctions: *Cartaway* at para. 60. One way to deter is to remove the incentive for non-compliance. However, if the disgorgement amount is based on profits, then

wrongdoers would not be deterred from contravening, or attempting to contravene. They would only face the risk of having to disgorge amounts *if their schemes succeeded*. However, the public is still harmed. A profit-oriented interpretation would undermine the statute's remedial and protective purpose. The failure to "turn a profit" on the wrongdoing should not prevent the regulator from requiring the wrongdoer to give up money received from the wrongdoing.

[89] I agree with the following conclusion reached by the Commission in *McCabe,* 2014 BCSECCOM 512:

> [75] McCabe also said that the circumstances of this case are very different from *Michaels* and necessitate that an order for disgorgement, if any, be limited to net rather than gross proceeds. He sought to distinguish the two cases on a number of grounds including the seriousness of the misconduct, the nature of the deductions sought, the source of the monies subject to disgorgement and the evidence of loss by the investors.
>
> [76] None of the factors identified by McCabe support limiting a section 161(1)(g) order to net, rather than gross, proceeds. It is clear from Michaels that neither the source of the monies subject to the order nor the nature of the deductions sought are determinative.
>
> [77] The panel in *Michaels* stated that the focus of the sanction should be on compelling the respondent to pay <u>any</u> [emphasis [of the Panel]] amounts obtained from the contravention of the Act…

[90] For similar reasons, I do not accept the Poonians' submission that amounts paid to the Commission under settlement orders with other participants in the scheme should reduce the amount the Poonians must disgorge. In my view, those are separate proceedings dealing with the misconduct of different persons or entities and amounts those persons obtained as a result of their contraventions. How *those* persons are sanctioned does not change the fact of how much the *Poonians* obtained as a result of *their* contraventions.

[91] There is a clear exception to the general "no deductions" principle. Amounts the wrongdoer has returned to the victims (e.g., the investors) should properly be deducted from the disgorgement amount. This is consistent with the purpose of s. 161(1)(g) of removing ill-gotten amounts: no amount obtained remains when the amount has been returned to the victim(s). I would agree with Vice Chair Cave's

comment (in dissent but not on this point) in *Streamline* at paras. 92–97, and in particular, the comments at paras. 92–94:

> [92] Section 161(1)(g) should be read to refer to the financial benefits respondents continue to have at the time the order is made. Amounts returned to investors should be deducted from the amount of the disgorgement order.
>
> [93] This is consistent with the purpose of a disgorgement order, namely to deprive a respondent of wrongly obtained benefits. If an order requires disgorgement of a benefit a respondent no longer has, then it will not serve the purpose of removing wrongly obtained benefits, and instead will simply be a penalty.
>
> [94] The OSC [Ontario Securities Commission] consistently has deducted amounts returned to investors when fashioning disgorgement orders. For example: *North American Financial Group Inc. (Re)* 2014 LNONOSC 580; *Rezwealth Financial Services Inc. (Re)* 2014 LNONOSC 450; *Empire Consulting Inc. (Re)* 2013 LNONOSC 132; *McErlean (Re)* 2012 LNONOSC 782; *Maple Leaf Investment Fund Corp. (Re)* 2012 LNONOSC 196.

[92] I pause to note this analysis does not mean the Commission may *never* permit deductions in other circumstances. The provision is clear that the Commission may order the person to pay *any* (not necessarily all) amounts obtained to the Commission. The Commission's jurisprudence is well established that in some circumstances deductions may be permitted: *Michaels* at para. 35. One example noted in *Michaels* is where the respondents have unequal degrees of culpability. Of course, how much to deduct (if any) is within the discretion of the Commission in its determination of what would be in the public interest in the circumstances of each case.

[93] In sum, I conclude s. 161(1)(g) does not require the amount obtained to be "profit" or that there be a "netting" or deduction of expenses, costs, or of amounts paid to the Commission by other persons.

"Amount obtained"

[94] I now turn to the question of whether the "amount obtained" means the amount obtained by the person who failed to comply with the *Act*. Related to this issue is whether and when a joint and several order may issue.

[95] I find it helpful in the present exercise to reiterate some well-established principles of statutory interpretation.

[96] First, the court must read the words of the statute in their plain, ordinary and grammatical sense. Secondly, the court must be informed by the context, which includes the surrounding wording in other parts of the provision or other provisions, and the scheme of that provision and the statute as a whole. This context includes the purpose of the provision specifically, and of the statute generally.

[97] Turning first to a plain reading of the text, I note the "amount obtained" has to be obtained by *someone*. As a matter of plain meaning and common sense, an amount cannot be obtained if no one obtains it.

[98] The interpretive challenge arises from the language of s. 161(1)(g), which omits explicit reference to who is doing the obtaining. In other words, the present interpretive exercise is to determine whom the Legislature intended, implicitly, to do the "obtaining". The appellants contend it is the person who has failed to comply. The Executive Director submits that no words should be added, and essentially the "obtaining" is by anyone who contributed to the failure to comply or whose wrongful act contributed to the amount being obtained. In other words, as long as the person has contravened the *Act* or failed to comply, and the Commission considers it in the public interest, that person may be subject to a joint and several order despite not having directly or indirectly obtained any amount.

[99] Read grammatically, the clause "that the person pay to the commission any amount obtained" is the object of the verb "order". It refers to the order that may be made. It is also obvious from "if a person has not complied with this Act…the person pay to the commission any amount obtained" who the person is, what is being paid, and to whom it is being paid.

[100] It follows that the phrase "any amount obtained" refers to amounts obtained directly or indirectly by the person who is to pay pursuant to the order, because the person contravened the Act. The fact that "amount obtained" must also be causally

connected to ("as a result of") the contravention (or failure to comply) of the person further supports this interpretation as the consistent, plain, and ordinary meaning.

[101] This interpretation appears to be understood by other securities commissions. In *Limelight*, the Ontario Securities Commission said (using "respondent" rather than "person"):

> [49] We note that paragraph 10 of subsection 127(1) of the Act provides that disgorgement can be ordered with respect to "any amounts obtained" as a result of non-compliance with the Act. Thus, the legal question is not whether a respondent "profited" from the illegal activity but whether the respondent "obtained amounts" as a result of that activity.
>
> [Emphasis added.]

The panel in *Limelight* further said:

> [52] In our view, the Commission should consider the following issues and factors when contemplating a disgorgement order in circumstances such as these:
>
> (a) whether an amount was obtained by a respondent as a result of non-compliance with the Act;
>
> …
>
> (c) whether the amount that a respondent obtained as a result of non-compliance with the Act is reasonably ascertainable;
>
> …
>
> [53] Staff has the onus to prove on a balance of probabilities the amount obtained by a respondent as a result of his or her non-compliance with the Act. Subject to that onus, we agree that any risk of uncertainty in calculating disgorgement should fall on the wrongdoer whose non-compliance with the Act gave rise to the uncertainty.
>
> [Emphasis added.]

[102] For its part, in summarizing the underlying principles of disgorgement, the Alberta Securities Commission explained in *Arbour Energy*:

> [37] This Commission discussed the underlying principles of disgorgement in *Re Planned Legacies Inc.*, 2011 ABASC 278 at paras. 71-75, referring there to several other cases. As noted in *Planned Legacies*, disgorgement is another tool that may be used to achieve specific and general deterrence. The Commission stated there (at para. 71) that disgorgement "reflects the equitable policy designed to remove all money unlawfully obtained by a respondent so that the respondent does not retain any financial benefit from breaching the Act. It is not a compensation mechanism for victims of the wrongdoing." In *Planned Legacies*, the Commission accepted the principle

> from the Ontario Securities Commission's decision in *Re Limelight Entertainment Inc.* (2008), 31 O.S.C.B. 12030 at para. 53 that Staff bear the initial burden of proving the amount obtained by a respondent through its non-compliance with the Act, with the burden then shifting to the respondent to disprove the reasonableness of that amount. We also note that the relevant amount is that "obtained", not the amount retained, the profit, or any other amount calculated by considering expenses or other possible deductions.
>
> [Emphasis added.]

Both "disgorgement" provisions in the Alberta and Ontario securities legislation (*Securities Act*, R.S.A. 2000, c. S-4, s. 198(1)(i); *Securities Act*, R.S.O. 1990, c. S.5, s. 127(1)(10)) use wording similar to the British Columbia statute (although the Ontario provision uses the word "disgorge"). Like the British Columbia provision, the Alberta and Ontario provisions also do not explicitly have the words "by the respondent [person]" after the words "any amounts obtained".

[103] This interpretation also appears to be understood in academic texts, including David Johnston, Kathleen Rockwell and Cristie Ford, *Canadian Securities Regulation*, 5th ed. (Markham, Ont: LexisNexis Canada, 2014):

> ¶14.31 This power is intended to prevent a person or company from retaining financial benefits that were received by contravening securities laws.
>
> ¶14.32 The legislative provisions refer to "amounts obtained". Therefore, the relevant amount is what a respondent obtained through misconduct, not what the respondent retained or spent inappropriately. …
>
> [Emphasis added.]

[104] In essence, I agree with Vice Chair Cave's analysis at para. 87 of *Streamline*:

> The phrase "the failure to comply" can only refer to the opening phrase of the section "if a person has not complied with the Act". The "amount obtained" referred to in the subsection must be based on that person's failure to comply, not the failure of anyone else.
>
> [Emphasis in original.]

[105] By contrast, the Executive Director relies on the Commission's recent decision in *Re Wong*, 2017 BCSECCOM 57, where the Commission opined:

> [90] The purpose of section 161(1)(g) is to remove from a respondent any amounts obtained through a violation of the Act. Notably, section 161(1)(g)

> does not limit an order to any amount *obtained by a respondent*. In our view, this omission is intentional and makes clear that we can make an order against a respondent with respect to all the money illegally obtained from investors as a result of that respondent's misconduct, and we are not limited to the ill-gotten gains obtained by that specific respondent. The plain wording of section 161(1)(g) supports our interpretation. To hold otherwise would be tantamount to importing into section 161(1)(g) a requirement that payment be limited to benefits, personal gains or some notion of profits enjoyed by a respondent.
>
> [Emphasis in original.]

With respect, I do not agree with that view. First, I do not consider the phrase "omission is intentional and makes clear" supports the Executive Director's position because there is no omission in a real or grammatical sense. Instead, there is simply a grammatical construction in which "the person" against whom the order is made is implied or understood to be the recipient of the "amount obtained", as earlier discussed. Something that is implicit in the plain and ordinary meaning of a phrase cannot be said to be intentionally omitted.

[106] Further, the Commission in *Wong* sidesteps the issue of *who* does the obtaining, and instead addresses *from whom* the amounts are obtained (i.e., investors). I think this analysis is inaccurate. The provision does not limit the persons from whom the moneys may be obtained, and indeed, should not. For example, the wrongdoer may obtain money from investors (e.g., in an illegal distribution), from other innocent market participants (e.g., from someone who buys shares sold by a person committing insider trading), or from other wrongdoers (e.g., a tipper who is paid remuneration by a trader for providing material non-public information). All of these amounts may properly be characterized as "amounts obtained" as a result of a contravention of the *Act* for the purposes of s. 161(1)(g). Indeed, these amounts should all be caught to achieve the goal of deterrence by removing the incentive for non-compliance.

[107] Second, I cannot agree that, "To hold otherwise would be tantamount to importing into section 161(1)(g)…some notion of profits..." The notion of profits is clearly displaced by the express choice of the word "amount", and for the other reasons explained earlier. To require the amount be obtained *by the respondent* only

means that the amount must have been *received* by that respondent. It does not import the notion that there is a "netting" of expenses to arrive at benefits, gains, or profits.

[108] I recognize the Commission's concern, as expressed in *Wong,* that a requirement the amount be obtained *by the respondent* would insert a restriction that would impair the effectiveness of s. 161(1)(g) in capturing *all* ill-gotten amounts because of the complexity and opacity of certain schemes. However, in my view, that concern is answered by the use of the words "or indirectly" in s. 161(1)(g). This enlarges the scope of the "amount obtained by a respondent" to include amounts other than amounts that arrived directly into his or her pocket. It could include and even overlap with, in an appropriate case, moneys obtained by a co-respondent, where that co-respondent is essentially receiving the amount for the contravener (i.e., the contravener obtained the amount *indirectly* through the co-respondent). I will return to the role of "indirectly" later in this judgment.

[109] This practical concern of the Commission is also addressed by the burden of proof in such cases, a point to which I will also return.

[110] In my view, the ordinary grammatical reading is that the "amount obtained" is the amount obtained by *the* person who failed to comply or committed the contravention, and the provision captures amounts so obtained, *directly or indirectly*.

[111] This reading is also consistent with the purpose of the provision: to deter persons from non-compliance by removing the prospect of receiving and retaining moneys from non-compliance. It is also consistent with what is *not* the primary purpose of the provision: it is not to punish or compensate.

[112] Section 161(1)(g) must be read in the context of its neighbours in ss. 161 and 162. As Stratas J.A. put it in *Burchill v. Canada*, 2010 FCA 145 at para. 11, referring to the *Income Tax Act,* R.S.C., 1985, c. 1 (5th Supp.), "Subsection 56(1)(a)(i) does not stand in splendid isolation in the Act; rather, it is part of an interconnected web of provisions." Section 161(1)(g) must be recognized as one in a list of enforcement

tools open to the Commission. The Commission has a broad arsenal of sanctions to enable it to discharge its public interest mandate. Each tool, however, takes a specific form to achieve a specific purpose. Disgorgement is a specific tool, and the Commission must not, in the name of the public interest, use that tool in such a way as to extend it beyond its specific, permissible purpose. Its purpose is to prevent wrongdoers from retaining amounts obtained from their wrongdoing. It is not to punish or compensate, although those aims are achievable by other means in the *Act,* or in conjunction with other sections of the *Act*.

[113] In my view, the suggestion that limiting the scope of s. 161(1)(g) conflicts with the *Act's* overarching protective goal erroneously conflates the discrete and recognized purposes of a s.161(1)(g) "disgorgement" order with the general purposes of the *Act* overall, which are achieved by the availability of the vast array of different enforcement tools employable in concert. This interpretation is not disharmonious with the remedial and protective nature of the *Act*. Instead, it recognizes that the *Act's* overarching goals are achieved by a host of specific measures, which themselves may have different purposes and be informed by different principles (e.g., punishment, compensation, specific and general deterrence, removal of incentives for non-compliance, etc.). Indeed, the Commission's public interest jurisdiction is not punitive, as the Court noted in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37:

> [42] … I agree with Laskin J.A. [(1999), 43 O.R. (3d) 257] that "[t]he purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets" (p. 272). … It is also consistent with the objective of regulatory legislation in general. The focus of regulatory law is on the protection of societal interests, not punishment of an individual's moral faults…

[114] I agree with Vice Chair Cave that where a s. 161(1)(g) order is made to require someone to pay an amount to the Commission that person did not obtain, the only purpose of such a payment is punishment or compensation. It is not to surrender ill-gotten amounts because the amounts surrendered were not obtained in

the first place. See also *Limelight* at para. 63, where the Ontario Securities Commission recognized that "it would be unfair and inconsistent with the principles underlying the disgorgement remedy for the aggregate amount ordered to be disgorged by Canadian securities regulators or courts to exceed the amounts obtained by [the respondents] from investors."

[115] Finally, I turn to whether s. 161(1)(g) permits a joint and several order.

Joint and Several Orders

[116] The appellants rely on *Cinar Corporation v. Robinson*, 2013 SCC 73, which addressed disgorgement of profits under s. 35 of the *Copyright Act*, R.S.C. 1985, c. C-42, the relevant part of which reads:

> 35 (1) Where a person infringes copyright, the person is liable to pay…such part of the profits that the infringer has made from the infringement and that were not taken into account in calculating the damages as the court considers just.

[117] The appellants submit that *Cinar* stands for the proposition that disgorgement orders, which are not intended to compensate, cannot be made on a "solidary" or "joint and several" basis. They rely on the following passage from *Cinar*:

> [86] … Disgorgement of profits under s. 35 is designed mainly to prevent unjust enrichment, although it can also serve a secondary purpose of deterrence: *Vaver* [*Intellectual Property Law: Copyright, Patents, Trade-marks*, 2d ed. (Toronto: Irwin Law, 2011)], at p. 650. It is not intended to compensate the plaintiff. This remedy is not subject to the principles that govern general damages awarded under Quebec's law of extra-contractual liability, whose aim is compensatory. Consequently, solidarity of profits ordered disgorged under s. 35 of the *Copyright Act* cannot be inferred from art. 1526 of the *CCQ* [*Civil Code of Québec*, S.Q. 1991, c. 64], which makes co-authors of a fault solidarily liable for the "obligation to make reparation for injury caused to another".
>
> [87] Disgorgement under s. 35 of the *Copyright Act* goes no further than is necessary to prevent each individual defendant from retaining a wrongful gain. Defendants cannot be held liable for the gains of co-defendants by imposing liability for disgorgement on a solidary basis.
>
> [Emphasis in original.]

[118] The Executive Director argues *Cinar* is distinguishable because s. 35 of the *Copyright Act* includes the clause "profits that the infringer has made", whereas

s. 161(1)(g) does not expressly state *who* obtained the amounts. Further, the Executive Director argues s. 35 deals with civil liability in the copyright context, where, unlike the securities context, there is no public interest concern.

[119] In my view, the Executive Director reads too narrowly the Supreme Court's reasoning in *Cinar.* I consider the decision in *Cinar* to be authoritative on this issue. While s. 35 of the *Copyright Act* expressly refers to "profits", the reasoning applies with necessary modifications to "amounts obtained". Further, although s. 35 uses the express words "that the infringer has made", as discussed above, it is clear and grammatically understood by the wording of s. 161(1)(g) that the amounts were obtained *by the person* who has failed to comply with or contravened the Act (in other words, the person who has "infringed" the Act).

[120] More importantly, I read *Cinar* as standing for broader principles on the nature of the disgorgement remedy. That a wrongdoer may not benefit from wrongdoing (a theme first developed in equitable jurisprudence on unjust enrichment) is a basic legal principle. It is one of fairness and justice. The Executive Director argues the copyright context does not admit of "any public interest" consideration. However, while the presence of public interest informs the Commission's decisions, it cannot expand the *Act's* permissible scope of what the Commission may do. The public interest is not unlimited. In my opinion, disgorgement may not go further than required to prevent each wrongdoer from retaining an amount obtained, directly or indirectly, as a result of the wrongdoing. Nor does deterrence require more.

[121] The Executive Director submits that a person who contravenes the *Act* ought not to benefit from the complexity and sophistication of their illicit schemes, and cites *Re Samji*, 2015 BCSECCOM 29 at para. 42, where the Commission said, "respondents always bear responsibility for any uncertainty with respect to the amount retained by them. It is not in the public interest that they benefit from any such uncertainty."

[122] The Executive Director also notes the comment of the United States Court of Appeal for the District of Columbia Circuit that "you can't reward complicated

byzantine frauds that by their very nature conceal paper and money trails": *SEC v. Whittemore*, 659 F.3d 1 at 6; 198 U.S. App. D.C. 67; 2011 U.S. App. LEXIS 21907.

[123] I agree with these observations. As noted earlier, securities regulation statutes are remedial and protective in nature, and therefore should be construed in a manner sensitive to economic reality. The economic reality is that the increased complexity of schemes and transactions – and the Executive Director points to a few examples – may make it difficult, if not impossible, to trace exact funds from a contravention into the pockets of the wrongdoer. But tracing is not required: *Re Manna Trading Corp Ltd.,* 2009 BCSECCOM 595 at para. 43.

[124] The Commission's decisions on this point often refer to *Limelight* as an articulation of seminal propositions. In that case, a joint and several disgorgement order was ultimately made against two of the individuals (Da Silva and Campbell) and the corporation they directed and controlled. In particular, the Ontario Securities Commission found the two individual respondents were the directing minds of the corporation (Limelight) and commented:

> [59] Da Silva and Campbell were the directing minds of Limelight; they were directly involved in breaches of the Act by Limelight and its salespersons … and they were aware of and authorized, permitted or acquiesced in all such breaches. Da Silva and Campbell were also the principal shareholders of Limelight. In our view, individuals should not be protected or sheltered from administrative sanctions by the fact that the illegal actions they orchestrated were carried out through a corporation which they directed and controlled. In this case, Limelight, Da Silva and Campbell acted in concert with a common purpose in breaching key provisions of the Act.

[125] The Executive Director here, for example, submits the Poonians and Sihotas were each found to have been "directly involved in and contributed to" the market manipulation scheme (*Poonian Sanctions* at paras. 82-83). This finding is not challenged on appeal. Therefore, the Executive Director contends they all acted in concert with the common purpose of perpetrating the manipulation scheme, which supports the propriety of a joint and several disgorgement order against them, as was the case in *Limelight*.

[126] I cannot agree. In my view, the result reached in *Limelight* was driven by the finding that the two individuals *directed and controlled* the corporate entity. This distinction is buttressed by the fact the third individual respondent, who had no such role in the corporation, was not part of the joint and several disgorgement order. Respondents cannot be held jointly and severally liable for a s. 161(1)(g) order purely on the basis they acted in concert with the common purpose of breaching the Act. This is because the language of s. 161(1)(g) requires the disgorged amount to be obtained, directly or indirectly, by the person. Acting jointly is not synonymous with obtaining amounts, directly or indirectly. As I will explain below, however, having direction and control over another respondent or entity may constitute indirect obtainment.

[127] The Executive Director also urges this Court to follow the Ontario Divisional Court's recent decision in *Phillips v. Ontario Securities Commission*, 2016 ONSC 7901. In that case, the appellants had argued that it was not open to the Ontario Securities Commission to order disgorgement on a joint and several basis against individuals who did not obtain the funds ordered to be disgorged where the corporate entity that actually obtained those funds was not named as a respondent before the Ontario Securities Commission. In discussing the Commission's decision, the court said this:

> [65] The Appellants submit that it was unreasonable for the Commission to have ordered the Appellants to disgorge amounts that were not obtained by them personally and were obtained by entities that were not named as respondents in the proceeding. In this case, the amounts were invested with FLG entities and the FLG entities in question were not named respondents in the proceeding. In its Sanctions Decision, the Commission accepted that Commission staff chose not to name these entities as they were all parties to a court-supervised *CCAA* wind-up and staff wished to avoid depleting these entities' assets.
>
> [66] In its Sanctions Decision, the Commission addressed the Appellants' argument and rejected it. Relying on several past decisions, the Commission found that "the Commission's authority to order disgorgement is not limited to ordering an individual respondent to disgorge amounts he or she obtained personally" (Commission Sanctions Decision, at para. 29) and that the Commission had the authority to order the Appellants "to disgorge the funds obtained in contravention of the Act in circumstances where the FLG entities that ultimately received the funds are not respondents in [the] proceedings" (at para. 30). The Commission concluded (at para. 54) that a disgorgement

> order was "appropriate in these circumstances because ascertainable amounts have been obtained as a result of the non-compliance of the [Appellants] with Ontario securities law and such an order will deter the Respondents and other market participants from similar conduct."

After reviewing certain cases, the court concluded:

> [78] What this review establishes is that the Commission's decision that it had the authority to order disgorgement was consistent with the plain wording of the legislation, the purpose of the legislation and prior case law.
>
> [79] As already noted, the Commission concluded that Mr. Phillips should disgorge $16,587,254, representing the full amounts raised by him and others under his supervision and direction, and that Mr. Wilson should disgorge $7,817,739, representing the amounts Mr. Wilson personally raised from investors. Both amounts factor in the paid and pending distributions to investors from the court-supervised wind-up. In making these orders, the Commission considered the following facts:
>
> …
>
> [80] The Commission's decision fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" and the reasons given were justifiable, transparent and intelligible (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47).

Given my determination of the applicable standard of review in the three appeals before us, I do not consider *Phillips* helpful.

[128] In my view, the practical difficulty posed by a complex scheme is addressed in two ways. First, the Legislature chose to modify the words "any amount obtained" by the adverbs "directly or indirectly" (these words are absent from the Ontario statute's corresponding section).

[129] Secondly, securities jurisprudence has applied s. 161(1)(g) to require the Executive Director only to prove on a balance of probabilities a "reasonable approximation" of the amount obtained by the wrongdoer as a result of that wrongdoer's contravention or failure to comply. Once that onus is met, the burden shifts to the wrongdoer to disprove the reasonableness of the amount. Importantly, ambiguity or uncertainty in the calculations is resolved in favour of the Executive Director: see *Limelight* at para. 48; *SPYru* at paras. 139–140; *Re Zhong,* 2015 BCSECCOM 383 at paras. 51–52; *Schmidt* at para. 66; *Streamline* at paras. 99-100

(Vice Chair Cave in dissent). I will discuss both of the ways in which more complicated schemes are addressed, turning first to "directly or indirectly".

"Directly or indirectly"

[130] In establishing the link between the "amount obtained" and the person subject to the order by using the words "directly or indirectly", the Legislature ensured the purpose of s. 161(1)(g) was not frustrated by difficulties presented by complex schemes. As stated, "directly or indirectly" modifies "obtain".

[131] In my view, the use of these explicit words indicates that the amount need not be obtained directly by the person who has contravened the *Act* (who is also the person against whom the order to pay is made). In addition, it could be obtained *indirectly*. By using those words, the Legislature intended "amount obtained" to capture amounts the wrongdoer obtained through indirect means (e.g., through agents, nominees, *alter egos)*, as opposed to direct means (i.e., where the money is received directly into that wrongdoer's "pockets" or accounts). This is especially operative in certain types of wrongdoing such as illegal distributions (e.g., non-exempt trading without prospectus or registration) where, by the nature of the activity (fundraising), the money flows not to the wrongdoer (e.g., the promoter), but to some other entity (e.g., the corporate issuer of securities). If s. 161(1)(g) is to function properly and achieve its goal of deterrence by the divesting of ill-gotten amounts, then the amounts obtained by the issuer must also be capable of being disgorged.

[132] The Commission's decision in *Michaels* is an example of where the amount obtained was obtained indirectly. Michaels obtained amounts through a corporate entity that was, as stated by Vice Chair Cave in *Streamline*, Michaels' corporate *alter ego*. It was the vehicle Michaels used to receive (obtain) the funds from his wrongdoing.

[133] The interposition of the corporate vehicle did not prevent s. 161(1)(g) from operating to require Michaels to disgorge the amount he and his *alter ego* obtained. In essence, I agree with Vice Chair Cave's comment in *Streamline* that they were

effectively one person. That conclusion is not based only on a finding of "effective personhood". Such an order is supportable by the express language of s. 161(1)(g) and, in particular, the adverbs "directly or indirectly", as well as the purpose of s. 161(1)(g), the *Act*, and the requirement that statutory construction be sensitive to economic reality.

[134] Using a corporate *alter ego* is but one example of a mechanism a wrongdoer may employ to indirectly obtain funds from wrongdoing. It is impossible to imagine and enumerate the wide variety of tactics wrongdoers may use to do so. The critical element is that the wrongdoer and the person with whom he or she is held jointly and severally liable were, in effect, acting as one person. This may occur, in another example, where one wrongdoer directs and controls the accounts of numerous other persons, and effectively has direction and control over the activity and assets in those accounts (e.g., using nominee accounts).

[135] Yet another example may arise where the wrongdoer instructs the person providing the amount to pay the amount to someone else instead of to the wrongdoer, with that "nominee recipient" essentially holding the amounts for the wrongdoer. This may especially be the case where the recipient is closely related to the wrongdoer, such as a spouse or partner: see e.g., *Zhong* at paras. 16–17; see also, *Streamline* at para. 91 (Vice Chair Cave in dissent). Whether someone is acting just as a "nominee" or as an active participant in the scheme depends on the nature and degree of the person's direction and control, and culpability, which are properly matters of fact for determination by the Commission.

[136] The Commission adopted similar reasoning in *Re Sabourin*:

> [70] Having considered the relevant factors, we will order that Sabourin and the Corporate Respondents disgorge $27,900,000, on a joint and several basis. That amount represents the up to $33.9 million obtained by Sabourin and the Corporate Respondents from investors less the amount of $6 million that appears to have been returned to investors (paragraphs 176 and 177 of the Merits Decision). We impose joint and several liability on Sabourin and the Corporate Respondents because, as stated in the Merits Decision, Sabourin was the directing and controlling mind of the Corporate Respondents and it would be impossible to treat them separately (paragraph 187 of the Merits Decision). As stated at paragraph 370 of the Merits

> Decision, Sabourin concocted and orchestrated the investment schemes. Because of our view that the Individual Respondents are less culpable than Sabourin and the Corporate Respondents and played distinct roles in the investment schemes, we will not order that any of the Individual Respondents pay, on a joint and several basis, the amounts we order disgorged by Sabourin and the Corporate Respondents.
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> [Emphasis added.]

[137] I recognize it is not the role of this Court to lay down rigid rules on how to identify or capture illicit financial behaviour and transactions. That expertise lies with the Commission. If the Commission is inclined to make a s. 161(1)(g) order jointly and severally, it is for the Commission to inquire into and determine, as a matter of fact, whether there is sufficient direction and control between, or of, the two or more persons or entities, such that a joint and several order is essentially only requiring the person who failed to comply to pay amounts he or she obtained, albeit indirectly.

[138] The Commission may also decide what amount to order under s. 161(1)(g), and in certain circumstances, may order an amount different from the total amount obtained. This was expressed in *Michaels*:

> [35] Other Commission decisions, including *Oriens* (as it dealt with the other individual respondent, Anderson), and *Pacific Ocean Resources Corporation and Donald Verne Dyer*, 2012 BCSECCOM 104, demonstrate that in other circumstances it may be inappropriate to make a section 161(1)(g) order in the total amount obtained. Where a party to a contravention of the Act does not control the issuer of the securities, has not been equally culpable with another respondent, or the funds obtained have clearly gone to a third party, the Commission may issue a section 161(1)(g) order in an amount less than the full amount obtained through contraventions of the Act.
>
> [Emphasis added.]

Ordering an amount less than the full amount obtained is, of course, permissible on a plain reading of s. 161(1)(g). The amount does not need to be the total, but it may be "any" amount obtained. The passage from *Michaels* also confirms "control" as a relevant consideration.

"Reasonable approximation" and Shifting Burden of Proof

[139] The limits on joint and several orders that I have described also do not unduly hinder the Commission's ability to carry out its public interest mandate and ensure wrongdoers do not retain any ill-gotten amounts from complex or opaque schemes. While the onus of proof is on the Commission to establish the wrongdoer has obtained an amount, and that the amount was obtained as a result of the contravention, the required standard of proof is not certainty. Instead, the Executive Director is required to prove a "reasonable approximation" of the amount obtained; then the burden shifts to the wrongdoer to disprove the reasonableness of that amount: *SPYru* at paras. 139–140; *Zhong* at paras. 51–52. I agree with Vice Chair Cave's analysis at paras. 99–100 of *Streamline* (in dissent):

> [99] Both the ASC and OSC have adopted the US approach that the [*sic*] once the executive director provides evidence, consistent with the principles described above, of an "approximate" amount of disgorgement then the burden shifts to the respondent to disprove the reasonableness of the number: *Limelight*, paragraph 48; *Schmidt (Re)*, paragraph 66. I agree with this approach.
>
> [100] In order to assess the reasonableness of the number, it is necessary to assess whether the proceeds of an illegal distribution were generally used to the benefit of the investors (i.e. in furtherance of their investment objectives) or whether they were used to the benefit of the respondents (i.e. ill-gotten benefits). Where funds were used for the benefit of investors it would be inappropriate to make a disgorgement order for those funds.

[140] This approach goes a significant distance to ensure that a sanction is not frustrated by the complexity of the wrongdoing or the wrongdoer's intentional masking of their activities. It also permits flexibility for the Commission. The degree of latitude in determining whether an approximation is "reasonable" would depend on the circumstances, including the complexity or opacity of the scheme. As noted above, any ambiguity or uncertainty in calculations would be resolved against the wrongdoer whose wrongdoing created the uncertainty. Thus, the latitude or scope of what is reasonable would expand with the degree of complexity of the scheme. Most importantly, this approach respects the wording of the statute, which, for the reasons

explained above, requires proof that the amount was obtained by the person who contravened the *Act*.

[141] The Executive Director has expressed concern that reasonably foreseeable cases may arise where the interpretation described would be unduly restrictive and insufficient to capture complex opaque schemes of wrongdoers acting in concert with a common purpose in breaching the *Act*.

[142] In my opinion, on the language as it is now, the elasticity of the burden of proof is such that it will permit the acquisition of information sufficient to impose a disgorgement order consistent with these reasons. I observe that there remain also an array of other financial and compliance tools available under the *Act* to address schemes of wrongdoing. Ultimately, the Legislature determines the tools available to address non-compliance with the *Act*.

Summary

[143] To summarize, the following principles emerge from the discussion above:

1. The purpose of s. 161(1)(g) is to deter persons from contravening the *Act* by removing the incentive to contravene, i.e., by ensuring the person does not retain the "benefit" of their wrongdoing.

2. The purpose of s. 161(1)(g) is not to punish the contravener or to compensate the public or victims of the contravention. Those objectives may be achieved through other mechanisms in the *Act*, such as the claims process set up under Part 3 of the *Securities Regulation* or the s. 157 compliance proceedings in the *Act*.

3. There is no "profit" notion, and the "amount obtained" does not require the Commission to allow for deductions of expenses, costs, or amounts other persons paid to the Commission. It does, however, permit deductions for amounts returned to the victim(s).

4. The "amount obtained" must be obtained *by that respondent*, *directly or indirectly*, as a result of the failure to comply with or contravention of the *Act*. This generally prohibits the making of a joint and several order because such an order would require someone to pay an amount that person did not obtain as a result of that person's contravention.

5. However, a joint and several order may be made where the parties being held jointly and severally liable are under the direction and control of the contravener such that, in fact, the contravener obtained those amounts *indirectly*. Non-exhaustive examples include use of a corporate *alter ego*, use of other persons' accounts, or use of other persons as nominee recipients.

Application

[144] I now turn to apply these principles to the three appeals before this Court. I agree with and adopt the two-step approach identified by Vice Chair Cave in *SPYru* at paras. 131–32:

> [131] The first step is to determine whether a respondent, directly or indirectly, obtained amounts arising from his or her contraventions of the Act. This determination is necessary in order to determine if an order can be made, at all, under section 161(1)(g).
>
> [132] The second step of my analysis is to determine if it is in the public interest to make such an order. It is clear from the discretionary language of section 161(1)(g) that we must consider the public interest, including issues of specific and general deterrence.

[145] In my view, this approach accords with the words of the provision. Of course, the second step is not at issue here, as the determination of whether it is in the public interest to make an order is a decision for the Commission, with its expertise. The concern here is whether the requirements of the first step are satisfied.

Poonians/Sihotas

[146] The Commission found that the "amount obtained" was the aggregate net trading gain in the accounts of the Poonians, Sihotas, and the Secondary

Participants. The appellants challenge this finding. They argue that the Commission was required to make a finding that each of Mr. and Mrs. Poonian and Mr. and Mrs. Sihota obtained, personally, some amount, directly or indirectly, and that a disgorgement order may only be made against each of them severally for their specific amount.

[147] In my view, the Commission's finding that the aggregate net trading gain is the "amount obtained" is sound. The Commission assessed the evidence before it and concluded the relevant trading accounts were, essentially, enriched (in the aggregate) by approximately $7.3 million. It is also uncontested that this amount resulted from the purchase and sale of OSE shares at prices inflated by the Poonians and Sihotas' manipulation.

[148] Although the Commission made findings as to the degrees of involvement of each of the Poonians and Sihotas, the difficulty is that it made no finding that each of these four individuals obtained amounts *personally*. Furthermore, the Commission found that each of these four individuals participated and contributed to the manipulation scheme in different ways, with varying degrees of culpability, but made no finding as to the existence or degree of direction and control required for a finding as to whether any individual *indirectly* obtained an amount.

[149] The problem is that the order holds all four individuals jointly and severally liable for the full amount. As discussed above, a joint and several order is generally not permitted under s. 161(1)(g), the concern being that a person would be ordered to disgorge an amount that person did not obtain directly or indirectly.

[150] The scheme in question involved controlling and directing trading in a number of accounts to realize the aggregate net trading gain. It involved making payments to others to facilitate some of those sales.

[151] The Commission has before it the trading records of all the relevant accounts. Some accounts belong to the Sihotas or the Poonians. It is clear that portions of the aggregate net trading gain in those accounts were "obtained" by those account

holders. The issue is, what portions of the aggregate net trading gain in accounts of *other* persons can be properly found to have been obtained directly or indirectly by any of the Poonians or Sihotas?

[152] In my view, the Commission must determine whether amounts in those other accounts were, effectively, obtained *indirectly* by one or more of the appellants in that one or all of the Poonians and Sihotas had control and direction over those accounts. If such control and direction were established, there would then be a finding that the portion of the aggregate net trading gain in those accounts was obtained *indirectly* by that person. Therefore, that person could be properly held liable for those amounts. Again, this answers the Commission's concerns expressed in *Wong* (at para. 90), as quoted in para. 105 above. This is a factual finding this Court cannot and should not make.

[153] The Executive Director argues such apportionment is problematic because "[i]f such a determination can be made, it may well be only within the specific and unique knowledge of the respondents themselves." In my view, the fact-finding exercise falls within the Commission's province, and as explained above, the Commission does not have to determine the proportions to a certainty. The amount each person obtained directly or indirectly just needs to be "reasonably approximate". The onus is then on that person to show why such an amount (or apportionment) is not reasonable. Any uncertainty in the calculations is resolved in favour of the Executive Director, since a wrongdoer should not benefit from any ambiguity arising from his or her misconduct. Although not at issue in these appeals, I think it clear that such determinations are factually-driven, within the Commission's expertise, and would attract deference on review: *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 at para. 23.

Lathigee

[154] Lathigee and Pasquill were held jointly and severally liable, with FIC Group entities, for the amounts raised from the fraudulent offerings.

[155] They argue the amounts were obtained by the corporate entities, not by them personally, and that some funds were used for their intended purpose.

[156] Lathigee and Pasquill distinguish *Michaels*, in part, on the basis that the corporate entity in that case was created specifically for the fraudulent purpose. However, they note their corporate group (FIC) pre-existed the fraudulent transactions and did initially carry on legitimate operations and investments. I do not agree that this is a meaningful distinction.

[157] Whether the corporate entity was initially created for a fraudulent purpose or later became a vehicle for fraud does not change the fact that the corporate entity, controlled and directed by the individual wrongdoers, was a vehicle for fraud. The critical finding is that these entities obtained funds as a result of the fraud, and the individuals controlling and directing them received the funds *indirectly.*

[158] Lathigee and Pasquill also contend that some of the funds fraudulently raised were used for their intended purpose (i.e., invested in the advertised opportunities). I cannot sustain this argument. While some of the funds may have been used for their intended purpose, the fact they were raised by fraudulent misrepresentations or omissions is what constitutes the contravention.

[159] As to the receipt of the funds by the corporate, and not the personal, entities, this argument founders when one considers the economic reality of raising capital. It is the nature of fraudulent fundraising that funds raised are received (obtained) by the corporate vehicle, and not the personal fraudster. Indeed, the entire transaction is the exchange for money of securities of the issuer. The money goes to the issuer, not to the individual. An interpretation sensitive to economic reality would hold jointly and severally liable the fraudster and the vehicle he was found to have directed and controlled for the amounts they received because the fraudster had indirectly received those funds.

[160] The Commission found as a fact that Lathigee and Pasquill had jointly directed and controlled the relevant FIC Group entities that raised (obtained) the

money: *Lathigee Liability* at para. 5. This factual finding is not challenged on appeal, and I see no reason to disturb it.

[161] Therefore, the Commission found that each of Lathigee and Pasquill had "obtained" the offering "amount", albeit indirectly through certain FIC Group entities they directed and controlled. This accords with the decision in *Michaels* because Lathigee and Pasquill and their corporate entities were "effectively one person".

[162] On that basis, I consider it was appropriate and within the scope of s. 161(1)(g) to make the joint and several order for the full offering amount.

Disposition

[163] Subsection 167(3) of the *Act* provides:

> (3) If an appeal is taken under this section, the Court of Appeal may direct the commission to make a decision or to perform an act that the commission is authorized and empowered to do.

[164] For the reasons explained, I would allow the appeals in CA42514 (*Poonian*) and CA42515 (*Sihota*) and set aside the s. 161(1)(g) orders made against those appellants.

[165] Pursuant to s. 167(3), I would remit the Poonians and Sihotas' matter to the Commission to assess the evidence already before it to make the necessary factual findings as to whether a s. 161(1)(g) order should be made against each of them. In my view, it is incumbent on the Commission and properly within its expertise to make determinations as to the conduct of each person, the existence, if any, of each person's direction and control over accounts containing the "amounts obtained", and on balance, what proportion of the amount obtained (aggregate net trading gain) can properly be found as having been directly or indirectly obtained by each person. Of course, it is also for the Commission to determine whether it is in the public interest to make any order under s. 161(1)(g).

[166] To be clear, leave to appeal in all these cases was only granted with respect to the s. 161(1)(g) orders, and only those orders are set aside. All other sanctions imposed on the appellants are not before this Court and remain undisturbed.

[167] I would not disturb the s. 161(1)(g) order made in the Lathigee appeal. I would dismiss that appeal (CA42518).

"The Honourable Madam Justice MacKenzie"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Mr. Justice Fitch"

JAX126

Exhibit C

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JAX126

ALVERSON TAYLOR & SANDERS
KURT R. BONDS, ESQ.
Nevada Bar #6228
MATTHEW M. PRUITT, ESQ.
Nevada Bar #12474
6605 Grand Montecito Parkway
Suite 200
Las Vegas, Nevada 89149
(702) 384-7000
efile@alversontaylor.com
Attorneys for Plaintiff

DISTRICT COURT

CLARK COUNTY, NEVADA

-*-

BRITISH COLUMBIA SECURITIES COMMISSION, Plaintiffs, vs. MICHAEL PATRICK LATHIGEE, Defendant.	CASE NO.: A-18-771407-C DEPT. NO.: XIV **PLAINTIFF'S NRCP 16.1(a)(2) EXPERT DISCLOSURES**

Plaintiff, BRITISH COLUMBIA SECURITIES COMMISSION ("BCSC"), by and through its counsel of record, ALVERSON TAYLOR & SANDERS, hereby submits its Expert Disclosures by producing the following documents and list of witnesses pursuant to NRCP 16.1(a)(2) as follows:

I.

LIST OF EXPERT WITNESSES

REBUTTAL EXPERTS

(1) Gordon R. Johnson
Borden Ladner Gervais LLP
1200 Waterfront Centre
200 Burrard St, P.O. Box 48600
Vancouver, BC, Canada V7X 1T2
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F 604-622-5817
gjohnson@blg.com

KB/25513

Mr. Johnson will testify regarding his background and experience regarding the subject matter of his opinion, and his qualifications regarding the same. He will also testify regarding his review of the records in this matter, including, but not limited to, the declaration of Patrick J. Sullivan. He will also testify regarding his opinions as expressed in his expert reports.

II.

LIST OF DOCUMENTS

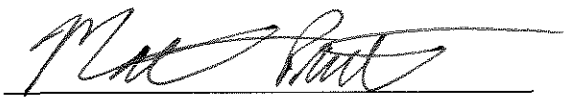
1. Exhibit A;

   - Expert report prepared by Mr. Gordon R. Johnson
   - Mr. Gordon R. Johnson Curriculum Vitae

Plaintiff reserves the right to use any document identified by any other party to this action and reserves the right to supplement this list of documents as discovery is ongoing.

DATED this 15th day of August, 2018.

ALVERSON TAYLOR & SANDERS



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(702) 384-7000
Attorneys for Plaintiff

CERTIFICATE OF SERVICE VIA CM/ECF

I hereby certify that on this 15th day of August, 2018, I did serve, via Case Management/Electronic Case Filing, a copy of the above and foregoing PLAINTIFF'S NRCP 16.1(a)(2) EXPERT DISCLOSURES addressed to:

ALVERSON TAYLOR & SANDERS
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6605 GRAND MONTECITO PARKWAY, SUITE 200
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2505 Anthem Village Drive, Suite E599
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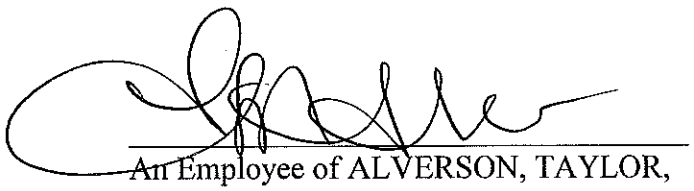

An Employee of ALVERSON, TAYLOR, MORTENSEN & SANDERS

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Exhibit A

JAX130

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Borden Ladner Gervais

August 13, 2018

Delivered by Email

Lawson Lundell LLP
Suite 1600 Cathedral Place
925 West Georgia Street
Vancouver, BC V6C 3L2

Attention: Mr. William L. Roberts

Dear Sir:

Re: Expert Opinion re: Declaration of Patrick J. Sullivan

I have been asked to review the opinion of Patrick Sullivan contained in his letter of July 9, 2018. To the extent my own opinion differs I have been asked to explain that in this letter, and to provide the basis and reasons for my opinions.

In compensation for my analysis and preparation of this letter, I expect that my fees will be slightly less than CAD $10,000.00. If I am called upon to testify at depositions or trial, my rate for such work is $600.00 per hour.

I have not provided any form of testimony as an expert in the past four years.

My Qualifications

I received my law degree from the University of British Columbia in 1985. After that I was a Clerk with the British Columbia Court of Appeal during the 1985-86 term. During the summer of 1986 I worked as a Research Intern in Ottawa with the Law Reform Commission of Canada. My assignment was to assist in the Commission's Criminal Code reform project by researching and commenting on the Criminal Code provisions related to securities offences.

In the fall of 1986 I began my articles with the Vancouver based law firm Ladner Downs. I remained with that firm, initially as an associate and then as a partner. In 2000 Ladner Downs merged with other firms to become Borden Ladner Gervais LLP, a firm with significant offices in Montreal, Ottawa, Toronto, Calgary and Vancouver. I am a partner in that firm.

Early in my career our firm became the lead enforcement counsel for what was then the Vancouver Stock Exchange (the "**VSE**") The VSE then operated its own enforcement processes. I became one of the external enforcement counsel for that exchange. In that capacity I had conduct of approximately a dozen enforcement hearings, several appeals to the British Columbia

Securities Commission, one appeal to the British Columbia Court of Appeal and many dozen other proceedings that settled before a final hearing.

After the VSE merged with the Alberta Stock Exchange and its head office function moved to Alberta, I began to represent respondents in securities industry disciplinary hearings. I also began to represent investment dealers and advisors in liability claims and, at times, I was retained by self-regulatory organizations in the securities regulatory field to conduct disciplinary proceedings on an ad hoc basis. I have also represented various banks, fund managers, public companies and individuals in responding to regulatory concerns in the securities industry, frequently in response to proceedings initiated by the British Columbia Securities Commission.

I am familiar with the securities regulatory framework in Canada and specifically in British Columbia. My work experience has included a significant focus on securities law and regulation almost continuously for over 30 years.

A copy of my current Curriculum Vitae is attached.

Mr. Sullivan's Opinion

I have reviewed Mr. Sullivan's opinion. I accept his factual assumptions. I agree that the range of data and information he has considered is reasonable, and I have considered the same sources, excluding the complaint in the Nevada proceeding, which I did not review. Excluding Mr. Sullivan's summary of his opinions at page one of this letter and subject to minor issues that are largely questions of nuance, I agree with Mr. Sullivan up to about the middle of page 5 of his opinion. From there forward I disagree with the opinions he expresses in his letter.

It is my impression that Mr. Sullivan's opinion includes an implicit focus on the impact of Section 161(1)(g) remedy on Mr. Lathigee. Certainly I agree the impact of the remedy is significant in that the order in question requires Mr. Lathigee to pay $21,700,000 Canadian without proof that Mr. Lathigee personally received that amount. Where my opinion diverges from that of Mr. Sullivan relates to where the analysis should focus. It is my opinion that under the laws applicable in British Columbia in the securities law context the classification of a remedy as a penalty or otherwise is determined by reference to the purpose of the remedy in question. This opinion is well supported in the decision of the British Columbia Court of Appeal in *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207.

In the *Poonian* decision, our Court of Appeal makes it clear that its reasoning applies regardless of whether the Section 161(1)(g) remedy is imposed against a respondent who personally and directly obtained amounts or against a respondent who obtained amounts "indirectly". In this case the finding was that the amounts in question were received indirectly by Mr. Lathigee because the funds resulted from the fraud which had been proven and flowed to one or more corporate entities which Mr. Lathigee and Mr. Pasquill were controlling and directing (see paragraphs 157 to 159 of *Poonian*).

The British Columbia Court of Appeal expresses the purpose of the Section 161(1)(g) remedy most clearly at paragraph 111 of the *Poonian* decision. There the Court makes it clear that the

purpose is not to punish or to compensate. The purpose of the remedy is to deter non-compliance by removing the prospect of receiving and retaining moneys from non-compliance.

I agree with Mr. Sullivan that one of the purposes of imposing a penalty is deterrence. But I do not agree this means every remedy which includes a deterrent intent is a penalty and I believe this is clear from the reasoning of the British Columbia Court of Appeal in *Poonian*.

There are several other portions of the *Poonian* decision which, in my opinion, support my conclusion that the Section 161(1)(g) remedy is not a penalty under British Columbia law. I include some of those paragraphs below:

> [112] Section 161(1)(g) must be read in the context of its neighbours in ss. 161 and 162. As Stratas J.A. put it in *Burchill v. Canada*, 2010 FCA 145 (CanLII) at para. 11, referring to the *Income Tax Act,* R.S.C., 1985, c. 1 (5th Supp.), "Subsection 56(1)(a)(i) does not stand in splendid isolation in the Act; rather, it is part of an interconnected web of provisions." Section 161(1)(g) must be recognized as one in a list of enforcement tools open to the Commission. The Commission has a broad arsenal of sanctions to enable it to discharge its public interest mandate. Each tool, however, takes a specific form to achieve a specific purpose. Disgorgement is a specific tool, and the Commission must not, in the name of the public interest, use that tool in such a way as to extend it beyond its specific, permissible purpose. Its purpose is to prevent wrongdoers from retaining amounts obtained from their wrongdoing. It is not to punish or compensate, although those aims are achievable by other means in the *Act,* or in conjunction with other sections of the *Act*.
>
> [113] In my view, the suggestion that limiting the scope of s. 161(1)(g) conflicts with the *Act's* overarching protective goal erroneously conflates the discrete and recognized purposes of a s.161(1)(g) "disgorgement" order with the general purposes of the *Act* overall, which are achieved by the availability of the vast array of different enforcement tools employable in concert. This interpretation is not disharmonious with the remedial and protective nature of the *Act*. Instead, it recognizes that the *Act's* overarching goals are achieved by a host of specific measures, which themselves may have different purposes and be informed by different principles (e.g., punishment, compensation, specific and general deterrence, removal of incentives for non-compliance, etc.). Indeed, the Commission's public interest jurisdiction is not punitive, as the Court noted in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 (CanLII):
>
> > [42] ... I agree with Laskin J.A. [(1999), 1999 CanLII 7316 (ON CA), 43 O.R. (3d) 257] that "[t]he purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets" (p.

> 272). ... It is also consistent with the objective of regulatory legislation in general. The focus of regulatory law is on the protection of societal interests, not punishment of an individual's moral faults...
>
> [114] I agree with Vice Chair Cave that where a s. 161(1)(g) order is made to require someone to pay an amount to the Commission that person did not obtain, the only purpose of such a payment is punishment or compensation. It is not to surrender ill-gotten amounts because the amounts surrendered were not obtained in the first place. See also *Limelight* at para. 63, where the Ontario Securities Commission recognized that "it would be unfair and inconsistent with the principles underlying the disgorgement remedy for the aggregate amount ordered to be disgorged by Canadian securities regulators or courts to exceed the amounts obtained by [the respondents] from investors."

I believe that by this language the Court of Appeal in *Poonian* was accepting the accuracy of the following reasoning from the British Columbia Securities Commission's decision in *Streamline Properties Inc. (Re)*, 2015 BCSECCOM 66 as follows:

> 92 Section 161(1)(g) should be read to refer to the financial benefits respondents continue to have at the time the order is made. Amounts returned to investors should be deducted from the amount of the disgorgement order.
>
> 93 This is consistent with the purpose of a disgorgement order, namely to deprive a respondent of wrongly obtained benefits. If an order requires disgorgement of a benefit a respondent no longer has, then it will not serve the purpose of removing wrongly obtained benefits, and instead will simply be a penalty.

I think our Court of Appeal has made it clear that the various enforcement remedies which might be imposed can and do have different purposes which are not limited to punishment of wrongdoers or compensation of victims. The "disgorgement" remedy has the purpose of removing the incentive for non-compliance. It is not a penalty.

Other Comments

There is a broad range of remedies that might be imposed under Section 161 of the *Securities Act*. These include, for example, submitting to a review of practices and procedures, cancellation of registration, orders prohibiting the dissemination of certain types of information to the public and a number of other remedies. From the perspective of a respondent, any remedy that is imposed will feel burdensome. Some of those remedies might have a very significant impact on a respondent, for example by depriving a respondent of an ability to earn an income in the field for which he or she has trained and qualified. But many of those remedies are not penalties, even

some of the very burdensome remedies. They are intended to be remedial and to protect the public.

I disagree with the suggestion that Section 161(1)(g) remedies are "penalties" because they occur in a phase of an administrative proceeding that is often called a sanctions hearing.

I disagree with the suggestion that because compensation is not the objective of Section 161(1)(g) therefor disgorgement is not an objective. Disgorgement and compensation are different concepts.

Conclusion

In conclusion, based on the analysis above, in my opinion Section 161(1)(g) of the *Securities Act* is not a penalty in British Columbia law.

Yours truly,

Borden Ladner Gervais LLP

by:

Gordon R. Johnson
GRJ/md
Encl.

JAX136

Borden Ladner Gervais

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Partner

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Corporate Commercial Litigation and Arbitration
Securities Litigation

EDUCATION / BAR ADMISSIONS

LLB, University of British Columbia, 1985

British Columbia, 1987

PROFESSIONAL INVOLVEMENT

Chair, The Advocates Society, British Columbia Advisory Board
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Co-Chair, BC Branch of the Canadian Bar Association, Civil Litigation Subsection, 2009-10

Treasurer, BC Branch of the Canadian Bar Association, Civil Litigation Subsection, 2010 - 2016

COMMUNITY INVOLVEMENT

Board Member, Vancouver Symphony Orchestra (VSO), 2008-2015

Board Member and Board Chair, VSO School of Music, 2011-present

Board Member, Vancouver United Football Club, 2011-2015

Board Member, Dunbar Soccer Association, 2008-11

Board Member, Vancouver Youth Soccer Association, 2009-11

HOBBIES

Men's soccer, player and manager, Dunbar Physio Dragons

Competitive canoeing, including Yukon River Quest 2017 (World's Longest Ultra-Marathon Canoe Race)

EXECUTIVE SUMMARY

Gordon Johnson is a Partner and the Chair of BLG's Professional Committee. Gordon has a commercial litigation practice that covers many topics. In addition to his experience with a broad range of commercial disputes, Gordon's background includes many years' experience in securities industry disputes, including both prosecuting and defending regulatory issues, defending investment claims and dealing with disputes between investment firms. Gordon also has particular experience in dealing with real estate disputes.

Before commencing practice, Gordon was a clerk with the British Columbia Court of Appeal, and a research intern with the Law Reform Commission of Canada. Since then, he has frequently appeared as counsel before the British Columbia Supreme Court, the British Columbia Court of Appeal, the British Columbia Securities Commission, and various other tribunals.

REPRESENTATIVE WORK

- *TELUS v. CDS and Mason Advisors* — represented the Canadian Depository Service in the British Columbia Supreme Court and the British Columbia Court of Appeal in a claim which determined the ability of beneficial shareholders to exercise shareholder rights through Canada's share depository system.
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- *Northern Securities Ltd. v. GLG Lifetech Inc.* — represented a public company in resisting a fee claim by its sponsor for acting as a sponsor in an application for a listing on the TSX.
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- Author, "The Collapsing Deal" chapter, *British Columbia Real Estate Practice Manual*, Continuing Legal Education Society of British Columbia (CLE BC), updated yearly 2001-2016.
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- Author, "Maximizing Examinations for Discovery," Insight Information Seminar on Litigation, Securities and Corporate Commercial Law, May 2008.
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- Martindale-Hubbell® BV® Distinguished™ 4.4 out of 5 Peer Review Rated.
- Recognized in the 2014 to present editions of *Benchmark Canada* as a "local litigation star" and "securities litigation star."

ABOUT BLG

Borden Ladner Gervais LLP (BLG) is a pre-eminent full-service, national law firm focusing on business law, commercial litigation and intellectual property solutions for our clients. With more than 750 lawyers, intellectual property agents and other professionals in six Canadian cities, BLG assists clients with their legal needs, from major litigation to financing and patent registration. For further information, visit blg.com

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Exhibit D

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DECL

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Counsel for Defendant,
Michael Patrick Lathigee

STATE OF NEVADA
EIGHTH JUDICIAL DISTRICT COURT AT CLARK COUNTY
Hon. Adriana Escobar, District Judge

BRITISH COLUMBIA SECURITIES COMMISSION, Plaintiff, — *vs.* — MICHAEL PATRICK LATHIGEE, Defendant.	Case No. A-18-771407-C {Dept. 14} **DECLARATION OF PATRICK J. SULLIVAN**

Patrick J. Sullivan, upon my oath, do declare as follows:

Attached hereto as Exhibit 1 is a full, true and correct copy of my Letter of July 9, 2018, which states my expert opinion in the above-captioned matter and the grounds therefore.

Further Declarant Sayeth Not.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

DATED this 9th day of July, 2018, by:

Patrick J. Sullivan

 JAX142

Exhibit 1

TAYLOR VEINOTTE SULLIVAN
BARRISTERS

July 9, 2018

VIA EMAIL

Riser Adkisson LLP
6671 S. Las Vegas Blvd.
Suite 210
Las Vegas, NV 89119

Attention: Jay Adkisson

Dear Mr. Adkisson:

Re: Expert Opinion

Introduction

I have been asked to provide an opinion on whether Enforcement Orders made pursuant to Section 161(1)(g) of the British Columbia *Securities Act* (the "BC *Securities Act*") involve the imposition of a fine or penalty.

In my opinion, an Enforcement Order under Section 161(1)(g) of the BC *Securities Act* does involve the imposition of a penalty. While I will develop this further below, in coming to my opinion, I took into account:

1. While commonly referred to as disgorgement orders, an Enforcement Order under Section 161(1)(g) of the BC *Securities Act* is not intended as a compensation mechanism. Rather, it is intended as an enforcement mechanism to ensure people convicted of securities violations in British Columbia pay any amount they obtain as a result of the BC *Securities Act*;

2. Compensation is dealt with elsewhere in the Act under different legislative provisions;

3. Section 161(1)(g) like the other sub-sections of Section 161(1), is intended to achieve deterrence.

Direct 604 484 2302 pjs@tvsbarristers.com
Suite 502 · 1168 Hamilton Street Vancouver BC V6B 2S2 Telephone 604 687 7007

 JAX142

Riser Adkisson LLP
July 9, 2018

Attention: Jay Adkisson

Factual Assumptions

In preparing my report, I have made the following factual assumptions:

1. On July 8, 2014, a Panel of the British Columbia Securities Commission (the "BCSC Panel") made findings, *inter alia*, that Mr. Lathigee breached the BC *Securities Act*;

2. On March 16, 2015, the same BCSC Panel (except for one panel member who had retired from the BC Securities Commission) issued a Sanctions Decision in relation to the liability findings it made in July 2014. In the sanctions decision, the BCSC Panel imposed the following sanctions against Mr. Lathigee:

    a) Pursuant to Section 161(1)(b) of the BC *Securities Act*, the BCSC Panel permanently barred Mr. Lathigee from trading in securities except (conditionally) through one account;

    b) Pursuant to Section 161(1)(d) of the BC *Securities Act*, the BCSC Panel permanently barred Mr. Lathigee from being a director or officer of an issuer except one owned by him or his immediate family;

    c) Pursuant to Section 161(1)(d) of the BC *Securities Act*, the BCSC Panel permanently barred Mr. Lathigee from acting as a promoter;

    d) Pursuant to Section 161(1)(d) of the BC *Securities Act*, the BCSC Panel permanently barred Mr. Lathigee from acting as a consultant or as management in a company engaged in the securities industry;

    e) Pursuant to Section 161(1)(d) of the BC *Securities Act*, the BCSC Panel permanently barred Mr. Lathigee from engaging in investor relations activity;

    f) Pursuant to Section 161(c) of the BC *Securities Act*, the BCSC Panel permanently barred Mr. Lathigee from relying on trading exemptions except to the extent necessary to trade in his own account;

    g) Pursuant to Section 161(1)(g) of the BC *Securities Act*, the BCSC Panel ordered Mr. Lathigee to pay to the Commission $21.7 million, being the total amount obtained, directly or indirectly, as a result of Mr. Lathigee's contraventions of the BC *Securities Act*; and

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h) Pursuant to Section 162 of the BC *Securities Act*, the BCSC Act ordered Mr. Lathigee pay an administrative penalty of $15 million.

3. On April 15, 2015, relying on Section 163(1) of the BC *Securities Act*, the BC Securities Commission registered the sanctions decision in the British Columbia Supreme Court. Section 163(1) allows the Securities Commission to file a decision with the BC Supreme Court. This does not involve an adjudication on the merits but is a registration process to facilitate the collection of monetary orders made by BCSC Panels;

4. In the context of Mr. Lathigee's case, filing the sanctions decision allowed the BC Securities Commission to use the mechanisms available in the civil court process to pursue the $15 million ordered to be paid by the BCSC Panel pursuant to Section 162 of the BC *Securities Act* and the $21.7 million ordered to be paid pursuant to Section 161(1)(g) of the BC *Securities Act*;

5. The within process for recognition of the foreign money judgment was commenced on March 19, 2018. In paragraph 17, the Complaint avers that the amount claimed is not for a fine or penalty.

Qualifications

I received my undergraduate degree from Carleton University in law with a minor in criminology in 1991. I received my law degree from the University of British Columbia in 1995.

After articling for a year, I was called to the Bar of British Columbia in 1996. I have acted as counsel in a wide variety of commercial litigation and administrative matters, with a focus on securities litigation at the BC Securities Commission and other financial self regulatory organizations (including IIROC which is similar in nature to FINRA).

Early in my legal career, the firm I was at did *ad hoc* work for the BC Securities Commission, and I appeared and did Hearings work as junior counsel for the BC Securities Commission. Since that time, I have been involved in dozens of Securities Commission matters as counsel to parties under investigation including matters in British Columbia, Alberta and Ontario. I have also appeared as counsel and have resolved cases by way of Settlement Agreement and appeared in numerous contested Securities Commission Hearings.

I have provided expert opinion evidence in relation to the BC Securities Law in an Alberta Securities Commission matter. It was not necessary for me to appear at trial, but I was cross-examined on my evidence as part of an interlocutory process.

I was one of the founding partners of Taylor Veinotte Sullivan in 2001.

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Riser Adkisson LLP
July 9, 2018

Attention: Jay Adkisson

I am responsible for the preparation of this opinion.

I relied on my experience and familiarity the BC Securities Law and the enforcement of the BC *Securities Act* in formulating my opinion.

Documents I Relied On

As this is essentially a legal opinion, I did not have to rely on a significant number of documents in coming to my opinion. I did consider the Sanctions Decision against Mr. Lathigee. I also considered the Complaint and the factual assumptions referred to above.

In terms of case law, I reviewed a number of cases in coming to my opinion, but specifically relied on the following:

1. *BC Securities Commission v. Biller*, 2001 BCCA 208 (CanLII) http://canlii.ca/t/1tkjd;
2. *Pezim v. British Columbia (Superintendent of Brokers)*, 1994 CanLII 103 (SCC), [1994] 2 S.C.R. 557;
3. *Poonian v. British Columbia Securities Commission*, 2017 BCCA 207 (CanLII), http://canlii.ca/t/h41bz; and
4. *R. v. Samji*, 2017 BCCA 415 (CanLII), <http://canlii.ca/t/hp2gz at para. 91, 116.

Opinion

In British Columbia, the regulation of securities is primarily dealt with by the BC *Securities Act*. The BC *Securities Act* is part of a much larger framework which regulates the securities industry throughout Canada. The primary goal of the BC *Securities Act* is the protection of the investor but other goals include capital market efficiency and ensuring public confidence in the system.

These overarching goals are achieved by a host of different measures, which themselves may have different purposes and be informed by different principles (e.g., punishment, compensation, specific and general deterrence, removal of incentives for non-compliance, etc.). For example:

1. An individual might be prosecuted criminally. Criminal proceedings are pursued in criminal court (section 155);
2. An individual might be the subject of administrative proceedings. Administrative proceedings are pursued before a panel of the BC Securities Commission. Panels are

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typically made up of three people with expertise that may be legal (lawyers), financial (accountants) and other professions (including geologists) (section 161);

3. The BC *Securities Act* also provides the BC Securities Commission with the jurisdiction to apply amounts collected for the purpose of promoting securities related education or to allow individuals who have suffered a loss to make a claim to funds collected by the BC Securities Commission.

Under the BC *Securities Act*, administrative proceedings are not subject to the same rules of evidence as court proceedings. For example, hearsay evidence is admissible as of right in an administrative proceeding.

Following findings of liability in an administrative proceeding, the BCSC Panel can order a variety of administrative orders under Section 161 or an administrative penalty under Section 162 of the BC *Securities Act*. The pre-conditions to the ordering of orders under Sections 161 and 162 of the BC *Securities Act* are a determination that the person has contravened a provision of the BC *Securities Act* and a consideration of the public interest.

The title of Section 161 of the BC *Securities Act* is "Enforcement Orders". The title of the section is instructive as are the types of orders a BCSC Panel can make pursuant to Section 161.

With respect to the title, it is clear that the purpose of the orders is to assist in enforcement of the *Securities Act*. While a BCSC Panel's jurisdiction under Section 161 of the BC *Securities Act* is limited to sanctions that are protective and preventative, specific and general deterrence are appropriate considerations in imposing penalties. In other words, a key goal of orders made pursuant to Section 161 is to prevent the Respondent from committing similar acts in the future and to prevent others from committing those acts.

With respect to the types of orders available pursuant to Section 161 of the BC *Securities Act*, relying on Section 161(1) of the BC *Securities Act*, a BCSC Panel can order that a person comply with the BC *Securities Act*, cease trading in securities, resign any position they hold as a director or officer of an issuer of securities or a securities registrant, prohibit an individual from engaging in investor relations or promotional activities, cancel securities registration and order a person to pay any amount obtained as a result of a breach of the BC *Securities Act* (commonly referred to as disgorgement).

Many of these orders were in fact made in this case. When taken in context, it is clear that Section 161(1) containing a series of provisions designed to penalize those who violate the Act in order to prevent future misconduct while the goal of the provisions is not to "punish" the remedies available to prevent future misconduct are clearly penalties.

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As was the case in this matter, administrative Hearings under the BC *Securities Act* are typically broken down into two stages: a liability stage and a sanctions stage. It is at the "sanctions" stage that the penalties under Sections 161 and 162 can be imposed. In my opinion, sanctions are essentially penalties.

The jurisdiction to order that a person pay an amount obtained as a result of a breach of the BC *Securities Act* in Section 161(1)(g) of the BC *Securities Act* is part of an inter-connected web of provisions in the BC Securities Act. Section 161(g) allows a BCSC panel to make an order that an individual pay any amount they obtained as a result of a breach of the BC *Securities Act*. \

Section 161(1)(g) was recently the subject of a series of cases that resulted in dissenting opinions by BCSC Hearing Panels. In a case I was involved in with a two person Hearing Panel, no orders were made under Section 161(1)(g) because the Panel members disagreed about whether the section applied in the circumstances.

As a result of these series of dissenting options, the issue of how to apply Section 161(1)(g) was appealed to the British Columbia Court of Appeal in a number of cases. Those appeals were eventually heard together. A number of guiding principles have resulted from that jurisprudence.

In particular, the case law is now clear that Section 161(1)(g) is specifically intended to deter persons from contravening the BC *Securities Act* by removing the incentive to contravene the BC *Securities Act* by ensuring the person does not retain the "benefit" of their wrongdoing. In other words, the goal is deterrence and deterrence is an objective achieved by imposing appropriate penalties.

The case also establishes that the purpose of Section 161(1)(g) of the BC *Securities Act* is not to compensate the public or victims of the contravention. The Court of Appeal made it clear that to the extent compensation is an objective, it is achieved through other mechanisms in the BC *Securities Act* in the same way that if criminal prosecution is an objective, it can be achieved through other provisions in the BC *Securities Act*. In other words, while Section 161(1)(g) has been called a disgorgement provision, its purpose is not disgorgement.

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Conclusion

In all of the circumstances, I am of the opinion that the order that Mr. Lathigee pay $21.7 million pursuant to Section 161(1) of the BC *Securities Act* was a penalty imposed against Mr. Lathigee as a result of the findings that Mr. Lathigee had breached the BC *Securities Act*.

Yours truly,

TAYLOR VEINOTTE SULLIVAN

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DISTRICT COURT

CLARK COUNTY, NEVADA

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BRITISH COLUMBIA SECURITIES COMMISSION, Plaintiffs, vs. MICHAEL PATRICK LATHIGEE, Defendant.	CASE NO.: A-18-771407-C DEPT. NO.: XIV **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S COUNTERMOTION FOR SUMMARY JUDGMENT**

COMES NOW, Plaintiff, BRITISH COLUMBIA SECURITIES COMMISSION, and hereby files Plaintiff's Opposition to Defendant's Motion for Summary Judgment, and Plaintiff's Countermotion for Summary Judgment.

This Opposition and Countermotion are made and based upon the pleadings and papers already on file, the summary of points and authorities contained herein, any attached exhibits, declarations and affidavits, and oral argument as may be heard by this Honorable Court.

DATED this 9th day of November, 2018.

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POINTS AND AUTHORITIES

INTRODUCTION

Whereas Defendant's Motion for Summary Judgment, and Plaintiff's Countermotion for Summary Judgment deal with the same subject matter, Plaintiff integrates its Opposition with its Countermotion arguments, so as to avoid unnecessary repetition. In short, Defendant's arguments fail, and Plaintiff is entitled to summary judgment, as Plaintiff's judgment is a valid foreign-country judgment from a court which grants reciprocity to recognition of US disgorgement judgments, and it is not a fine or penalty. Defendant has waived all defenses except that "the Disgorgement Order is in the nature of a fine or penalty, and is thus not subject to recognition under either the NUF-CMJRA or comity."[1] As stated, a Canadian disgorgement judgment is not a fine or penalty. Even if it were a fine or penalty, such would not be dispositive because this Court may grant comity even to judgments which are based on fines or penalties.[2]

SUMMARY OF MATERIAL FACTS NOT GENUINELY AT ISSUE

Judgment was Granted Against Defendant for Securities Fraud

In a decision dated July 8, 2014 (the "Liability Findings"), the BRITISH COLUMBIA SECURITIES COMMISSION (the "Commission") found that Defendant, Mr. Lathigee, together with others, perpetrated a fraud, contrary to section 57(b) of the Securities Act, R.S.B.C. 1996 c. 418 (the "BC Securities Act") when:

(a) he raised $21.7 million (CAD) from 698 investors without disclosing to those investors important facts about FIC Group's financial condition; and

(b) he raised $9.9 million (CAD) from 331 investors for the purpose of investing in foreclosure properties, and instead used most of the funds to make unsecured loans to

[1] Def's MSJ, Memorandum 1:21-23.
[2] Restatement (Third) of Foreign Relations Law of the United States, § 483 cmt a ("Nonrecognition not required but permitted").

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> other FIC Group companies, the proceeds of which were used at least in part to pay salaries and other overhead expenses of the FIC Group.[3]

On March 16, 2015, the Commission issued a sanctions decision (the "Sanctions Decision") arising out of the Liability Findings in the following amounts against the following parties:

a. FIC REAL ESTATE PROJECTS LTD. $9,800,000

b. FIC FORECLOSURE FUND LTD. $9,900,000

c. WBIC CANADA LTD $2,000.000

d. MICHAEL PATRICK LATHIGEE, EARLE DOUGLAS PASQUILL, FIC REAL ESTATE PROJECTS LTD., jointly and severally $9,800,000

e. MICHAEL PATRICK LATHIGEE, EARLE DOUGLAS PASQUILL, FIC FORECLOSURE FUND LTD., jointly and severally $9,900,000

f. MICHAEL PATRICK LATHIGEE, EARLE DOUGLAS PASQUILL, WBIC CANADA LTD., jointly and severally $2,000,000

On April 15, 2015, the Sanctions Decision was registered in the Vancouver Registry as a judgment of the British Columbia Supreme Court in court file no. L-150117, pursuant to section 163 of the BC Securities Act (the "Judgment"). [4]

The amount of the Judgment ordered to be payable by Michael Patrick Lathigee, jointly and severally with other defendants, excluding administrative penalties, is $21,700,000 CAD.[5] That amount of the Judgment was was granted for disgorgement of funds fraudulently obtained from investors, pursuant to section 161(1)(g) of the BC Securities Act.[6] Specifically the tribunal stated:

> "We find we have the authority to order disgorgement against the individual respondents in this case, up to $21.7 million, the full amount obtained by fraud."[7]

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[3] Ex 1, Judgment, p.1 § 2.
[4] Ex 1, Judgment.
[5] *Id* at p.9 §§ 43, 46, and 49, and p.13 § 62(d).
[6] *See Id* at p.7 § 34-37.
[7] *Id* at p.9 § 43.

> "The amounts obtained from investors need not be traced to them specifically and we find that $21.7 million was obtained, directly or indirectly, as a result of their individual contraventions of the Act."[8]
>
> "Each respondent's misconduct contributed to the raising of the $21.7 million fraudulently. We find that it is in the public interest to order the respondents to pay the full amount obtained as a result of their fraud."[9]

Prior to the proceedings which led to the Judgment, Defendant was served with a Notice of Hearing, dated March 1, 2012, which set forth the allegations and gave a date, time, and location for a hearing.[10] Defendant's counsel, H. Roderick Anderson of Harper Grey LLP, accepted service of the notice on March 8, 2012, and then appeared for all respondents at the March 20, 2012 hearing.[11] Defendant continued to be represented by such counsel throughout the proceedings of the case.[12] In fact Defendant was afforded at least six days of trial wherein his counsel was able to call and cross-examine witnesses, and present evidence.[13] There is no question regarding personal jurisdiction over Defendant, as Defendant was a resident of British Columbia at all material times during the proceedings.[14]

Ultimately Defendant was found liable for fraud, and the findings on liability were set forth by the Panel on July 8, 2014[15] Another Notice of Hearing was served on Defendant October 16, 2014, giving a date and time for hearing on sanctions.[16] A hearing on sanctions was held on February

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[8] *Id* at p.9 § 46.
[9] *Id* at p.9 § 49.
[10] Ex 2, Notice of Hearing, BCSC_000054-000067.
[11] Ex 3, Transcript of March 20, 2012 Hearing, at 2:8-12.
[12] *See* Ex 4, Transcript of April 11, 2012 Hearing, at 1:25-27; Ex 5, Transcript of September 16, 2013 Proceedings, at 0:5-8; Ex 6, Transcript of September 17, 2013 Proceedings, at 1:15-20; Ex 7, Transcript of September 18, 2013 Proceedings; Ex 8, Transcript of September 19, 2013 Proceedings; Ex 9, Transcript of September 20, 2013 Proceedings; Ex 10, Transcript of September 21, 2013 Proceedings; Ex 11, Transcript of September 23, 2013 Proceedings; Ex 12, Transcript of September 24, 2013 Proceedings.
[13] *Id.*
[14] *See* Declaration of Plaintiff § 9.
[15] Ex 13, Panel Findings on Liability, BCSC_1512-1577.
[16] Ex 14, Notice of Hearing dated October 16, 2014, BCSC_001692.

13, 2015, which was attended by Defendant's counsel.[17] The Panel's sanctions decision was set forth on March 16, 2015, wherein disgorgement was granted against Defendant.[18]

Defendant was granted leave to appeal the decisions of the Panel to the Court of Appeal for British Columbia, with the Court of Appeal unanimously dismissing the appeal by order pronounced May 31, 2017, as a result of which the Judgment, including the disgorgement order, remains in full force and effect.[19]

Defendant is Believed to have Brought his Fraud to Nevada Attempting to Evade Legal Consequences

As set forth in the Sanctions Decision, given that the Defendant is "permanently prohibited" from engaging in investment activities in British Columbia, and such other Canadian jurisdictions in which a reciprocal may have been made, he instead has based his operations in Nevada.[20] Defendant has been involved in operations of at least 19 entities in Nevada which appear by their names to be investment companies; the latest being "LVIC BLOCKCHAIN AND CRYPTOCURRENCY FUND LLC".[21] It would be in the best interest of Nevada's citizens to allow the Judgment to be enforced against Defendant to diminish his abilities to project his fraud to Nevada.

LEGAL ARGUMENTS

Recognition of the Foreign Judgment is Proper Under NRS 17.700 – 17.820

As a preliminary point, it is important to note that, in regard to enforcement of securities law, the U.S. has the Securities Exchange Commission (the "SEC"), and Canada has thirteen such organizations, one for each province and territory of Canada, one of which, for the province of British Columbia, being the Commission. The Judgment in issue was pronounced by the

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[17] Ex 15, Transcript of February 13, 2015 Hearing.
[18] Ex 1, Judgment.
[19] Ex 16, Appellate Court Decision, BCSC_001996-002047, at BCSC_002047 § 167.
[20] *See* Ex 1, Judgment § 62(b).
[21] Ex 17, Lathigee Corporate Vehicles.

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Commission, and, as noted above, recognized as a judgment of the British Columbia Supreme Court and, subsequently upheld on appeal. The Judgment is, in all respects, a foreign-country judgment, being a judgment of one of the superior courts of Canada.

A Nevada court "*shall* recognize a foreign-country judgment," to which NRS 17.700 to 17.820 apply, except as provided for under NRS 17.750 sections 2 and 3.[22] NRS 17.740 sets forth the applicability of NRS 17.700 to 17.820. It states that such statutes apply to the extent that the judgment "(a) Grants or denies recovery of a sum of money; and (b) Under the law of the foreign country where rendered, is final, conclusive and enforceable."[23] Further, it provides that such statutes do not apply to the extent that the judgment is "(a) A judgment for taxes; (b) A fine or other penalty; or (c) A judgment for divorce, support or maintenance or other judgment rendered in connection with domestic relations."[24]

If it is found that the aforementioned statutes do not apply to a certain judgment, then we look to other law regarding recognition of foreign country judgments. For example, in the case of divorce, support or maintenance, UIFSA, as set forth in NRS 130, governs.[25] If there is no other statute on point, then a court can still grant recognition of a foreign-country judgment based on the common-law principles of comity.[26] While Plaintiff is confident that the Judgment is squarely within the scope of NRS 17.700 to 17.820, it also sets forth herein the reasons in the alternative that the Judgment should be granted under principles of comity.

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[22] NRS 17.750(1).
[23] NRS 17.740(1).
[24] NRS 17.740(2).
[25] *See* NRS 130.105.
[26] *See City of Oakland v. Desert Outdoor Advertising, Inc.*, 127 Nev. 533, 547 (2011); *see also Hilton v. Guyot*, 159 U.S. 113 (1895).

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The Judgment Grants Recovery of a Sum of Money, and is Final, Conclusive and Enforceable Under the Laws of Canada, and is not for Taxes or Domestic Relations

Defendant admits in its responses to Plaintiff's Requests for Admission numbers 1-4, that the Judgment, against Defendant is final, conclusive and enforceable under the laws of Canada, that the time for appeal has expired, that no payments have been made, and that the Judgment is not for taxes or domestic relations.

In addition to Defendant's admissions, the Commission has clearly proven that the Judgment grants the recovery of a sum of money, and that under the laws of British Columbia specifically, and Canada generally, the Judgment is final, conclusive and enforceable.[27] The certificate of the British Columbia Supreme Court, exemplifying the Judgment, states that:

> "The Decision was entered as a Judgment on April 1, 2015."[28]
>
> "The Time for appeal has expired and no appeal is pending under s. 167 of the *Securities Act*."[29]
>
> "With no payments being made, and the full amount remaining due on the Judgment, as noted above"[30]

Additionally, the Judgment is not a judgment for taxes or domestic relations as acknowledged by Defendant's First Amended Answer.[31]

The Judgment is Not a Fine or Penalty

The Judgment is also not a fine or penalty. The statute under which the Judgment was granted provides for the judgment debtor to "pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the failure to comply or the contravention."[32] If the Commission receives money pursuant to a judgment under 161(1)(g), it must give notice, and

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[27] *See* Ex 1, Judgment.
[28] Ex 1, Judgment, § 3.
[29] *Id* at § 4.
[30] *Id* at § 6.
[31] Ex 18, Defendant's First Amended Answer § 17.
[32] Ex 19, Canada Securities Act [RSBC 1996] Chapter 418, Part 18, § 161(1)(g).

persons who have been harmed by the fraud can submit an application to have such funds distributed to them.[33] Pursuant to section 15.1 of the BC Securities Act, and the regulations under the BC Securities Act, Securities Regulation 196-97, it is *mandatory* that the Commission distribute disgorgement funds to proper claimants, and it is therefore the Commission's strict policy to do so.[34] This is illustrated by the fact that the Commission advertises on its website, under a section entitled "Returning Funds to Investors," the cases which have received funds pursuant to a judgment under section 161(1)(g), and provides guidance to victims on how they can lay claim to such funds.[35] In other words, disgorgement orders made under 161(1)(g) of the BC Securities Act are not fines or penalties, but are orders for the funds to be disgorged from the judgment-debtor for any amounts obtained, directly or indirectly, as a result of the judgment-debtor's misconduct, to then by the Commission to repay the individuals harmed by the judgment-debtor's misconduct.

The Commission must follow the claims process set forth by law to distribute the disgorgement funds to proper claimants.[36] As such, these funds are compensatory in nature.[37] Even if the disgorgement judgment has a deterrent function, this does not in and of itself make the judgment a penalty, as any civil judgment has a deterrent function in modern society, and the goal of all laws is to provide for compliance. Ultimately the end function of 161(1)(g) is disgorgement, and returning of those funds to claimants who have been harmed by the misconduct, which is therefore an order that is specifically not one in the nature of a penalty or fine.

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[33] *Id* at Part 3, § 15.1.
[34] *Id* at Part 3, § 15.1; *See* Declaration of Plaintiff § 6; Ex 20, Securities Regulation, B.C. Reg. 196/97, Ministerial Regulation M244/97, Part 3, § 7.4(6).
[35] Ex 21, BCSC Website, "Returning Funds to Investors," accessed August 30, 2018.
[36] Ex 19, Canada Securities Act [RSBC 1996] Chapter 418, Part 18, § 161(1)(g).
[37]

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In fact, penalties and fines were dealt with separately by the orders made by the Commission's panel. In particular, Defendant has an additional judgment against him in the amount of $15 Million CAD for administrative penalties, and Defendant also agreed to pay fines in the amount of $60,000 CAD.[38] These fines and penalties are clearly set forth separately from the portion of the Judgment for disgorgement, for which the Commission seeks recognition before this Court, further evidencing that the portion of the Judgment granted under 161(1)(g) is not a fine or penalty under the applicable law, as the fines and penalties were dealt with separately. Despite Defendant's mischaracterization of his report, Plaintiff's expert has stated unequivocally that disgorgement is a remedy, and not a penalty.[39] "Section 161(1)(g) remedy is not a penalty under British Columbia Law."[40] "It is not a penalty."[41]

The Supreme Court of British Columbia has echoed that disgorgement is not a penalty under its law. That Court recognized a US SEC disgorgement order, finding that evidence that the SEC's policy to distribute proceeds of the judgment to injured investors, even when not strictly required to do so, was enough to recognize the judgment and not deem it a penalty for purposes of recognition.[42]

Canada Law Governs as to Whether the Judgment was a Fine or Penalty

Defendant's representation of "characterization" under the Restatement (Second) of Conflict of Laws is mistaken and outright wrong. Characterization is used to determine the correct choice of law rules based on the circumstances of the case, but once the forum's choice of law rules are used, then the law of the jurisdiction pointed to by those choice of law rules is used. "In essence, it involves two things: (1) classification of a given factual situation under the appropriate legal categories and specific rules of law, and (2) definition or interpretation of the terms employed in the

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[38] Ex 1, Judgment, §§ 18(b), 62(b)(iv-v(erroneously labeled iv)).
[39] Ex 30, Plaintiff's Expert's Report p. 3-4.
[40] *Id.*
[41] *Id.*
[42] Ex 22, *US (SEC) v. Peever*, 2013 BCSC 1090, §§ 27-29.

legal categories and rules of law."[43] "A concept should be classified in the way it is classified in the body of law which the court is applying."[44]

Thus, if A sues B in Nevada, when the judgment was granted in one of the provinces of Canada, with that province being the place with the most significant relationship to the judgment, and the judgment complies with § 98 of the Restatement, then the local law of the province of Canada will apply in regard to the definition and classification of the disgorgement judgment since it is that law which is necessarily being applied.[45]

British Columbia's law regarding disgorgement judgments must be applied, because the law establishing disgorgement is unique to British Columbia, and although similar to US law, has its own unique provisions providing for compensation to victims of defendant's crimes. For example, a US disgorgement judgment "authorizes but does not require" the SEC to "distribute the disgorged award to victims of the defendants' illegal activity."[46] In British Columbia, however, the regulatory authority, herein the Commission, is absolutely required to distribute the award to victims making a proper claim.[47] So while the regulations may have mixed motives, the primary result of a British Columbia disgorgement judgment, such as in issue here, is compensation.

Defendant's arguments conflate US and Canadian law, generally, and incorrectly apply US Supreme Court law to this case when the *Erie Doctrine* would require federal courts in this case to follow state law on this matter.[48] British Columbia law has held that disgorgement orders are not a penalty, because amounts returned to investors must be deducted from the amount of the

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[43] Restatement (Second) of Conflict of Laws § 7 cmt b (1971)
[44] *Id* at cmt d.
[45] *Id* at Illustration 1.
[46] Ex 22, § 12.
[47] Ex 19, Canada Securities Act [RSBC 1996] Chapter 418, Part 3, § 15.1; *See* Declaration of Plaintiff § 6; Ex 20, Securities Regulation, B.C. Reg. 196/97, Ministerial Regulation M244/97, Part 3, § 7.4(6).
[48] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

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disgorgement order.[49] British Columbia Courts, and other courts of Canada's provinces, have enforced US disgorgement judgments, holding that they are "not a foreign penal judgment…"[50] The British Columbia Supreme Court explained that the "civil proceedings brought by SEC are distinct from the criminal proceedings brought by the U.S. Attorney General and the criminal proceedings do not prevent the plaintiff from pursuing its enforcement remedies in British Columbia on the civil judgment."[51] "The fact that there are contemporaneous criminal proceedings involving [the Defendant] and arising out of the same delict does not convert the civil judgment into a penal order."[52]

The most important rule from the Restatement (Second) of Conflict of Laws as applied to this case is section 98, which states, "A valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying cause of action are concerned." There can be no doubt that Plaintiff has a valid, final judgment rendered under a fair trial in a contested proceeding, and its judgment, which is not a penalty, but which disgorges ill-gotten funds and returns them to Defendant's victims, should be recognized by this Honorable Court.

Even if it Were a Fine or Penalty, such Does Not Preclude Recognition of the Judgment, but only Makes the Statute Inapplicable – Making Comity the Law by Which to Recognize the Judgment

Foreign Judgment recognition is not precluded for fines and penalties, but such only serves to make the NUF-CMJRA, as codified under the applicable sections of NRS 17, inapplicable.[53] If the NUF-CMJRA does not apply to the Judgment, which is not admitted but specifically denied, then the analysis must fall to other law, namely comity, which this Court may still look to pursuant to NRS

[49] Ex 27, *Streamline Properties Inc. (Re)*, 2015 BCSECCOM 66 § 92-93.
[50] Ex 26, § 25.
[51] *Id.*
[52] *Id.*
[53] NRS 17.740(2).

17.820, which states, "NRS 17.700 to 17.820, inclusive, do not prevent the recognition under principles of comity or otherwise of a foreign-country judgment not within the scope of NRS 17.700 to 17.820, inclusive."

Defendant Cannot Present Evidence that Due Process was Not Afforded

The only grounds for denying recognition of a foreign-country judgment to which the Recognition of Foreign-Country Money Judgments act is applicable are found in NRS 17.750(2) and (3):

> "2. A court of this State may not recognize a foreign-country judgment if:
> (a) The judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
> (b) The foreign court did not have personal jurisdiction over the defendant; or
> (c) The foreign court did not have jurisdiction over the subject matter."
>
> "3. A court of this State need not recognize a foreign-country judgment if:
> (a) The defendant in the proceeding in the foreign court did not receive notice of the proceeding in sufficient time to enable the defendant to defend;
> (b) The judgment was obtained by fraud that deprived the losing party of an adequate opportunity to present its case;
> (c) The judgment or the cause of action on which the judgment is based is repugnant to the public policy of this State or of the United States;
> (d) The judgment conflicts with another final and conclusive judgment;
> (e) The proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be determined otherwise than by proceedings in that foreign court;
> (f) In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action;
> (g) The judgment was rendered in circumstances that raise substantial doubt about the integrity of the rendering court with respect to the judgment; or
> (h) The specific proceeding in the foreign court leading to the judgment was not compatible with the requirements of due process of law."
>
> "4. A party resisting recognition of a foreign-country judgment has the burden of establishing that a ground for nonrecognition stated in subsection 2 or 3 exists."

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Defendant has Withdrawn the Majority of his Affirmative Defenses, including those Regarding Due Process

Judging from Defendant's affirmative defenses, Defendant previously rested its defense on §§ 2(a), 3(g) and 3(h). Defendant, however, has waived or withdrawn each of these defenses. In response to Plaintiff's Request for Admission No. 11, Defendant states "Defendant hereby withdraws his lack of due process claim other than as may be affected by defendant's defense that the Disgorgement Judgment is a penalty…"[54] Defendant further admits that he was represented by counsel in the proceedings against him, that multiple hearings were held in the proceedings against him, and that he received notice of those hearings.[55] Defendant further expressly withdraws any claim that the proceedings were inherently biased, that the judgment was rendered in circumstances raising doubts about the integrity of the BCSC, that the proceedings were not compatible with US due process, and that the BCSC delayed this action.[56]

Through its discovery responses, Defendant has waived, or withdrawn, its first, third, fourth, and fifth affirmative defenses. Defendant even waived his second affirmative defense through his Motion for Summary Judgment, which states, "Defendant Lathigee asserts but a single defense that is common to both the NUF-CMJRA and to comity, which is that the Disgorgement Order is in the nature of a fine or penalty."[57] This leaves only one affirmative defense, that the Judgment "is clearly denoted as a 'sanction' and is otherwise a fine and/or penalty that is not subject to recognition or to comity."[58]

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[54] *See* Ex 28, Def's Rsps to Pltf's RFAs, Response No. 11.
[55] *See* Ex 28, Def's Rsps to Pltf's RFAs, Responses No. 12-14.
[56] *See* Ex 29, Def's Rsps to Pltf's ROGs, Responses No. 2-4, & 6.
[57] Def's MSJ, Memorandum 1:21-23.
[58] Ex 18, Def's Amended Answer, p. 3-4.

Even if Not Waived, Defendant's Defenses Fail

All the sections of NRS 17.750(2) and (3) relied on by Defendant's affirmative defenses are similar and go to an attack on the impartiality of the foreign court, and the compatibility of such proceedings with principles of due process. Defendant's defense fails, as all evidence points to Defendant having been given full due process, namely notice and a hearing, and an opportunity to fully defend the matter before a panel of adjudicators, with counsel representing him and then being afforded the rights of appeal of any decision then made.[59]

This was not some kangaroo court of a lawless nation; this was a formal civilized trial in British Columbia, Canada, in a similar manner to what we in any state in the US would recognize as an administrative law proceeding before administrative law judges. The Judgment was then certified and recognized by the Supreme Court of British Columbia as a judgment of that court on April 1, 2015, and then survived an appeal to the Court of Appeal for British Columbia in a decision by a unanimous three-judge panel pronounced May 31, 2017, and written by Madam Justice MacKenzie.[60]

In evaluating whether a judgment was compatible with the requirements of due process of law under the Uniform Recognition of Foreign-Country Money Judgments Act, the Ninth Circuit Court of Appeals looked to the comments of the uniform act. It concluded that the Act "requires only

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[59] *See* Ex 2, Notice of Hearing, BCSC_000054-000067; Ex 3, Transcript of March 20, 2012 Hearing, at 2:8-12; Ex 4, Transcript of April 11, 2012 Hearing, at 1:25-27; Ex 5, Transcript of September 16, 2013 Proceedings, at 0:5-8; Ex 6, Transcript of September 17, 2013 Proceedings, at 1:15-20; Ex 7, Transcript of September 18, 2013 Proceedings; Ex 8, Transcript of September 19, 2013 Proceedings; Ex 9, Transcript of September 20, 2013 Proceedings; Ex 10, Transcript of September 21, 2013 Proceedings; Ex 11, Transcript of September 23, 2013 Proceedings; Ex 12, Transcript of September 24, 2013 Proceedings.

[60] Ex 1, Judgment; Ex 16, Appellate Court Decision, BCSC_001996-002047, at BCSC_002047 § 167.

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'basic' or 'fundamental' fairness for a specific foreign proceeding to be 'compatible with the requirements of due process of law.'"[61] The Court continued:

> "The act's purpose is to 'make it more likely that money judgments rendered in that state would be recognized in other countries.'"
>
> "It would undermine this purpose to enforce only those foreign judgments which resulted from proceedings that conformed to our own notices of constitutional due process."
>
> "Such a high bar would encourage foreign powers to condition the enforcement of *our* judgments on the satisfaction of *their* procedural requirements, which could be just as onerous as our own."[62]
>
> "Courts ask only whether the party resisting judgment 'was denied fundamental fairness in the particular proceedings leading to the foreign-country judgment,' not whether the foreign proceedings literally conformed to the requirements of due process under our own Constitution."
>
> "To demonstrate a lack of 'fundamental fairness,' the party resisting the judgment must point to more than mere 'procedural differences' – like a lack of trial by jury or 'different evidentiary rules' – between the process that the party received in the foreign proceeding and the process to which it would have been entitled here."
>
> "Rather, the party must establish a deprivation of 'basic procedural fairness' by, for example, proffering evidence of 'corruption' or that the foreign judgment was entered for 'political reasons.'"[63]

Defendant has presented no evidence of corruption, or that the Judgment was entered for political reasons, which might indicate a deprivation of basic procedural fairness. In fact, Defendant has offered no evidence at all throughout discovery.[64] Instead, all of the evidence produced to date, by Plaintiff, shows that Defendant received, as set out previously, notice, which includes notice of the critical issues, a full trial, and right of appeal, and that Plaintiff was involved in the proceedings and appeal from the start, and represented by qualified and knowledgeable counsel throughout. It is

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[61] *Midbrook Flowerbulbs Holland B.V. v. Holland America Bulb Farms, Inc.*, 874 F.3d 604, 616 (9th Cir. 2017).
[62] *Id.*
[63] *Id* at 617.
[64] *See* Ex 23, Defendant's 16.1 Disclosures.

not now for this Court to discount or allow Defendant to collaterally attack those properly-noticed proceeding which clearly complied with all concepts of procedural fairness.

COMITY

Recognition of the Foreign Judgment is Proper Pursuant to the Principles of Comity

NRS 17.820 states that "NRS 17.700 to 17.820, inclusive, do not prevent the recognition under principles of comity or otherwise of a foreign-country judgment not within the scope of NRS 17.700 to 17.820, inclusive." Therefore, if this Court decides that such statutes do not apply to the Judgment, within the scope set forth in NRS 17.740, the Court may instead recognize the Judgment under the principles of comity.

A Court may grant comity in recognizing a foreign country judgment even if the judgment is a tax, fine or penalty.[65]

> "'[C]omity is a principle whereby the courts of one jurisdiction may give effect to the laws and judicial decisions of another jurisdiction out of deference and respect.'"[66]

> "A court applying the principle of comity should consider the 'duties, obligations, rights and convenience of its own citizens and of persons who are within the protection of its jurisdiction.'"[67]

Comity is a rule of practice, convenience, and expediency, rather than rule of law, that courts have embraced to promote cooperation and reciprocity with foreign lands.[68] Principles of Comity are embraced by both Canada and the United States, in each of their respective Provinces and States, as

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[65] Restatement (Third) of Foreign Relations Law of the United States, § 483 cmt a ("Nonrecognition not required but permitted").
[66] *In re Chao-Te*, 2015 WL 3489560, p.2 (Nev.)(*citing Mianecki v. Second Judicial Dist. Court.* 99 Nev, 93, 98, 658 P.2d 422, 424–25 (1983)).
[67] *Id.*
[68] *Mujica v. AirScan, Inc.*, 771 F.3d 580, 598 (9th Cir. 2014)(*citing Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru*, 109 F.3d 850, 854 (2d Cir.1997)(*quoting Somportex Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir.1971)).

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the two close countries endeavor to promote cooperation and offer reciprocity between two similar legal systems.

While Courts should consider whether due process was given in their decision to grant comity, such requires only that the basic requisites for due process are necessary – including notice and a hearing.[69] The seminal comity case, *Hilton v. Guyot*, declares:

> "[Comity] contributes so largely to promote justice between individuals, and to produce a friendly intercourse between the sovereignties to which they belong, that courts of justice have continually acted upon it as a part of the voluntary law of nations."[70]

> "Where there has been opportunity for a full and fair trial before a foreign court of competent jurisdiction, conduction the trial on regular proceedings, after due citation of voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of that country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of the United States should not allow it full effect, the merits of the case should not, in an action brought in this country on the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of a party that the judgment was erroneous in law or in fact."[71]

Canada and the U.S. have a long history together as two nations which sprung up in close proximity at similar times. The two nations' legal systems are largely similar, as they both arose from British and European jurisprudence.

The SEC and securities commissions of each of the Provinces, including the Commission, often work together, as the nature of the proximity and relations of the two countries makes it easy for fraud to move between the countries.[72] The U.S. and provinces of Canada are actually parties to a Memorandum of Understanding, to which the SEC and BCSC are signatories, which provides that

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[69] *Society of Lloyd's v. Hudson*, 276 F.Supp.2d 1110, 1112 (D. Nev. 2003).
[70] *Hilton v. Guyot*, 159 U.S. 113, 165 (1895).
[71] *Id* at 123.
[72] *See S.E.C. v. Lines*, 2009 WL 2431976, p.1 (S.D.N.Y.).

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the "Authorities will provide the fullest mutual assistance," "to facilitate the performance of securities market oversight functions and the conduct of investigations, litigation or prosecution…"[73]

Canadian courts, including the British Columbia Courts, have upheld SEC disgorgement judgments on multiple occasions.[74] One of the more recent cases, *United States (Securities Exchange Commission) v. Peever*, recognized, and permitted enforcement of, an SEC disgorgement judgment, even though the defendant alleged that its purpose was partially penal in nature.[75] The same Court also gave effect to an SEC disgorgement judgment in *United States (Securities and Exchange Commission) v. Cosby*, holding that "as it is only the disgorgement aspect of the foreign judgment that the plaintiff seeks to enforce, the judgment is not a foreign penal claim and it is enforceable or actionable in this jurisdiction."[76] That Court held again, in *United States of America v. Shull*, that the disgorgement order sought to be enforced by the SEC in Canada was "neither a penal sanction nor a taxation measure."[77]

It is critically important that we maintain our good relations and ties with Canada by giving effect to its Province's judgments, as it gives effect to ours, especially those meant to provide some restoration to the victims of securities fraud. "International law is founded upon mutuality and reciprocity."[78] If we want Canada's Provinces to continue to recognize our securities judgments, then we need to recognize theirs.

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[73] Ex 24, Memorandum of Understanding between SEC and BCSC.
[74] *See* Ex 22, *United States (Securities Exchange Commission) v. Peever*, 2013 BCSC 1090 (CanLII); Ex 25, *United States (Securities and Exchange Commission) v. Shull*, [1999] B.C.J. No. 1823 (S.C.); *and* Ex 26, *United States (Securities and Exchange Commission) v. Cosby*, 2000 BCSC 338.
[75] Ex 22, *United States (Securities Exchange Commission) v. Peever*, 2013 BCSC 1090 (CanLII).
[76] Ex 26, *United States (Securities and Exchange Commission) v. Cosby*, 2000 BCSC 338.
[77] Ex 25, *United States (Securities and Exchange Commission) v. Shull*, [1999] B.C.J. No. 1823 (S.C.).
[78] *Hilton v. Guyot*, 159 U.S. 113, 228 (1895).

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If we fail to uphold Canada's Provinces' securities judgments, and more particularly, disgorgement judgments, then they may very likely refuse to uphold ours, and in that situation the citizens of both countries are worse off. U.S. and Nevada citizens who are victimized by securities fraud would be less likely to receive any recompense.

DEFENDANT'S PRECAUTIONARY REQUEST

Defendant asks this Court to stay any further proceedings herein until some imaginary appeal may take place. This request is not founded on any legal basis, as it would be impossible for Defendant now to appeal Plaintiff's judgment. Defendant even admits in his response to Plaintiff's Request for Admission number 2, that "the time for appeal has expired and no appeal is pending."[79] With Defendant's own admission that the time for appeal has expired and no appeal is pending, this Court should forthwith deny Defendant's Precautionary Request.

CONCLUSION

For all reasons set forth herein, Plaintiff respectfully requests that this Honorable Court DENY Defendant's Motion for Summary Judgment, GRANT Plaintiff's Countermotion for Summary Judgment, and grant recognition to the Canadian judgment according to statute, and in the spirit of comity with our neighboring nation.

DATED this 9th day of November, 2018.

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KURT R. BONDS, ESQ.
Nevada Bar #6228
MATTHEW M. PRUITT, ESQ.
Nevada Bar #12474
6605 Grand Montecito Parkway
Suite 200
Las Vegas, Nevada 89149

[79] Ex 28, Def's Rsps to Pltf's RFAs, Response No. 2.

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JAX168

CERTIFICATE OF SERVICE VIA CM/ECF

I hereby certify that on this 9th day of November, 2018, I did serve, via Case Management/Electronic Case Filing, a copy of the above and foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S COUNTERMOTION FOR SUMMARY JUDGMENT** addressed to:

Jay D. Adkisson LLP
2505 Anthem Village Drive, Suite E599
Henderson, NV 89052
Phone: 702-953-9617
Fax: 877-698-0678
E-Mail: jay@risad.com

An Employee of ALVERSON TAYLOR & SANDERS

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JAX169

AFFIDAVIT OF MATTHEW PRUITT IN SUPPORT OF PLAINTIFF'S OPPOSITION AND COUNTERMOTION FOR SUMMARY JUDGMENT

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

MATTHEW PRUITT being first duly sworn, deposes and says:

1. This Affidavit is being made in connection with Plaintiff's Motion for Summary Judgment.

2. I am counsel for the Plaintiff in this matter with knowledge of the things testified to in this affidavit.

3. Exhibits 17, 18, 21, 23, 24, 28, 29 and 30, attached to this Motion, are full, true and correct copies of such documents which they depict.

4. FURTHER YOUR AFFIANT SAYETH NAUGHT.

MATTHEW PRUITT

SUBSCRIBED and SWORN to before me this 9th day of November, 2018.

NOTARY PUBLIC

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
KIMBER LEE FOSTER
Appt. No. 17-2363-1
My Appt. Expires May 1, 2021

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DECLARATION OF PLAINTIFF'S REPRESENTATIVE

I, Catherine Palmer, depose and say:

1. I am over 21 years of age and competent to testify as to matters set forth herein.
2. The matters set forth herein are true and correct and of my own personal knowledge, and if called upon to testify to these matters, I could and would do so competently, except as to those matters stated on information and belief, and as to such matters I believe them to be true.
3. I am a Senior Enforcement Officer of the British Columbia Securities Commission.
4. Exhibits 1-16, 19-22, and 24-27, attached hereto, are full, true, and correct copies of what they purport to be.
5. The facts set forth in this Motion for Summary Judgment are true and accurate.
6. Pursuant to section 15.1 of the British Columbia Securities Act, and Securities Regulation 196-97, it is *mandatory* that the Commission distribute disgorgement funds to proper claimants, which the Commission does.
7. Defendant received notice of the proceedings against him which resulted in the judgment against him.
8. Defendant appeared through counsel, and was fully represented at hearings and trial before a tribunal with proper jurisdiction.
9. Defendant was a resident of British Columbia at all material times during the proceedings.
10. The judgment sought, through this case, to be recognized by the courts of Nevada, grants recovery of $21.7 Million CAD (the "Judgment"), and is final, conclusive and enforceable under Canadian law.
11. Such Judgment is not for taxes, is not a fine or penalty, and is not a judgment for domestic relations.
12. I declare under penalty of perjury that the foregoing is true and correct. FURTHER YOUR DECLARANT SAYETH NAUGHT.

DATED this 7th day of November, 2018.

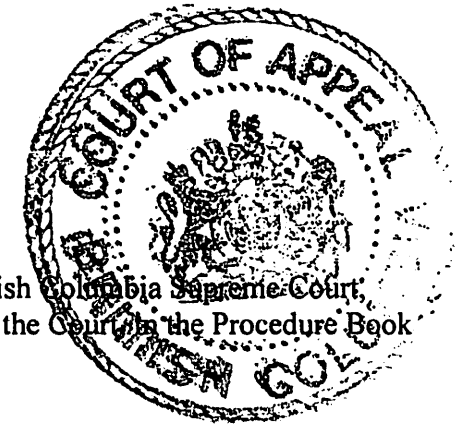
CATHERINE PALMER
SENIOR ENFORCEMENT OFFICER
BRITISH COLUMBIA SECURITIES COMMISSION

JAX171

EXHIBIT 1

JAX171
JAX171

CERTIFICATE



CANADA, Province of British Columbia

It is hereby certified that, among the records enrolled in the British Columbia Supreme Court, Vancouver Registry, before the Honourable the Chief Justice of the Court, in the Procedure Book there is record of an action, numbered as No. L-150117

BETWEEN:

BRITISH COLUMBIA SECURITIES COMMISSION Petitioner

and

MICHAEL PATRICK LATHIGEE;
EARLE DOUGLAS PASQUILL;
FIC REAL ESTATE PROJECTS LTD.;
FIC FORECLOSURE FUND LTD., and
WBIC CANADA LTD.

Respondents

1. On March 16, 2015, the Petitioner rendered a decision against the Respondents, pursuant to a hearing under s. 161(1) and 162 of the *Securities Act*, R.S.B.C. 1996, c. 418 (the "**Securities Act**"), under 2105 BCSECCOM 78 (the "**Decision**").

2. Pursuant to section 163 of the *Securities Act*, the Petitioner registered the Decision with the British Columbia Supreme Court, as a judgment of this court (the "**Judgment**").

3. The Decision was entered as a Judgment on April 1, 2015.

4. The Time for appeal has expired and no appeal is pending under s. 167 of the *Securities Act.*

REGISTRAR
BC COURT OF APPEAL
18-JAN-2018

5. Further details if any: None.

6. Particulars:

Amounts Owing, Standing as Judgment by each of the Respondents under S. 161(1)(g) of the Securities Act:

22798.131136.KAR.14538534.2

FIC Real Estate Projects Ltd.,	$9,800,000
FIC Foreclosure Fund Ltd.,	$9,900,000
WBIC Canada Ltd.	$2,000,000
Michael Patrick Lathigee, Earle Douglas Pasquill, FIC Real Estate Projects Ltd., jointly and severally	$9,800,000
Michael Patrick Lathigee, Earle Douglas Pasquill, FIC Foreclosure Fund Ltd.., jointly and severally	$9,900,000
Michael Patrick Lathigee, Earle Douglas Pasquill, WBIC Canada Ltd.., jointly and severally	$2,000,000

With no payments being made, and the full amount remaining due on the Judgment, as noted above.

All and singular which premises by the tenor of these presents we have commanded to be certified.

IN TESTIMONY WHEREOF we have caused the Seal of our Court at Vancouver, B.C. to be hereunto affixed.

At Vancouver, B.C. this 23 day of January, 2018.

A Registrar of the British Columbia Supreme Court, Vancouver Registry

E. AU

DEPUTY DISTRICT REGISTRAR

~~Clerk of the British Columbia Supreme Court, Vancouver Registry~~

22798.131136.KAR.14538534.2

SUPREME COURT
OF BRITISH COLUMBIA
VANCOUVER REGISTRY
APR 01 2015

FORM 17.2 (RULE 2-2 (3)) L-150117

Court File No.:

Court Registry: Vancouver Registry

In the Supreme Court of British Columbia

Between

British Columbia Securities Commission — Plaintiff(s) Petitioner(s) Applicant(s) Solicitor(s)

and

Michael Patrick Lathigee, Earle Douglas Pasquill, FIC Real Estate Projects Ltd., FIC Foreclosure Fund Ltd. and WBIC Canada Ltd. — Defendant(s) Respondent(s) Client(s) Defendant(s) by Counterclaim Third Party(ies)

REQUISITION

Filed by: British Columbia Securities Commission
[party(ies)]

Required: The filing of the attached tribunal award made under the Securities Act, RSBC 1996, c.418, section 163 and Rule 17.1 of the Supreme Court Rules.
[name of Act]

My address for service is:

Address for Service: PO Box 10142, Pacific Centre, 701 West Georgia Street, Vancouver, BC V7Y 1L2
Fax number address for service (if any)
E-mail address for service (if any)

Date 30-Mar-2015
[dd/mmm/yyyy]

Michele Cook
Signature of ☒ filing party
☐ lawyer for filing party(ies)
Michele Cook, Assistant Secretary to the Commission
[type or print name]

Citation: 2015 BCSECCOM 78

Michael Patrick Lathigee and Earle Douglas Pasquill, FIC Real Estate Projects Ltd., FIC Foreclosure Fund Ltd., WBIC Canada Ltd.

***Securities Act*, RSBC 1996, c. 418**

Hearing

Panel	Audrey T. Ho	Commissioner
	Judith Downes	Commissioner
Hearing Date	February 13, 2015	
Date of Decision	March 16, 2015	

Appearing

Derek Chapman	For the Executive Director
H. Roderick Anderson Owais Ahmed	For the Respondents

Decision

I Introduction

¶ 1 This is the sanctions portion of a hearing pursuant to sections 161(1) and 162 of the *Securities Act*, RSBC, 1996, c.418. The Findings on liability, made on July 8, 2014 (2014 BCSECCOM 264), are part of this decision. Since the Findings, the panel chair, Vice Chair Brent W. Aitken, retired and did not participate in the sanctions hearing or any deliberations regarding sanctions.

¶ 2 The Findings panel found that:

a) all the respondents perpetrated a fraud, contrary to section 57(b) of the Act, when they raised $21.7 million from 698 investors without disclosing to them the important fact of FIC Group's financial condition; and

b) Michael Patrick Lathigee, Earle Douglas Pasquill and FIC Foreclosure Fund Ltd. perpetrated a second fraud, contrary to section 57(b), when they raised $9.9 million from 331 investors in FIC Foreclosure for the purpose of investing in foreclosure properties and instead used most of the funds to make unsecured loans to other FIC Group companies.

II Position of the Parties

¶ 3 The executive director seeks:

a) permanent market prohibitions against the respondents, under sections 161(1)(b), (c) and (d) of the Act;

b) disgorgement orders against the respondents under section 161(1)(g), for the amounts obtained by them, respectively, in contravention of the Act, as follows:

- Lathigee - $21.7 million
- Pasquill - $21.7 million
- FIC Real Estate Projects Ltd. - $9.8 million
- FIC Foreclosure - $9.9 million
- WBIC Canada Ltd. - $2 million; and

c) administrative penalties against the respondents under section 162, in the same amount as the section 161(1)(g) order sought against each of them.

¶ 4 The respondents submitted that the appropriate sanctions are as follows:

a) 10-year market prohibitions against the respondents, under sections 161(1)(b) and (d), subject to two carve-outs:

- Lathigee and Pasquill may trade through a registered dealer in their own RRSP and cash accounts
- Lathigee and Pasquill may each act as a director and officer of an issuer whose shares are solely owned by him or by him and his immediate family;

b) no disgorgement orders against any of the respondents;

c) administrative penalties against each of Lathigee and Pasquill in the amount of $500,000; and

d) no administrative penalties against the corporate respondents.

III Analysis

A Factors

¶ 5 Orders under sections 161(1) and 162 are protective and preventative, intended to be exercised to prevent future harm. See *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)* 2001 SCC 37.

¶ 6 In *Re Eron Mortgage Corporation* [2000] 7 BCSC Weekly Summary 22, the Commission identified factors relevant to sanction as follows (at page 24):

> In making orders under sections 161 and 162 of the Act, the Commission must consider what is in the public interest in the context of its mandate to regulate trading in securities. The circumstances of each case are different, so it is not possible to produce an exhaustive list of all of the factors that the Commission considers in making orders under sections 161 and 162, but the following are usually relevant:
>
> - the seriousness of respondent's conduct,
> - the harm suffered by investors as a result of the respondent's conduct,
> - the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct,
> - the extent to which the respondent was enriched,
> - factors that mitigate the respondent's conduct,
> - the respondent's past conduct,
> - the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia,
> - the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers,
> - the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
> - the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
> - orders made by the Commission in similar circumstances in the past.

B Application of the Factors

Seriousness of the conduct

¶ 7 The Commission has consistently held that fraud is the most serious misconduct prohibited by the Act. In *Manna Trading Corp Ltd.*, 2009 BCSECCOM 595, the Commission, at paragraph 18, said, "Nothing strikes more viciously at the integrity of our capital markets than fraud."

¶ 8 The magnitude of the fraud perpetrated in this case is among the largest in British Columbia history. The respondents raised $21.7 million from 698 investors without telling them that the FIC Group had a severe cash flow problem. A relatively small number of potential events could have triggered its insolvency in a very short time frame. Three of the respondents led FIC Foreclosure's 331 investors to believe that the $9.9 million raised from them would be invested in foreclosure properties and soon. Instead, FIC Foreclosure used most of the funds to make unsecured loans to other FIC Group companies.

Harm to investors; damage to capital markets

¶ 9 The respondents' misconduct has harmed a large number of investors. The respondents provided no evidence that the investors will be able to recover their investments.

¶ 10 The harm to the reputation and integrity of our capital markets is also clear.

Enrichment

¶ 11 The executive director and the respondents each tendered evidence to establish (or refute) if, and to what extent, Lathigee and Pasquill received any of the fraudulently raised funds for their personal benefit.

¶ 12 The FIC Group was run, from a financial point of view, as one entity. The evidence before us indicates that the bulk of the $21.7 million was used for the benefit of the FIC Group of companies.

Mitigating or aggravating factors

¶ 13 There are no mitigating factors. There are no aggravating factors beyond the ones cited below under the heading "Past Conduct".

¶ 14 Lathigee and Pasquill argued that their conduct after 2008, the year in which the funds at issue were raised, is a mitigating factor. They said that they (and Pasquill in particular) have worked to help the FIC Group recover assets through various means including lawsuits against third parties, kept the companies' filings in good standing, worked with the companies' receiver, and communicated with investors to keep them up to date on progress and answer all their questions.

¶ 15 We do not see how Lathigee's and Pasquill's conduct after the funds were raised, as described in paragraph 14, lessens the gravity of their fraudulent acts, and we do not consider it to be a mitigating factor. In addition, we do not consider their co-operation in the other proceedings to be a mitigating factor in considering sanctions in this proceeding. See: *Rashida Samji et al* 2015 BCSECCOM 29 (paragraph 16).

¶ 16 Lathigee and Pasquill also argued that the fact that the fraud was not designed to enrich them is a mitigating factor. We do not agree. If we had found that the fraud was designed to enrich them, that would be an aggravating factor. The absence of an aggravating factor does not equate to the presence of a mitigating factor.

Past conduct

¶ 17 Lathigee, Pasquill and WBIC have a history of regulatory misconduct.

¶ 18 As more particularly described in paragraphs 14-16 of the Findings,

a) In December 2005, Commission staff issued cease trade orders against three FIC Group companies (WBIC, FIC Investments Ltd. and China Dragon Fund Ltd.) for using forms of offering memoranda that did not comply with the requirements of

the Act. Lathigee and Pasquill were directors and officers of each company at the time.

b) In June 2007, Lathigee, Pasquill, WBIC and China Dragon entered into a settlement agreement with the Commission and admitted to certain securities law violations. Lathigee agreed to pay a $60,000 fine and Pasquill agreed to pay a $30,000 fine.

¶ 19 In addition, on September 2, 2008 (after the fund raising period in this case), the executive director issued a further cease trade order against WBIC. This order was related to inadequate disclosure in WBIC's offering memoranda dated June 1, 2007 and February 1, 2008 regarding: risk factors related to the investments, investments made by WBIC in related companies, and material agreements entered into by WBIC including loan guarantees. Lathigee and Pasquill were directors and officers of WBIC at the time.

Risk to investors and markets

¶ 20 For the reasons discussed below, we find the respondents to be a serious ongoing risk to the capital markets and permanent market bans are warranted.

¶ 21 First, those who commit fraud represent the most serious risk to our capital markets. Here, the fraud is significant.

¶ 22 Second, WBIC and the individual respondents' multiple past infractions show they do not respect securities laws. They were not deterred by orders and sanctions from prior infractions.

¶ 23 Third, Lathigee remained active in the capital markets after his involvement in the FIC Group, co-founding an investment club in Las Vegas with a mandate that resembles the FIC Group's mandate. When talking about his background, he was not forthcoming about his regulatory history.

¶ 24 The executive director submitted a video posted on YouTube in April 2014. This was a year after the issuance of the Notice of Hearing in this case but before the liability hearing.

¶ 25 According to the video, entitled "Experts of Southern Nevada", which is in the format of an interview of Lathigee:

a) Lathigee now lives in Las Vegas and is a co-founder and leader of an investment club called the Las Vegas Investment Club;

b) The mandate of the club appears quite similar to the mandate of the FIC Group;

c) Lathigee talked about the strategy of investing in tax liens and tax deeds, and claimed a lot of success in the past with investing in these liens and deeds;

d) Lathigee claimed that he had previously built the largest investment club in North America that grew to $100 million in assets under management; and

e) Lathigee talked about some of his past successes and background but there was no mention of his regulatory history in British Columbia.

Specific and general deterrence

¶ 26 The sanctions we impose must be sufficient to ensure that the respondents and others will be deterred from engaging in similar misconduct.

Previous orders

¶ 27 The executive director referred us to three recent decisions of this Commission that dealt with fraud: *IAC – Independent Academies Canada Inc.* 2014 BCSECCOM 260, *David Michael Michaels et al* 2014 BCSECCOM 457, and *Samji*.

¶ 28 In *IAC*, the respondents raised $5.1 million from investors without filing a prospectus. Of that amount, $1.645 million was raised fraudulently. The respondents did not tell investors that the property to be developed with their money was in foreclosure. The panel ordered permanent market bans, an administrative penalty of $7 million against the individual respondents on a joint and several basis, plus a section 161(1)(g) order against all the respondents for the money that was raised illegally.

¶ 29 In *Michaels*, the panel found that Michaels convinced people to purchase $65 million of securities through fraud, misrepresentation and unregistered advising. Michaels received $5.8 million in commissions and fees from the scheme. The circumstances in *Michaels* are different from the present case in that the investments made by Michaels' clients went into investments in accordance with their intentions. However, the panel found that the seriousness of the misconduct was heightened by Michaels' predatory behavior in targeting seniors. The panel there ordered permanent market bans, an administrative penalty of $17.5 million, plus a section 161(1)(g) order for $5.8 million against Michaels.

¶ 30 In *Samji*, the panel found that Samji operated a $100 million Ponzi scheme and defrauded at least 200 investors. The panel ordered permanent market bans, an administrative penalty of $33 million, plus a section 161(1)(g) order of approximately $11 million representing the difference between the monies deposited by investors under the Ponzi scheme and the monies paid out to them, against Samji and the corporate respondents on a joint and several basis.

C Appropriate Orders

a) Market prohibitions

¶ 31 Fraud is the most serious misconduct prohibited by the Act. Permanent market prohibitions are common for those found to have committed fraud.

¶ 32 For the reasons already stated, we conclude that it is not in the public interest to allow the respondents to operate in the capital markets. We find that a permanent market ban against the respondents is necessary to protect the markets and the investing public, subject to two carve-outs:

a) We are prepared to allow Lathigee and Pasquill to trade for their own accounts through a registered dealer. We do not see any risk to the investing public by doing so.

b) We are also prepared to allow Lathigee to act as a director and officer of one private issuer whose securities are owned solely by him or by him and his immediate family. He is currently the director and officer of such a company, and we see no risk to the investing public by allowing him to continue. We are not granting this carve-out to Pasquill as he indicated that he has no need for it.

b) Orders under section 161(1)(g)

¶ 33 Section 161(1)(g) states that the Commission may order:

> "(g) if a person has not complied with this Act, … that the person pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the failure to comply or the contravention;" (emphasis added)

¶ 34 The respondents challenged our authority to make a section 161(1)(g) order (sometimes referred to as a "disgorgement order") against the individual respondents. They argued that, for section 161(1)(g) to apply, the respondent against whom the order is issued must have obtained a payment or avoided a loss, directly or indirectly, as a result of the contravention of the Act. They said there is no evidence that Lathigee and Pasquill obtained any payment or avoided any loss as a result of their contraventions of the Act.

¶ 35 The respondents argued that to order disgorgement against a respondent who has not obtained any money as a result of a contravention would improperly punish the respondent or, alternatively, wrongly duplicate the purpose of an administrative penalty. They relied on *Manna Trading*, which stated (in paragraph 36) that the purpose behind section 161(1)(g) orders is to remove "the incentive of profiting from illegal misconduct" and to return money obtained by contravening the Act.

¶ 36 The executive director disagreed. He argued that it is clear from a plain reading of section 161(1)(g) that it is not limited to requiring payment of the amount obtained by a respondent. He cited *Oriens Travel & Hotel Management Ltd.* 2014 BCSECCOM 91 and *Michaels*.

¶ 37 The Commission in *Oriens* and *Michaels* held that an order against a respondent for payment of the full amount obtained as a result of his contravention of the Act is possible without having to establish that the amount obtained through the contravention was obtained by that respondent. We agree.

¶ 38 We do not read *Manna Trading* as supporting the respondents' interpretation of section 161(1)(g). The panel there found four individual respondents to have perpetrated a fraud and ordered each of them to pay to the Commission under section 161(1)(g) the full amount obtained by the fraud without regard to the finding that they were personally enriched by different amounts. That panel concluded it was not necessary, in making orders under section 161(1)(g), to trace investor funds into the hands of the respondents. It said (at paragraph 44) that each respondent's individual contraventions, directly or indirectly, resulted in the investment of US$16 million in the Manna Ponzi scheme and ordered each of them to pay that amount under section 161(1)(g), as it was "the amount obtained, directly or indirectly, as a result of their individual contraventions of the Act."

¶ 39 We also find instructive the decision of the Ontario Securities Commission (OSC) in *Limelight Entertainment Inc.* (2008) 31 O.S.C.B. 12030 (cited in *Michaels*).

¶ 40 The Ontario Securities Act contains provisions that are identical in all relevant respects to section 161(1)(g). In *Limelight*, the OSC stated, in paragraph 49:

> "We noted that paragraph 10 of subsection 127(1) of the Act provides that disgorgement can be ordered with respect to "any amounts obtained" as a result of non-compliance with the Act. Thus, the legal question is not whether a respondent "profited" from the illegal activity but whether the respondent "obtained amounts" as a result of that activity. In our view, this distinction is made in the Act to make clear that all money illegally obtained from investors can be ordered to be disgorged, not just the "profit" made as a result of the activity. ... In our view, where there is a breach of Ontario securities law that involves the widespread and illegal distribution of securities to members of the public, it is appropriate that a respondent disgorge all the funds that were obtained from investors as a result of that illegal activity. ..."

¶ 41 In *Limelight*, the OSC found two individual respondents, Da Silva and Campbell, to be the directing minds and principal shareholders of Limelight, and to have committed illegal acts both personally and through their control and direction over Limelight and its salespersons. The OSC ordered disgorgement jointly from Limelight, Da Silva and Campbell of the entire amount raised. In doing so, the OSC stated, in paragraph 59:

> "In our view, individuals should not be protected or sheltered from administrative sanctions by the fact that the illegal actions they orchestrated were carried out through a corporation which they directed and controlled. In this case, Limelight, Da Silva and Campbell acted in concert with a common purpose in breaching key provisions of the Act."

¶ 42 We agree with the principles articulated and approaches taken in the illegal distribution and fraud cases canvassed above. They are even more compelling in cases of fraud. We should not read section 161(1)(g) narrowly to shelter individuals from that sanction where the amounts were obtained by the companies that they directed and controlled.

¶ 43 We find we have the authority to order disgorgement against the individual respondents in this case, up to $21.7 million, the full amount obtained by fraud.

¶ 44 We next considered whether we should exercise our discretion to make section 161(1)(g) orders against each respondent and in what amount.

¶ 45 With respect to the individual respondents, they submitted that the panel should not make such an order against them even if we have the authority, because they were not personally enriched and they only received reasonable compensation from the FIC Group.

¶ 46 The principles articulated in the cited cases apply equally to this case. Lathigee and Pasquill, personally and with the corporate respondents that they directed, committed fraud on close to 700 investors. They were the directing and controlling minds of the corporate respondents. They should not be protected or sheltered from sanctions by the fact that the illegal actions they orchestrated were carried out through corporate vehicles. The amounts obtained from investors need not be traced to them specifically and we find that $21.7 million was obtained, directly or indirectly, as a result of their individual contraventions of the Act.

¶ 47 With respect to the corporate respondents, they obtained the amount raised by them respectively as a result of their individual contraventions of the Act. But, they submitted that a section 161(1)(g) order should not be made against them as they have no ability to pay, and such an order may result in their entering into bankruptcy to the prejudice of the investors.

¶ 48 A respondent's ability to pay is not a relevant consideration. Even if it were, the respondents did not provide any evidence that the corporate respondents would have the money to pay the investors if we decline to make a section 161(1)(g) order.

¶ 49 Each respondent's misconduct contributed to the raising of the $21.7 million fraudulently. We find that it is in the public interest to order the respondents to pay the full amount obtained as a result of their fraud. Accordingly, we order the respondents to pay to the Commission, jointly and severally, the respective amounts set out in paragraph 62(d) below.

c) Administrative Penalty

¶ 50 Under section 162 of the Act, where the Commission has determined that a person has contravened a provision of the Act, it "may order the person to pay the commission an administrative penalty of not more than $1 million for each contravention".

¶ 51 The respondents first argued that the executive director had only alleged, and the Findings panel had only found, that the respondents committed one act of fraud when they raised the $21.7 million and three respondents committed a second act of fraud when they raised the $9.9 million. Therefore, the respondents argued that this panel has no authority to order any penalty under section 162 in excess of $2 million against the three respondents who committed fraud twice and $1 million against the remaining respondents.

¶ 52 The executive director disagreed. He said the notice of hearing alleged that the fraudulent conduct involved 698 investors who invested $21.7 million, and 331 investors who invested the $9.9 million. Therefore, a separate fraud was perpetrated with respect to each investor, which means the respondents contravened section 57(b) a total of 1,029 times (698 with respect to the FIC Group investors and 331 with respect to the FIC Foreclosure investors).

¶ 53 We agree with the executive director. His interpretation is consistent with the language in the Findings. The Findings panel stated, "We find that the respondents perpetrated a fraud on those investors, contrary to section 57(b) of the Act" [emphasis added], with respect to the 698 FIC Group investors (paragraph 303), and again with respect to the 331 FIC Foreclosure investors (paragraph 357).

¶ 54 Therefore, the respondents perpetrated a fraud each time they traded securities to an investor. As with *Manna Trading* and *Samji*, where a similar argument was advanced, the respondents in this case contravened section 57(b) multiple times in their dealings with hundreds of investors. There are, therefore, hundreds of contraventions for which we could order an administrative penalty.

¶ 55 Much of the parties' submissions focused on the quantum of the administrative penalty against the individual respondents.

¶ 56 Some Commission panels had used a two or three times multiplier on the amount of the fraud as a guide in determining the appropriate sanction. See, for example, *IAC*. There is no hard and fast rule. It is trite to say that each case is different and we must look at the circumstances unique to the case.

¶ 57 The respondents here suggested that the administrative penalty should be $500,000 for each individual respondent. But if the panel applies a multiplier, then it should be based only on the amounts paid by the corporate respondents to the individual respondent personally or to his holding companies.

¶ 58 Even if we consider the amounts paid by all the FIC Group companies to each individual respondent since January 2008, the evidence suggests they totaled less than $400,000, and a three times multiplier would be $1.2 million. In our view, that is far too low for specific and general deterrence in light of the magnitude of the fraud.

¶ 59 Here, the misconduct is greater in magnitude and seriousness than that in *IAC*, and not as egregious as that in *Michaels*. In our view, an administrative penalty of $21.7 million (in addition to the $21.7 million disgorgement) against each individual respondent as requested by the executive director is not necessary for meaningful specific and general deterrence. We find $15 million to be proportionate to the harm done, making it appropriate for the respondents personally and sufficient to serve as a meaningful and substantial general deterrence to others. A $15 million administrative penalty against each respondent is in line with the penalties ordered in *IAC* and *Michaels*.

¶ 60 We do not draw any material distinction between the responsibility that Lathigee and Pasquill have for the misconduct. The administrative penalty should be the same with respect to both of them.

¶ 61 We do not find it serves the public interest or any useful purpose to impose an administrative penalty against the corporate respondents. They were controlled by Lathigee and Pasquill and did not act independently of the directions from the two individuals. There is no need for specific deterrence against them. In our opinion, general deterrence can be achieved through administrative penalties against the individual respondents.

IV Orders

¶ 62 Considering it to be in the public interest, and pursuant to sections 161 and 162 of the Act, we order that:

a) FIC Real Estate Projects Ltd., FIC Foreclosure Fund Ltd., WBIC Canada Ltd. (the "corporate respondents")

i. under section 161(1)(b)(i), all persons permanently cease trading in, and be permanently prohibited from purchasing, any securities or exchange contracts of the corporate respondents;

ii. under section 161(1)(d)(v), the corporate respondents are permanently prohibited from engaging in investor relations activities;

iii. under section 161(1)(c), on a permanent basis, none of the exemptions set out in the Act, the regulations or decisions (as those terms are defined by the Act), will apply to any of the corporate respondents; and

iv. subject to paragraph 62(d) below, under section 161(1)(g), the corporate respondents pay to the Commission the amounts obtained, directly or indirectly, as a result of their contraventions of the Act, as follows:

- FIC Projects - $9.8 million
- FIC Foreclosure - $9.9 million
- WBIC - $2 million;

b) Lathigee

i. subject to the exception in paragraph 62(b)(ii)(b) below, under section 161(1)(d)(i), Lathigee resign any position he holds as a director or officer of an issuer or registrant;

ii. Lathigee be permanently prohibited:
   (a) under section 161(1)(b)(ii), from trading in or purchasing any securities or exchange contracts, except that he may trade and purchase them for his own account through a registrant if he gives the registrant a copy of this decision;
   (b) under section 161(1)(d)(ii), from becoming or acting as a director or officer of any issuer or registrant, except that he may act as a director or officer of one issuer whose securities are solely owned by him or by him and his immediately family members (being: Lathigee's spouse, parent, child, sibling, mother or father-in-law, son or daughter-in-law, or brother or sister-in-law);
   (c) under section 161(1)(d)(iii), from becoming or acting as a promoter;
   (d) under section 161(1)(d)(iv), from acting in a management or consultative capacity in connection with activities in the securities market; and
   (e) under section 161(1)(d)(v), from engaging in investor relations activities;

iii. under section 161(1)(c), except for those exemptions necessary to allow Lathigee to trade or purchase securities and exchange contracts for his own account, on a permanent basis, none of the exemptions set out in the Act, the regulations or decisions (as those terms are defined by the Act), will apply to Lathigee;

iv. subject to paragraph 62(d) below, under section 161(1)(g), Lathigee pay to the Commission $21.7 million, being the total amount obtained, directly or indirectly, as a result of his contraventions of the Act; and

iv. under section 162, Lathigee pay an administrative penalty of $15 million;

c) Pasquill

i. under section 161(1)(d)(i), Pasquill resign any position he holds as a director or officer of an issuer or registrant;

ii. Pasquill be permanently prohibited:
   (a) under section 161(1)(b)(ii), from trading in or purchasing any securities or exchange contracts, except that he may trade and purchase them for his own account through a registrant if he gives the registrant a copy of this decision;
   (b) under section 161(1)(d)(ii), from becoming or acting as a director or officer of any issuer or registrant;
   (c) under section 161(1)(d)(iii), from becoming or acting as a promoter;
   (d) under section 161(1)(d)(iv), from acting in a management or consultative capacity in connection with activities in the securities market; and
   (e) under section 161(1)(d)(v), from engaging in investor relation activities;

iii. under section 161(1)(c), except for those exemptions necessary to allow Pasquill to trade or purchase securities and exchange contracts for his own account, on a permanent basis, none of the exemptions set out in the Act, the regulations or decisions (as those terms are defined by the Act), will apply to Pasquill;

iv. subject to paragraph 62(d) below, under section 161(1)(g), Pasquill pay to the Commission $21.7 million, being the total amount obtained, directly or indirectly, as a result of his contraventions of the Act; and

iv. under section 162, Pasquill pay an administrative penalty of $15 million.

d) Section 161(1)(g) payments

i. The respondents' respective obligations to pay under paragraphs 62(a)(iv), 62(b)(iv) and 62(c)(iv) above shall not exceed the following:

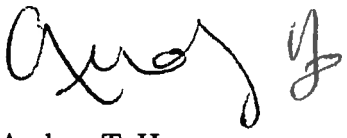
(a) $9.8 million (distributions relating to FIC Projects) – FIC Projects, Lathigee and Pasquill only, on a joint and several basis;

(b) $9.9 million (distributions relating to FIC Foreclosure) - FIC Foreclosure, Lathigee and Pasquill only, on a joint and several basis; and

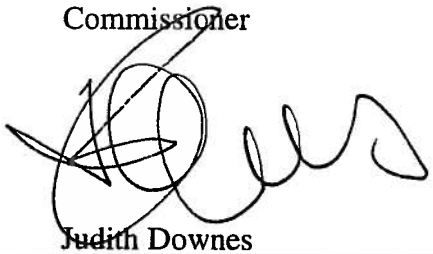
(c) $2 million (distributions relating to WBIC) - WBIC, Lathigee and Pasquill only, on a joint and several basis.

¶ 63 March 16, 2015

¶ 64 **For the Commission**



Audrey T. Ho
Commissioner



Judith Downes
Commissioner

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EXHIBIT 2

JAX189

Notice of Hearing

Michael Patrick Lathigee and Earle Douglas Pasquill, FIC Real Estate Projects Ltd., FIC Foreclosure Fund Ltd., WBIC Canada Ltd. (collectively, the Respondents)

Section 161 of the *Securities Act*, RSBC 1996, c. 418

¶1 The British Columbia Securities Commission (Commission) will hold a hearing at which the Executive Director will tender evidence, make submissions and apply for orders against the Respondents under sections 161, 162 and 174 of the *Securities Act*, RSBC 1996, c. 418 (the Act), based on the following facts:

Background

1. Michael Patrick Lathigee (Lathigee) and Earle Douglas Pasquill (Pasquill) jointly directed and controlled a group of companies that they represented and promoted collectively as the Freedom Investment Club (FIC or the FIC Group of Companies).

2. At all relevant times Lathigee and Pasquill were residents of Vancouver, British Columbia, where FIC also had its head office.

3. Lathigee and Pasquill were directors and the Chief Executive Officer and President, respectively, of:

   (a) FIC Real Estate Projects Ltd. (FIC Projects);
   (b) FIC Foreclosure Fund Ltd. (FIC Foreclosure);
   (c) WBIC Canada Ltd. (WBIC); and
   (d) other entities in the FIC Group of Companies.

4. FIC promoted investments that it represented as "funds". More accurately, these investments were securities offered by individual FIC companies and distributed, purportedly, under exemptions from the registration and prospectus requirements of the Act.

5. Lathigee, Pasquill, and FIC made the following representations in promoting FIC as an investment vehicle to prospective investors:

   (a) FIC was a club that provided its members with exclusive opportunities to invest in a variety of funds.

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(b) Only members in FIC were permitted to invest in a FIC fund. Persons wishing to become members were required to first pay a membership fee, which allowed them an opportunity to invest in one fund.

(c) Members were required to pay an additional fee in respect of each additional fund in which a member wished to invest.

(d) Each fund had specific guidelines that dictated the investment decisions made by that fund, and therefore "if a Member chooses to purchase shares, he/she should first select which fund is appropriate for their investment needs."

Misconduct

6. By February 2008, FIC had taken on a significant amount of debt in relation to several Alberta real estate properties it had acquired and was attempting to develop. These were, principally:

   (a) A $22,128,800 loan provided by a Canadian chartered bank (the Loan) to a FIC company, secured by a first mortgage on one of FIC's development properties and guaranteed by five other FIC companies, including WBIC, that jointly and severally agreed to repay the entire outstanding amount of the Loan in the event of default.

   (b) A $4,000,000 mortgage loan to a FIC company, secured by a first mortgage on a FIC property and with another FIC company as a covenantor.

   (c) A $8,940,000 mortgage loan to a FIC company, the repayment of which was guaranteed by three other FIC companies.

   (collectively, the Guaranteed Debt)

7. By early March, 2008, Lathigee and Pasquill were aware that FIC as a whole was, in their own words, "in a very bad situation", had "no cash flow", was "close to insolvency", and that there was a real possibility the Loan would be called and that FIC was "doomed".

8. Faced with FIC's dire financial situation, Lathigee and Pasquill chose, again in their own words, to keep it "confidential", and "focus on sales and bringing in cash and nothing else" to try and "save" FIC.

BCSC

Dishonest deprivation

9. Although FIC represented that investments in its various funds were individual investments, the reality was that Lathigee and Pasquill treated all money raised from FIC investors as one pool of money, orchestrating loans between FIC companies as required. In this fashion, money raised by one FIC company was effectively available to fund any other FIC company.

10. Between February 1, 2008 and November 15, 2008, Lathigee, Pasquill and the other Respondents aggressively promoted and distributed securities in the following FIC companies to members of FIC, without disclosing that the FIC Group of Companies was close to insolvency and that the investments were therefore extremely risky:

    (a) $1,999,732.30 by selling WBIC shares to 100 investors;

    (b) $9,759,405.36 by selling FIC Projects promissory notes to 267 investors;

    (c) $9,936,271.25 by selling FIC Foreclosure shares to 331 investors.

11. In promoting the sale of FIC Projects promissory notes, Lathigee and Pasquill mailed notices to FIC members and held webcasts in which they stated:

    (a) "We have over $100 million in Real Estate Assets and the loan amount we are seeking is $10 million"… "the asset base of FIC real estate alone is ten times bigger than the total amount being raised for the promissory note," and

    (b) "If you have followed the teachings of the Club, we have had an uncanny accuracy to guide members. We are now guiding you to go very heavy in cash and seek a cash flow opportunity that outperforms inflation"… "be an action-taker and take advantage of this spectacular opportunity that's so right for these times."

12. These statements were misleading. In reality, FIC's properties were encumbered by mortgages and liens, and FIC Projects was an unsecured real estate investment with little prospect of cash flow.

13. In a webcast promoting FIC Foreclosure shares, Lathigee represented it as an opportunity to invest in foreclosed properties in the United States, in the following terms:

(a) "I have discovered an opportunity for members where we can all make a fortune and the returns will likely be higher than any other opportunity we have pursued as a club. In fact, in my entire career I have never seen a better opportunity… the returns are spectacular."

(b) "The profits are enormous"… "I want you to get rich with the Club"… "the numbers are astounding"… "This deal will seal the legacy of the Freedom Investment Club and all its members to acquire enormous wealth"… "make gains that we never thought possible."

(c) "I am positive this will be our best investment opportunity to date, and maybe ever, because these type of opportunities, as I see them, come along once in a lifetime. In my career, it is the best one I've ever seen. This should be the opportunity where you write the largest cheque you have ever considered, to participate in an FIC offering."

14. In reality, of the approximately $9.9 million raised through the sale of its shares, FIC Foreclosure used only $1.4 million to buy foreclosed properties in the United States. Lathigee and Pasquill directed the majority of the remaining proceeds to other FIC companies, without disclosing it to the investors.

15. By December 2008, the bank holding the Loan began to take legal steps to collect it, which culminated in the appointment of a receiver in January of 2010. Investors in WBIC, FIC Projects and FIC Foreclosure lost most of their money.

Fraud

16. Lathigee, Pasquill and the other Respondents perpetrated a fraud on investors in WBIC, FIC Projects and FIC Foreclosure, contrary to section 57(b) of the Act.

Public interest

¶2 It is in the public interest that the Commission issue orders under sections 161 and 162 of the Act.

Hearing Process

¶3 The Respondents or their counsel are required to attend at the 12th Floor Hearing Room, 701 West Georgia Street, Vancouver, BC, on March 20, 2012, at 9:00 a.m. if they wish to be heard before the Commission sets a date for the Hearing. Relevant information gathered by Commission Staff in the investigation of this matter will be disclosed to the Respondents upon request to the Executive Director.

BCSC

¶4 At the Hearing, the Respondents may be represented by counsel, make submissions and tender evidence. The Respondents are requested to advise the Commission of their intention to attend the Hearing by informing the Secretary to the Commission at PO Box 10142, Pacific Centre, 701 West Georgia Street, Vancouver, BC V7Y 1L2 phone: (604) 899-6500; email: commsec@bcsc.bc.ca.

¶5 If the Respondents or their counsel do not appear at the Hearing, the Executive Director may apply to have questions of liability and sanction heard at the same time. Determinations adverse to the Respondents may be made in their absence.

¶6 March 1 , 2012

Paul C. Bourque
Mar 1 2012 4:11 PM
Executive Director

CSign

¶7 Paul C. Bourque, Q.C.
Executive Director

JAX195

EXHIBIT 3

JAX195

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20 March 2012

Vancouver, B.C.

(PROCEEDINGS RECOMMENCED AT 9:19 A.M.)

THE CHAIR: Act two.

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MS. PIVNENKO: Good morning.
THE CHAIR: We are running kind of like Provincial Court.
MS. PIVNENKO: Mila Pivnenko for the Executive Director, P-i-v-n-e-n-k-o, first initial M.

And we are here to set a date for the hearing. Now I understand that Mr. Anderson is appearing here for all the respondents.

MR. ANDERSON: Only for the -- I prefer to introduce myself so I can make it clear what I'm doing here. Mr. Chairman, my name is Anderson, my initials are H.R. And for the purposes of today, I'm appearing on behalf of all five respondents, but I may not be acting for perhaps more than one at the hearing of this matter and I will address that in a moment.

THE CHAIR: Okay.

MR. ANDERSON: In any event, maybe just to short-circuit this, I'm not in a position to fix a date today and I'll explain to you why I'm not. The investigation in this case started in -- I believe it was August of 2009 pursuant to an investigation order. There was evidence turned over and I was not involved in that part of the process, pursuant to some demands for production through the fall of 2009. And that was an ongoing process, from what I can tell upon

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my review of some of the information.

In February of 2010, one of the FIC group companies, that is not a respondent in this matter, was placed into receivership in Alberta. There was consequential orders made by the British Columbia Supreme Court in relation to that receivership and that result of which was a -- the receiver gained possession of a server which was -- the commission then issued a demand for production in relation to.

And after some appearances in B.C. Supreme Court in about mid-February 2010, a copy of that hard-drive was delivered to the commission, well, to Mr. Will Roberts as a representative of the commission on certain undertakings. I was involved in that aspect of it.

And because of difficulties with respect to the way in which the forensic computing company had dealt with the searches to try to vet out privilege documents before it was turned over, there were considerable delays. And that was, more or less, the last I heard of it until

February of this year when I received communications from my learned friend asking whether or not I was still representing anybody.

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And I asked why and to provide me with whatever it was that she wanted served.

On March the 1st, I was delivered the notice of hearing in this matter, which I forwarded to the clients and received instructions approximately a week later to accept service on behalf of all five respondents. We received disclosure on March the 13th. Mr. Lathigee no longer resides in Canada and he did not get a copy of the CD rom until yesterday as a result of taking a day or two to get to my office to get copies made and couriered out to the States.

Speaking for myself and my clients, I haven't looked at the CD rom yet. I haven't had the opportunity because of other commitments. I do not know at this point the degree at which there would be conflicts between either of the individual respondents and the companies.

I do know, I feel that I can tell you this, is that the idea would be to have as few lawyers

as possible for obvious reasons, but I'm not going to be in a position to make those determinations and if I need additional lawyers to be involved on behalf of these people for about three weeks from today because of my time commitments on other

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matters, so what I'm proposing is to put it over for somewhere in the neighbourhood of three weeks to a date convenient with a view that I can get those issues sorted out, have some kind of an idea of how long this will take to be heard from my perspective.

I want to make this point, as you know most of the time when you're involved in one of these matters, you go with your client to -- I think I'll interview -- often that process gives you a better idea of what the case is about, that has not happened here. And so this was more or less after a year out of the blue. I'm not blaming my friend but I really don't know what the commission staff has looked at. I, of course, got the letter of particulars and the notice of hearing which gives me an idea, but I don't know any of the

documents because I've just never been a party to any of that, which is unusual. So I'm asking for three weeks to get these things sorted out.

MS. PIVNENKO: I will suggest fixing the dates now and if -- far away for Mr. Anderson to get instructions or sort out his issues and if this is not workable, he can always ask for an adjournment later.

MR. ANDERSON: I don't have the ability to say I'm going to act

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on behalf of all five people at the hearing and I don't think there's any point in setting a hearing date when I haven't had a chance to look at the material, when I don't know if there's conflicts, don't know if other lawyer -- if we need one, will be available for whatever those dates are and I think it's just largely a waste of time. I mean it's not like there's anything urgent pressing about this case. It's been under investigation for almost three years.

THE CHAIR: If we were going to set dates, what dates did you have in mind?

MS. PIVNENKO: I had in mind July 25th -- 3rd to 26th. And the Executive Director's case will take two days, to estimate, including the cross-examination of our

own witnesses.

MR. ANDERSON: I can tell you, Mr. Aitken, this case is going to take a fair length of time and I really won't be able to do it for quite a while. What I have is I'm pretty well fully booked now through the summer except those times that I'm taking holidays. And I start a six month criminal trial on September the 17th, although I don't think it will take that long.

THE CHAIR: All right. Well, I think in the circumstances

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since Mr. Anderson isn't asking for the whole file at the time, I think I prefer to put it over for the three weeks or so that he's asking and then we'll have an idea of how many counsel are involved and how much leeway we're going to give the respondents in terms of hearing dates that are convenient. It's sometimes an issue.

So what is three weeks from --

MR. ANDERSON: Well, I'm here, Mr. Chairman, already on the -- I guess that's a late in the day pretrial on the 10th of April. I could come that morning if that works, but what I would -- of course, what I

typically try to do is to try to figure out how long it will take if we have other counsel. I'm sure there will be other counsel because I don't intend to act for all five. Roughly when the availability and the time is, talk to my friend, we might be able to hopefully arrange something in advance.

THE CHAIR: Now the 10th is not a good day for the commission. How would the 11th be?

MR. ANDERSON: I'm fine on the 11th.

THE CHAIR: 10:30 --

MS. PIVNENKO: Sure.

THE CHAIR: -- instead of the usual 10:00.

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MR. ANDERSON: 10:30 on the 11th?

THE CHAIR: Yes.

MR. ANDERSON: Thank you.

THE CHAIR: All right. Nothing further?

MS. PIVNENKO: No. Thank you.

THE CHAIR: Thank you.

(PROCEEDINGS ADJOURNED AT 9:28 A.M.)

JAX205

EXHIBIT 4

JAX205

IMPORTANT NOTICE - PLEASE READ
AGREEMENT OF PARTIES
WORKING WITH REALTIME AND/OR UNCERTIFIED DISK

We, the party working with realtime and/or uncertified transcripts, understand that if we choose to use the realtime screen and/or uncertified disk, or the printout, that we are doing so with the understanding that the disk is an uncertified, unedited copy.

We further agree not to share, give, copy, scan, fax or in any way distribute this realtime draft and/or uncertified disk in any form (written or computerized) to any party. However, our own experts, co-counsel and staff may have limited internal use of same with the understanding that we agree to destroy our realtime draft or any computerized form, if any, and replace it with the final transcript upon its completion.

REPORTER'S NOTE

Since this proceeding has been realtimed and/or given in uncertified disk form, please be aware that there may be a discrepancy regarding page and line numbers when comparing the realtime screen, uncertified disk, and the final transcript.

Also please be aware that the realtime screen and the uncertified transcript and/or uncertified disk may contain untranslated steno, reporter's notes in double parentheses, misspelled proper names, incorrect or missing Q/A symbols or punctuation and /or nonsensical English word combinations. All such entries will be corrected on the final, certified transcript.

Kathie Tanaka,
Official Reporter
UNITED REPORTING SERVICE LTD.

April 11, 2012
Vancouver, BC

(PROCEEDINGS COMMENCED AT 10:30 A.M.)

THE CHAIR: Good morning. Appearances just for the record?

MS. PIVNENKO: Mila Pivnenko, Pivnenko, for the executive director.

MR. ANDERSON: Please, Mr. Aitken, my name is Anderson. My initials are H.R. I appear for all of the respondents. Probably it's best I talk because I

sought the adjournment. And I probably should have phoned my learned friend earlier today, but I got caught in something that occupied my time until I got here. I've now had the opportunity to

go through some of the disclosure, talked to the clients about it. I identify a number of witnesses that would be required for their case. Now, this case is basically a fraud case. It's not an illegal distribution sort of thing and I don't think under the circumstances the individual respondents would be prepared to admit anything. I don't know what the ultimate position the commission staff will take vis-a-vis the companies. They're largely -- I won't say they're nonoperating, but they're not doing anything of consequence except involved in a variety of different lawsuits to attempt to recover monies, at least the way I understand it. I anticipate that, based on my review of material to date, is -- I would be uncomfortable of setting anything less than 10 days, but I think 10 days would be -- have an idea of what the witnesses would say. What I don't have a strong feel for at this point would be the number of documents involved in the case. It's that time of year. Anyway, the number of documents that will be involved -- what I do know is that there was significant production of

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documents made on several demands for production early on, which I referred to last time, a hard drive from a server that encompassed all of the documents of -- electronic documents of these three corporate respondents, documents pertaining to the individuals and a variety of other companies were produced to the commission. And I don't know the degree to which -- what kind of volume of documents the staff intends to rely on at the hearing. And I doubt if my friend knows at this point anyway. The difficulty that I have is that I start the -- I'm fundamentally booked with -- I have, you know, a few days here and there plus some summer holidays booked, but not that much this year. But I start John Patterson's criminal trial on the 17th of September, 2012. The trial is set to go essentially four days -- four days a week starting on that date. There's briefly recessing around Christmas time and then carrying on until -- I can give you the exact date. The ides of March. Now, I don't think -- you know, I'm just saying this. I don't think it's going to take that long, but I'm reluctant to book something in -- in there on top of it for fear that it gets carried away and to be -- in terms of my dealings with Crown counsel in the Patterson matter, I can tell you that what I

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thought would go a lot easier has not and so I -- I really don't want to book anything. Now, I am prepared to start something a week after -- not the immediate week after, but the week after that to give me a week after that case to complete my preparation, and that's the earliest that I can do.

THE CHAIR: So about a year from now --

MR. ANDERSON: Less.

THE CHAIR: -- roughly?
MR. ANDERSON: Eleven months. This Patterson trial is what's causing my grief. For a case that I was involved in from start to finish, it was going to take three or four days. There might be the odd place where I could do it, but this case is going to take longer than that. There's serious allegations. For the reasons that I expressed the last time, it's proceeded a little bit differently than usual because there was no interviews of the respondents and so it's different in that sense. You know, you usually have a feeling for the case and what's a live issue if you've been through that process.
THE CHAIR: Okay. Anything further?
MR. ANDERSON: No. That's all I can really say.
THE CHAIR: Miss Pivnenko?
MS. PIVNENKO: I am fully available in March, 2013.

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THE CHAIR: Do you have submissions on whether that's an unduly long period of time to wait?
MS. PIVNENKO: Well, it's a little unusual. I think this is the longest we've ever had to wait, but Mr. Anderson seems to have a legitimate reason for not being able to attend earlier.
THE CHAIR: Well, what I'm struggling with, counsel, is that it's -- in my opinion it is an unduly long period of time that we're setting down in a matter of this gravity and so I'm happy to hear you on that. I mean I think as far as the law goes, certainly the respondents are entitled to have adequate time to retain counsel, but it doesn't necessarily mean a specific counsel. So can I hear you on that?
MR. ANDERSON: Well, what I would say to that is this: The investigation started, if my memory serves me right -- and I haven't gone and looked. I'm going to say 2009, mid-August. I think I'm right on that. I have been involved -- and the commission, I think, knows this. I'm not saying my learned friend does. But the commission staff generally because I was dealing with, I think, Mr. Muir to begin with on this matter. The respondents co-operated to the degree that they were asked to do anything by the commission. And I think the -- the hard drive came into the possession of the commission -- I'm going to say almost -- well,

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they've had at least, I think, a year and a half to work on it. I don't think, say, eight months is that atypical in some of these hearings if they're more serious and they have a lot of documents. And the reality is the only reason that -- that I'm seeking more is I'm stuck with this other trial, which makes it an unusual situation because typically I at this stage of my career do not want to book six months of trial time. I don't need it anymore. And so I don't think I'm asking for a lot more here. And the problem, of course, it's created is if somebody else has to start from scratch, and I'm not satisfied at this time that I have somebody else

from my office that I would give this case to. The client's going to have to start from scratch.

THE CHAIR: Would you be prepared to undertake that if the Patterson criminal trial were being significantly truncated from the estimate you have now that you would be prepared to move the dates of this hearing up assuming there's a spot in the calendar? It's a soft undertaking. In other words, you keep your own calendar open to slot this in if that were to happen.

MR. ANDERSON: Right. I don't want to -- I don't intend to double book into Patterson. When I said to you at the beginning that I don't think it's going to

take that long, I really don't.

THE CHAIR: Yes.

MR. ANDERSON: And, you know, I'm doing certain things in it that -- I don't think it's any secret. Like, finally I got some draft admissions from the Crown at four o'clock last Thursday just before I broke for the weekend. And I'm going to work on those and if certain things like that can happen, I can see things unfolding in a little bit different way in that case for probably obvious reasons. And I don't mind moving something up. I wouldn't be asking for this kind of time if I was not stuck.

THE CHAIR: Well -- and I'm not asking you to double book. I'm just saying if at some point you know that that hearing is not going to occupy the time you have that you would -- you would advise us of that and that you are available to book it earlier if by then we still have time on the calendar. Your reputation stands you in good stead. You're known as a counsel who likes generally to move things along, so that would put some reliance on that kind of undertaking.

MR. ANDERSON: Well, and I would. I would. And I probably -- I probably won't have a good sense of that, I would think, until, you know, midsummer.

THE CHAIR: Oh, yes.

MR. ANDERSON: Just to put it into perspective, I agreed, I

think, late last September that the Crown would draft some admissions, which I would then look at. And we had a meeting and went through the kinds of topical areas where admissions might be made. And I mean I anticipated getting it somewhat before April. And so it's that kind of thing. But I'm under -- well, Crown's probably under more pressure from the administrative judge at Main Street to try to truncate it too.

THE CHAIR: And I'm not asking for any forecasts of when you'll learn it, just that when you do learn it, if you do learn it, then you tell us and we try to move this up a bit if that works for us and for staff.

MR. ANDERSON: I'd be happy to do it.

THE CHAIR: All right. Well, I don't actually have a calendar in front of me that's that far ahead, but if somebody wants to tell me what the Monday is in the third week of March.

MR. ANDERSON: It's the 25th. Like, this trial would finish on

the 15th and the 18th is the following Monday, which I've got to tell you I'd be hard pressed, I think, to start the following Monday if it went the distance. But the 25th would be the one after that. It would give me effectively a week in between.

THE CHAIR: I guess I do have an electronic calendar. I'm old enough that I don't always think of those things

first. Yes. The 25th. No idea when Easter is next year, but --

MR. ANDERSON: Well, I can tell you. It is in the week of the 25th. The holidays would be the 29th and the 31st.

MS. PIVNENKO: 1st is Friday.

THE CHAIR: Yes.

MR. ANDERSON: I'm looking at this. Why is this not meshing? I see, because -- my friend's right. It's the 1st.

MS. PIVNENKO: Well, the executive director is going to need three days. Are you saying you need 10 days for your part?

MR. ANDERSON: No. I think that -- I assumed that you'd say three days based on what you said last time.

MS. PIVNENKO: Okay.

MR. ANDERSON: And so I don't think -- some of these witnesses won't be whole day witnesses, I don't think.

MS. PIVNENKO: Okay.

THE CHAIR: Well, do you want to say March 25 through 28, April 2nd to the 5th, and do you want to say April 8 and 9 as well just so we have 10?

MR. ANDERSON: Yes. I think that's best. So 25 to 28 and 8 and 9.

THE CHAIR: Yes.

MR. ANDERSON: And I will undertake to advise the commission through the commission secretary and my learned friend should the Patterson thing change or

resolve, however. I think by the fall I'll know, but I just -- I can't see it going that kind of time.

THE CHAIR: Sure. All right. Anything further?

MS. PIVNENKO: No.

MR. ANDERSON: No.

THE CHAIR: All right. Well, we'll see you in a year.

MS. PIVNENKO: Thank you.

MR. ANDERSON: Yes.

(PROCEEDINGS ADJOURNED AT 10:42 A.M.)

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