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 5, Bates Nos. JAX754–960

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

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JAX754

EXHIBIT 13

JAX754

Citation: 2014 BCSECCOM 264

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

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

Hearing

Panel	Brent W. Aitken	Vice Chair
	Judith Downes	Commissioner
	Audrey T. Ho	Commissioner
Hearing Dates	September 16-20, 23, 24; December 6, 2013	
Date of Findings	July 8, 2014	
Appearing		
Derek Chapman	For the Executive Director	
H. Roderick Anderson	For the Respondents	
Owais Ahmed		

Findings

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1 Introduction

¶ 1 This is the liability portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418.

¶ 2 In a notice of hearing issued March 1, 2012 (2012 BCSECCOM 66), the executive director alleged that Michael Patrick Lathigee, Earle Douglas Pasquill, FIC Real Estate Projects Ltd.

(FIC Projects), FIC Foreclosure Fund Ltd. (FIC Foreclosure), and WBIC Canada Ltd. (WBIC) contravened the Act by perpetrating a fraud, contrary to section 57(b) of the Act.

¶ 3 The executive director alleges that the respondents acted dishonestly when, from February through August 2008, they:

- raised $21.7 million through the sale of securities to 698 investors without telling the investors important facts about the financial condition of the corporate respondents; and
- used $8.5 million of $9.9 million raised from 331 investors in FIC Foreclosure to make loans to related companies instead of investing the funds in foreclosures of residential properties in the United States, the purpose for which the funds were raised.

¶ 4 The executive director's only witness was a Commission staff investigator. The respondents' witnesses included Pasquill and Graham Woods, the chief financial officer of the corporate respondents. Lathigee attended portions of the hearing but did not testify.

2 Background

2.1 The Respondents and related parties

¶ 5 Lathigee and Pasquill jointly directed and controlled a group of companies, which included the corporate respondents, called Freedom Investment Club (FIC Group).

¶ 6 FIC Group was Lathigee's concept. According to Pasquill, the idea was that it would provide investors the opportunity to learn and develop investment skills, and would offer them the opportunity to participate in investments offered by FIC Group. FIC Group had regular meetings of members. The meetings typically had a so-called educational component accompanied by a presentation, typically made by Lathigee, about the current investment opportunities that FIC Group had on offer.

¶ 7 FIC Group also held events called "InvestFest" which, according to Pasquill, were "kind of investment seminars, where outside speakers would come, products were sold, and we would receive some commissions on those."

¶ 8 Lathigee and Pasquill were directors and officers of all of the companies in FIC Group, including the corporate respondents FIC Foreclosure, FIC Projects and WBIC. Lathigee and Pasquill were, respectively, the CEO and president of FIC Projects and WBIC, and the president and secretary of FIC Foreclosure.

¶ 9 It is not disputed that Lathigee and Pasquill were the acting and directing minds of FIC Group, including the corporate respondents, and were the sole individuals directing the affairs of FIC Group.

¶ 10 At all relevant times Lathigee and Pasquill were residents of Vancouver, British Columbia, also the location of FIC Group's head office.

¶ 11 FIC Group's primary business was real estate development, mostly in Alberta. Several different FIC Group companies were involved in various development projects.

¶ 12 FIC Group's largest development project was Genesis on the Lakes, a residential development near Edmonton, Alberta. Genesis was being developed in two phases. The first phase was divided into two sub-phases, 1A and 1B. Phase 1A was being financed by The Toronto-Dominion Bank through loans and other credit facilities to an FIC Group company called Genesis On The Lakes Ltd. As discussed below, the status of this project during the relevant period, and the associated financing, are highly significant to the issues in this hearing.

¶ 13 These are individuals who, during the relevant period, were members of FIC Group's management whose roles were relevant to the allegations in the notice of hearing:

- Graham Woods was a chartered accountant and FIC Group's chief financial officer.
- John Tansowny had overall responsibility for the acquisition, development and marketing of FIC Group's Alberta real estate projects.
- Steve Rea held the title Managing Director at FIC Group and during the relevant period, his responsibilities included managing the relationships with FIC Group's lenders.

¶ 14 FIC Group, Lathigee and Pasquill have a regulatory history. In December 2005, Commission staff issued cease trade orders against FIC Group companies FIC Investments Ltd. and WBIC because the forms of offering memoranda those companies used in distributions did not comply with the form required by the Act. Commission staff required both companies to refile their forms and offer rescission to investors who purchased under the earlier form. Both did so. Commission staff rescinded the FIC Investments order in March 2006 and the WBIC order in November 2006.

¶ 15 In June 2007 Lathigee, Pasquill, WBIC, FIC Foreclosure, and another FIC Group company, China Dragon Fund Ltd., entered into a settlement agreement with the executive director in which they admitted these contraventions of the Act (as described by FIC Foreclosure in an offering memorandum):

> ". . . illegal distribution during the period preceding the cease trade orders, making unwarranted claims about no management expense ratio, and improperly exercising and cashing out options."

¶ 16 China Dragon undertook to refile its offering memorandum and offer rescission to its investors. Lathigee and Pasquill undertook to pay fines of $60,000 and $30,000 respectively, and paid them.

2.2 The Distributions

¶ 17 From February 1 through August 21, 2008, the corporate respondents raised $21.7 million from 698 investors by distributing securities as follows:

- Between February and August 2008 FIC Foreclosure issued Class A shares to 331 investors for proceeds of $9.9 million. There were two offerings. The first, under the accredited investor exemption, was for $1.5 million to 39 investors in February through April. The second, under the offering memorandum exemption, was for $8.4 million to 292 investors in April through August.
- In March, April and July 2008 FIC Projects issued promissory notes to 267 investors for proceeds of $9.8 million, $9.6 million of which was invested in March and April from 253 investors. The notes were to pay annual interest of 12% to 15% to investors in quarterly instalments.
- In April and May 2008 WBIC issued Class A shares to 100 investors for proceeds of $2 million.

3 Law and Issues

3.1 Standard of Proof

¶ 18 The standard of proof is proof on a balance of probabilities. In *F. H. v. McDougall* 2008 SCC 53, the Supreme Court of Canada held:

> "49 In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred."

¶ 19 The Court also held (at paragraph 46) that the evidence must be "sufficiently clear, convincing and cogent" to satisfy the balance of probabilities test.

3.2 Meaning of Fraud

¶ 20 Section 57(b) of the Act says:

> "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
> . . .
> (b) perpetrates a fraud on any person."

¶ 21 The British Columbia Court of Appeal in *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7 set out the elements that must be proved to establish a finding of fraud under the Act, citing *R. v Théroux*, [1993] 2 SCR 5 (at p. 20):

> ". . . the *actus reus* of the offence of fraud will be established by proof of:
> 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
> 2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.

> Correspondingly, the *mens rea* of fraud is established by proof of:
> 1. subjective knowledge of the prohibited act; and
> 2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk)."

¶ 22 In *R. v. Cuerrier* [1998] 2 SCR 371, the court stated (at para. 116) that the element of dishonesty in fraud "can include non-disclosure of important facts." *Cuerrier* seems at first to be a case of little application to securities regulation: it was a sexual assault case. The accused was HIV-positive and failed to disclose that fact to individuals with whom he had consensual sex. It was necessary for the court to consider whether the non-disclosure was fraud, within the meaning of the *Criminal Code*, and thus vitiated the consent.

¶ 23 However, the Court noted (at para. 117) "The principles which have been developed to address the problem of fraud in the commercial context can, with appropriate modifications, serve as a useful starting point . . . ."

¶ 24 That brings us back to familiar territory. That non-disclosure can constitute dishonesty is fundamental to the public interest purposes of the Act. It is consistent with the disclosure obligations imposed by credible securities regulation regimes everywhere. The requirement for complete and accurate disclosure so that investors can make well-informed investment decisions is fundamental to the fostering of confidence in our capital markets.

¶ 25 It follows that, in the context of fraud under the Act, an "important fact" would include one that would affect a reasonable investor's investment decision.

¶ 26 In *R v. Zlatic* [1993] 2 SCR 29 the Supreme Court of Canada stated:

> "The fundamental question in determining the *actus reus* of fraud is whether the means to the alleged fraud can properly be stigmatized as dishonest . . . . In determining this, one applies a standard of the reasonable person. Would the reasonable person stigmatize what was done as dishonest?"

¶ 27 In *Zlatic*, the Court cited with approval the decision of the Ontario Court of Appeal in *R v. Currie* (1984), 5 OAC 280. Describing that decision, the Court in *Zlatic* said (at page 47):

> "The accused were in the business of investing funds in a certain company . . . but diverted these funds without notice to the investors to [another] company . . . . There was no question of any misrepresentations. Nor was there any question as to what the accused were authorized to do with the funds given to them. The court . . . found that the fact that the accused used the funds in a manner which was not authorized was sufficient grounds for finding that the accused acted dishonestly."

3.3 Issues

¶ 28 The executive director alleges two separate frauds.

¶ 29 The prohibited act associated with the first alleged fraud is that, in selling the securities of FIC Foreclosure, FIC Projects and WBIC, the respondents failed to disclose FIC Group's financial condition. Because, as described below, the financial condition of the corporate respondents was dependent upon the financial condition of FIC Group as a whole, it is not disputed that it is the financial condition of FIC Group that is relevant.

¶ 30 The notice of hearing describes FIC Group's financial condition in various ways. Paragraph 7 says that "by early March, 2008, Lathigee and Pasquill were aware" that FIC Group "was . . . 'in a very bad situation', had 'no cash flow', was 'close to insolvency', and that there was a real possibility [a major loan] would be called and that FIC Group was 'doomed.'"

¶ 31 Paragraph 10 repeats the allegation that FIC Group was "close to insolvency", and alleges that the investments in the distributions "were therefore extremely risky."

¶ 32 Both parties focused our attention on whether or not the evidence established that FIC Group was "close to insolvency".

¶ 33 The state of insolvency is a well-understood concept. There are many definitions, but most of them define a person as insolvent if either of two tests are met (see, for example, *Bankruptcy and Insolvency Act* RSC 1985 c.B-3.):

- the person is unable to meet his obligations as they become due (often labelled the "cash flow test"), or
- the person's liabilities exceed the realizable value of the person's assets (often labelled the "balance sheet test").

¶ 34 In our opinion, the reasonable approach for the purposes of this case is to interpret the phrase "close to insolvency" in the context of the notice of hearing as a whole; that is, was FIC Group's financial condition an important fact? A reasonable possibility that FIC Group could become insolvent would, of course, be an important fact, but so could other factors relevant to its financial condition.

¶ 35 This approach is consistent with the respondents' position on the issue. At the oral hearing on liability, the respondents said this at the outset of their submissions, in response to an earlier question from the panel about the nature of the executive director's allegation relating to FIC Group's financial condition:

> "Just as a starting point, dealing with this issue of insolvency or close to insolvency, I do think you're going to have to make some findings of fact with respect to the financial state of this group of companies . . . [in accordance]

with the evidence that you've heard. I think, though, it matters not so much whether you're to find not insolvent, close to insolvency, or insolvent.

Whatever finding of fact you make, I think you then would have to take – and I'm going to flesh this out more in terms of what the argument is concerning the correct tests for fraud – is whether or not, based on the facts you find, if you're to look at *Anderson*, *Zlatic*, and *Theroux*, when you put yourself in the position of the reasonable person who objectively looks at the conduct to decide whether it's dishonest, it will be within that factual matrix that your finding will get its import."

¶ 36 These are the issues relating to the prohibited act associated with the first alleged fraud:
- Whether FIC Group's financial condition was an important fact under the test in *Cuerrier*.
- If FIC Group's financial condition was an important fact, whether the respondents disclosed it to the investors.
- If the respondents failed to disclose it to the investors, whether that was dishonest, and therefore a prohibited act.

¶ 37 The prohibited act associated with the second alleged fraud is that Lathigee, Pasquill, and FIC Foreclosure used the majority of FIC Foreclosure's funds, not to invest in foreclosures of US residential properties, as investors were told, but to make loans to other FIC Group companies. The issues relating to the prohibited act associated with this fraud are:
- What the investors were told about FIC Foreclosure's intended use of the proceeds of the distribution.
- How the proceeds were actually used.
- If the proceeds were used differently than as disclosed to investors, whether that was a prohibited act.

¶ 38 The issues relating to both alleged frauds, if we find a prohibited act, are:
- Whether the prohibited act caused deprivation to the investors.
- Whether the respondents had subjective knowledge of the prohibited act and had subjective knowledge that the prohibited act could have as a consequence the deprivation of the investors.

4 Analysis and Findings

4.1 First Alleged Fraud: Failure to Disclose FIC Group's Financial Condition

4.1.1 Prohibited act

¶ 39 The issue is whether the respondents acted dishonestly because they knew important facts about FIC Group's financial condition and did not disclose them to the investors.

4.1.1.1 Relevant indicators of FIC Group's financial condition

¶ 40 We considered the following factors as relevant indicators of FIC Group's financial condition during the relevant period:

- FIC Group's financial records,
- the status of a credit facility (described below) that FIC Group had with TD Bank,
- significant unfunded liabilities related to the Genesis project, and
- FIC Groups' cash flow position.

4.1.1.2 FIC Group's financial records

¶ 41 Evidence of FIC Group's cash flow situation during the relevant period is not well-documented by financial records.

¶ 42 The FIC Group financial statements entered as evidence include only balance sheets and accompanying notes. They do not include statements of income or cash flow.

¶ 43 Woods prepared a cash report every day listing the closing cash balances in the accounts of the FIC Group companies. Some of those reports are in the evidence. They include notes about which balances were restricted – that is, pre-committed, held for security, or otherwise not available to meet cash requirements generally.

¶ 44 What is missing are documents showing FIC Group's actual cash position during the relevant period – the amounts, nature and timing of expected cash requirements, and the amounts, source and timing of expected cash inflows.

¶ 45 The lack of this type of evidence significantly hampers submissions made by both parties about FIC Group's financial condition.

¶ 46 For example, the executive director says that important facts about FIC Group's financial condition were that it was "deeply in debt" and "owed millions of dollars". For their part, the respondents admit that FIC Group had "short term" cash flow problems, but maintain that FIC Group had sufficient cash to meet its obligations. Both parties point to the balance sheets and the cash reports to support their positions.

¶ 47 However, these documents provide no help to either of them. A cash balance at a point in time, without further information, tells the reader nothing about the cash flow position of the company. Without any evidence of the amount and timing of cash demands and expected inflows, there is no context in which to determine the adequacy of FIC Group's cash position at any point in time.

¶ 48 On one issue, the balance sheets do provide some useful information, when considered together with other evidence. That issue is whether FIC Group would have been considered insolvent under the balance sheet test described above.

¶ 49 We have made no finding on this issue, for two reasons. First, although we did not undertake a full analysis of the evidence relevant to this issue, we reviewed it sufficiently to conclude

that it does not establish that FIC Group would have been considered insolvent, or close to insolvent, on the balance sheet test.

¶ 50 Second, and more important, we found that the executive director proved the allegations about FIC Group's financial condition on other grounds, so it was not necessary to consider this issue.

4.1.1.3 Status of the TD credit facility

¶ 51 FIC Group entered into a $22.1 million credit facility with TD Bank on May 31, 2007 for the acquisition and development of Phase 1A of the Genesis project. The TD facility was FIC Group's largest debt by far (its two other development mortgages were for $4 million and $8.9 million).

¶ 52 The TD facility consisted of three demand loans: a $5.5 million land loan, a $13.6 million servicing loan, and a $3 million line of credit. Although demand loans, the commercial arrangement was that they would remain outstanding for a period of 18 months, and were to be repaid through the sale of lots in the Genesis project. The facility was to expire on November 30, 2008 and the loans would then be called, unless renewed by TD.

¶ 53 Security for the TD facility included:

- a $22.1 million first mortgage against the Genesis project lands,
- an assignment of an investment portfolio held by 0760838 BC Ltd. (an FIC Group company we refer to as 076), and
- an assignment of $3 million of FIC Group term deposits and credit balances.

¶ 54 WBIC and 076 were also guarantors of the TD facility.

¶ 55 FIC Group was required to maintain the market value of the 076 investment portfolio at a minimum value of $9 million for the life of the Genesis project.

¶ 56 It was a term of the TD facility that no subsequent encumbrances be filed on the Genesis lands subject to the mortgage.

4.1.1.3.1 Requirement to maintain 076 portfolio at $9 million

¶ 57 According to FIC Group's combined financial statements, as at January 31, 2008 the market value of the 076 investment portfolio was $7.1 million, a deficiency of nearly $2 million.

¶ 58 By the end of February 2008, the portfolio's market value was down to $6.8 million, and by the end of March, to $5.9 million.

¶ 59 At the end of April the value was $7.9 million, but by the end of May had fallen to just over half of the required threshold: $4.9 million – a deficiency of $4 million.

¶ 60 In fact, there is no evidence that the portfolio's market value was, at any time during the relevant period, higher than $7.9 million, other than on one day – April 17, when the market value was just under $9 million – a day on which TD's representative was inquiring as to the balance.

4.1.1.3.2 Term prohibiting subsequent encumbrances

¶ 61 On February 7, 2008 contractors on the Genesis project registered builders' liens totalling $5 million against Phase 1 of the Genesis project.

¶ 62 Under an agreement effective on May 13, 2008, the contractors agreed to discharge the liens against Phase 1A upon the payment of $2 million, and to undertake to discharge liens against Phase 1B "upon registration of the plan", which we take to be a reference to the subdivision plan for Phase 1B of the development.

4.1.1.3.3 Status generally

¶ 63 The evidence shows that FIC Group management also had concerns about the status of the TD facility generally.

¶ 64 Apparently FIC Group owed a Craig Nelson a sum of money. On January 28 Pasquill emailed Lathigee about paying it back:

> "John [Tansowny] and I have discussed cash and we've decided to use the money that Malcolm is holding (supplemented with a bit from here) in order to pay off Craig Nelson's loan.
>
> I've told John, and he has agreed that we need to replace the Malcolm money asap (within a week) so that TD doesn't get upset." ["Malcolm" was an Edmonton lawyer who held deposits that were part of the $3 million in deposits and balance assigned as security under the TD facility.]

¶ 65 The next day, Pasquill sent a follow-up email, "Wire transfers went out today repaying $1,008,040.20. John: we must now replenish funds with Malcolm asap before TD finds out."

¶ 66 During his testimony, Pasquill was asked what his concern was about TD finding out. Pasquill testified, "It wasn't so much a matter of them finding out because they knew from time to time that the money in the account would dip below what they wanted in it . . . ."

¶ 67 The questioning continued:

> "Q So again you've got the money out of the account and you want to quickly put it back in before the TD finds out?
> A Yeah, finds out is probably overstating the thing."

Q That's your words, sir?
A Yes, I know. Sometimes you don't always say what you – it's just what pops into your head at the time, but clearly we didn't want to annoy the TD Bank and so clearly we wanted to get – get the account back to where it should be."

¶ 68 Asked what he meant by TD getting "upset", Pasquill testified, "Well, clearly they had set an amount that was supposed to be in the account, and that was part of their security. Any lender would want the security to be what they thought it would be."

¶ 69 The questioning continued:

"Q So it was your understanding that you were in breach of the loan if . . . the amount in that account got below that amount?"
A No, I wouldn't have called it a breach of the loan."

¶ 70 In a March 2, 2008, email to FIC Group management (discussed more fully below), Lathigee said, "If Genesis loan is to be called by TD which is a real possibility we have to factor then we are 'doomed'". On March, he added, "TD loan is a serious concern and the dominoes that would fall."

¶ 71 At an FIC Group management retreat held on March 5 and 6, the TD facility was the second item on the agenda. These are the relevant excerpts from the minutes:

"A back up plan needs to be ready in case TD fails. 19M. 30 days. Foreclosure process"
. . .
"2. Scenario: If TD Called the Loan/Mortgage
- 4 M already sitting as equity. 7M is first equity. 3M did not go into Phase 1. Net cost on construction is 6-7M. They hold a mortgage on the loan. We need to show that we are moving progress on the property (close on presales).
- 5.4M in presales
- 25% of proceeds will goes to us; 75% to TD. Genesis is the only security.
- Conversation with Wayne Sims shows that our fears were not inflated.
What number do we need to get rid of TD? [italics in the original]
- 35M (Phase 1 and Phase 2 funded)
- 10.5% interest rate, 3.5M in fees (secured only by Genesis)

Mike interested in 3 bid options for the $35M
Instafund is connected with lower cost non-shark money.

> From a lenders perspective the land belongs to our members. We are not as secure as we think we are. TD was willing to do a deal so long as everything was locked up.
> Timeframe on Instafund – working toward end of March for ending date."

¶ 72 Instafund was a lender with whom FIC Group was negotiating credit arrangements that could replace the TD facility.

¶ 73 On April 17, 2008 Wayne Sims, FIC Group's TD account manager, emailed Woods, asking for FIC Group to sign documents:

> "Graham: can you give me documentation showing the deposit being in place as I have to verify the margining is in line. We have given Steve the required Control Agreement and Power of Attorney for 0760838 BC Ltd. Due to changes in legislation these documents are not optional and are required. Please forward the docs asap."

¶ 74 Woods replied to Sims, copying Rea:

> "Unfortunately, today I have wired another $300,000 to CIBC Wood Gundy as the amount per their spreadsheet is just under $9,000,000.
>
> In regards to the Control Agreement and Power of Attorney, I will talk to Steve when I see him but whose legislation changed? TD, government, etc."

¶ 75 Rea emailed Woods:

> "I have the document here. NO MORE MONEY IS TO BE SENT INTO A TD ACCOUNT OF ANY KIND – THEY ARE OBVIOUSLY NERVOUS AND GRABBING EVERYTHING" [*emphasis in the original*]

¶ 76 Woods responded:

> "If we sign these documents, TD will take the $9M that is in 0760838. That would be terrible. It is even worse considering that we owe $2M in tax from 0760838.
>
> Steve, how much time would we have to take out the TD with other financing or a repayment? Any idea?
>
> Personally, I would feel as a complete failure if I sign over a $9M portfolio. I just don't know how all of this works if they call the loan. I wish I understood better."

¶ 77 Pasquill, copied on these emails, responded:

> "Guys. Let's not panic. In the next couple of days, let's sit down and revisit the cash flow projections in light of this. I really think we can find a way to take out TD."

¶ 78 In cross-examination, Pasquill said that "panic" was just a form of expression, and not too much should be read into it. "Clearly everyone was getting upset about it so I'm just calming things down a bit. Putting things back into perspective," he said.

¶ 79 On April 20, Pasquill emailed Lathigee on the subject of how to allocate individuals in the management group to deal with current issues facing FIC Group:

> "Here are some thoughts on roles:
>
> 1. Plan for TD:
> Primary: Steve with consulting help from Matthew. Because of the financial input required, Graham will have to play an important role and Earle will assist as needed.
> Also, this is a big job. Steve & Graham need a high level assistant . . . . We need to find a candidate fast. . . . Obviously this is urgent.
>
> 2. To extent possible, manage the relations with TD: Steve and Graham.
>
> 3. Take out TD
> a. Build a cash flow plan that defines how we can take out TD and when. . ."

¶ 80 Pasquill was asked in his testimony about his use of the word "urgent":

> "Q Obviously this is urgent?
> A Those are the words, yes.
>
> Q So getting a plan for TD at that time was urgent?
> A Yeah, I mean it wasn't life or death urgent, but clearly the sooner we could do it the more flexibility we would have the better off we'd be. And as I said, we weren't all that happy with the way TD was treating us, so the sooner the better."

¶ 81 On May 25, Woods emailed Pasquill about the status of the TD facility and the possible replacement funding from Instafund. This is an excerpt:

> "I spoke with Kevin of TD on Friday and we had a good conversation. I feel I can work with TD, however, the biggest problem with TD now, in my opinion, is that there is only 6 months left on the loan . . . and little chance of renewal with them which is the biggest problem."

¶ 82 During Woods' testimony, counsel for the executive director drew Woods' attention to these words, asking, "It looks to me like you thought there wasn't much chance TD was going to renew the loan. Is that a fair reading of that?" Woods answered, "I think that's a fair reading from that, that by November of, of '08, we – it would be difficult to."

¶ 83 Woods testified that FIC Group's relationship with TD "was good" and "seemed fine."

¶ 84 In his testimony, Pasquill described FIC Group's relationship with TD as "cordial" and said that FIC Group had no expectation that TD would call the loan "and in fact . . . would offer an extension."

¶ 85 Clearly, however, the relationship was not all that FIC Group could have wished. Pasquill said,

> ". . . we certainly had, you know, our feelings about TD. We weren't particularly happy.
> . . .
> Most of the dissatisfaction I think was on our side. We were looking for ways to take out the TD. Clearly they had plenty of security there. And in fact removal of some of that security would give us more flexibility.
> . . .
> We didn't particularly like some of the demands that they put on us, the restriction on the trading account and the money that had to be set aside and held.
>
> . . . the TD was being tardy with their payments. . . . And there was some problems with the speed at which the quantity surveyor, the surveyor, who was under their direction, was processing things."

¶ 86 In the end, FIC Group chose not to pursue the funding arrangements with Instafund. Pasquill testified that FIC Group management did not pursue it because they thought they would be able to find better terms with another lender. He testified that they did not feel any urgency to find replacement financing.

¶ 87 During the relevant period, FIC Group had no other source of funding to replace the TD facility.

4.1.1.3.4 Conclusions and findings

¶ 88 The evidence is that the market value of the 076 investment portfolio was continuously well under the required $9 million level at least until the end of May 2008.

¶ 89 In our opinion, the assignment of the 076 investment portfolio, and the requirement to maintain its market value at $9 million, were material components of the total security given by FIC Group for the $22.1 million TD facility. It represented a substantial portion of the amount outstanding under the facility. Equally important, from the perspective of security realization, the 076 investment portfolio of cash and publicly-traded securities was highly liquid, especially compared to the lands subject to the mortgage.

¶ 90 We find that the sustained material shortfall in the market value of the 076 investment portfolio was a material default by FIC Group of the requirement under the TD facility to maintain at a minimum of $9 million the market value of the 076 investment portfolio.

¶ 91 As for the builders' liens, the respondents say that, in FIC Group management's opinion at the time, the liens were "irrelevant to cash flow". This was because the liens related to unauthorized work, the contractors agreed to discharge the liens, and there were no advances made under the TD facility after the liens were filed.

¶ 92 The liens may not have had an immediate impact on FIC Group's cash flow, but that was not the only issue. Whether or not the liens directly affected cash flow, FIC Group was in default of the term of the TD facility that prohibited subsequent encumbrances.

¶ 93 A term prohibiting the filing of subsequent encumbrances is a common provision imposed by lenders to protect their security for advances made after the date the subsequent security is filed. The provision also gives a lender the flexibility, should the loan get into trouble, to make further advances in the course of managing the situation, without having to negotiate with subsequent encumbrance holders. We find this term of the TD facility was a material term of the facility.

¶ 94 We find that the filed liens were a material default by FIC Group of the term of the TD facility that no subsequent encumbrances be filed on the Genesis project. The default existed from the date the liens were filed until, in the case of the lien relating to Phase 1A, May 31, 2008 at the earliest and, in the case of the lien relating to Phase 1B, until an unknown later point in time.

¶ 95 In his testimony, Pasquill shrugged off the suggestion that FIC Group's default of the two conditions was a breach of the TD facility and denied that there was any question of TD

calling the loan before it came due in November. In our opinion, the communications among FIC Group management at the time show otherwise.

¶ 96 When Pasquill wrote Lathigee about using funds from TD's security to pay back Nelson, he speaks of the need to replace the funds "asap (within a week)" so that "TD doesn't get upset" and to do so "before TD finds out." In his testimony, he attempted to explain away this language, saying that it was not really a matter of TD finding out because "they knew from time to time that the money in the account would dip", and suggesting they were words that just popped into his head.

¶ 97 This is a common theme in Pasquill's testimony. As we note elsewhere in these Findings, Pasquill, faced with clear and unambiguous language from emails contemporaneous with the relevant events, offered weak and vague alternative interpretations of the emails, sometimes supported by assertions for which there is no evidence. We generally found these explanations to be unpersuasive. More often we found they lacked any credibility at all.

¶ 98 His testimony does show he understood the importance of keeping the market value of the 076 investment portfolio at the required level: he said the bank had set the amount at that level and it was part of its security. He also admitted that "[a]ny lender would want the security to be what they thought it would be". Inexplicably, however, he said he "wouldn't have called it a breach of the loan" although he did admit that "we didn't want to annoy the TD Bank."

¶ 99 In our opinion, it is not credible that a business executive of Pasquill's experience (he had many years' experience as an executive in a large retail business corporation before joining FIC Group as its chief operating officer) would be so blasé about keeping the market value of the 076 investment portfolio at the required level and about the possible consequences of failing to do so.

¶ 100 When TD representative Sims asked FIC Group to sign a "control agreement and power of attorney", Rea told Woods emphatically not to send any more money into a TD account "of any kind" because TD was "obviously nervous and grabbing everything". Woods agreed, saying that if FIC Group signed the documents, "TD will take" the $9 million 076 investment portfolio, which "would be terrible" especially in light of $2 million in income taxes that 076 owed, but did not have.

¶ 101 Pasquill urged calm upon Rea and Woods. "Let's not panic," he said. The next day he emailed Lathigee about developing a plan to take out TD, a matter on FIC Group's agenda since the March management retreat. In that email, he described it as "urgent".

¶ 102 Despite Pasquill's attempts in his testimony to downplay the urgency, FIC Group's management was clearly seriously concerned about the status of the TD facility:

- In early March, Lathigee described TD's calling of the loan a "real possibility that we have to factor".
- The TD facility was the second item on the agenda for the March management retreat.
- The minutes of that retreat noted that FIC Group's conversations with the TD representative show that "our fears are not groundless". No further details are provided, but clearly, despite what was apparently a cordial relationship with the individuals from TD managing the account, FIC Group had concerns about the relationship.
- The prospect of TD taking control of the 076 investment portfolio would have meant that the cash in that account would no longer have been available to pay 076's taxes or to meet other FIC Group cash requirements. That situation would, according to Woods, have been "terrible".
- TD was "tardy" with its funding payments.
- The plan to take out TD was necessary for FIC Group to "'contain' the risk" and avoid "the threat of its balance sheet being 'seized' by the TD".
- There was "only 6 months left on the TD loan and little chance of renewal with them which is the biggest problem." Woods confirmed that fact in his testimony (he tried to tie it to the November 2008 time frame, but clearly his words speak from the date of the email in April). Pasquill testified that FIC Group believed TD would offer an extension, but there is no evidence of that, nor to refute Woods' statement in the email, and corroborating testimony, that there would be no extension.

¶ 103 FIC Group was in negotiations with another lender, who ultimately offered replacement financing for the TD facility, but FIC Group turned it down. Both Woods and Pasquill testified that they believed they would be able to find better terms.

¶ 104 In our opinion, this evidence of FIC Group's relationship with TD and management's communications about that relationship, show that TD could well have decided to call the loan, especially in light of the material defaults we have identified.

¶ 105 We find that during the period that the TD facility was subject to these material defaults, FIC Group was exposed to the significant risk that TD might decide to call the loans immediately. We find that had TD done so, FIC Group would indeed have been "doomed" – having no funds to repay the loans, it would have immediately become insolvent.

4.1.1.4 Significant unfunded liabilities related to the Genesis project

4.1.1.4.1 Description

¶ 106 The FIC Group combined financial statements for the period ended January 31, 2008 show that Genesis contractors were owed $9.6 million for work completed to that date.

¶ 107 By the end of February, the Genesis contractor had billed at least $8 million for work done ahead of the project budget schedule. Pasquill testified that this was work relating to Phase 2 of the Genesis project. The TD funding was only for Phase 1. There was no funding for Phase 2, and the contractor was looking for payment.

¶ 108 In his testimony, Woods agreed, when it was put to him, that the $8 million in overruns was "obviously a cash problem".

¶ 109 On March 1 Woods emailed Lathigee, Pasquill [and Rea] about using FIC Foreclosure funds to pay Genesis trades:

> "You have indicated the fact that Genesis is the priority. I would like to use the $700,000 on Monday to pay down or off some of the Genesis trades that are owed money. My plan is to make the mid- to small-trades happy. . . .
>
> Anyway, what I am asking is if I can use the $700,000 in Foreclosure (leaving $0 balance) and then the next $350,000 that is collected . . . will go into the Foreclosure account . . . ."

¶ 110 Lathigee replied that he was in agreement, saying, " . . . after we raise 10m then we can pay back the foreclosure fund." Pasquill also approved, noting that he expected $900,000 in FIC Foreclosure's account, so Woods' proposal would still leave $200,000 for investment in foreclosure properties.

¶ 111 Hearing that more money than the $700,000 might be available, Woods replied:

> "Could we talk a bigger payment to Gentech?
>
> Steve and I will be calling Gentech early Monday AM to determine how much to them this week will keep the trades under them from putting liens on Genesis.
>
> I think we can make everyone happy for the time being"

¶ 112 Woods testified that these emails were about "finding some funds to alleviate the trades." He explained what he was trying to achieve with the unpaid Genesis trades:

> "Basically this related to the, the trades being unhappy that they were owed money, and obviously wanted to be paid . . . . And so we . . . were attempting to work out . . . an amount that, that kept things moving along on the project.
> . . .
> And then the term 'time being' meaning, get them moving along now, you know, knowing that there obviously would still be a balance owing to them, and that, at some point, you know, we would have to, you know, face that with them at that time."

¶ 113 Asked if FIC Group had the cash just to pay off all of the trades, Woods testified, "I can't say specifically. It may have been, it would have certainly been a challenge at that point in time to just outright pay them."

¶ 114 About the time the cost overruns came to light, Woods was also concerned about the accuracy of the valuations of Genesis on which FIC Group was assessing the profitability of that project. On February 23, he emailed Lathigee. He was responding to a long email Lathigee sent to him, Pasquill and Rea about Tansowny's compensation and performance. Woods said:

> "Mike,
>
> Personally from me to you at this time, your timing on this ties right in with a high degree of uncertainty that I am feeling in regards to the real estate projects. As you are aware, we base our selling prices almost entirely on the future profits of the real estate projects. I think there is a chance that they are way off and this will really make me looking like a chump. Something like this could impact my Chartered Accountant designation. As such, it is personal to me. I can't tell you over the past week or so how many of the items you have outlined I have been thinking about.
>
> Please do not talk or confront John prior to talking to myself, Steve and Earle. . . ."

¶ 115 Lathigee replied, asking if he could share Woods' email with Pasquill and Rea. Woods consented, and Lathigee forwarded it to them with the note, "Graham is very concerned."

¶ 116 Woods testified about this email:

> "Q Were you concerned on February 23 when you sent that email . . .?
> A My concern was that I believed some information had come to us that perhaps some of the, the figures related to the Genesis project were not as originally projected, and that would have been my concern at that time. And then, going forward, we have to look at that, and I always have to consider we want, we want to operate on the best information available to us in projecting figures out and profits and that sort of thing. And so this is just sort of an indication that, you know, we have got, we have got to be as tight as we can on such projections.
>
> Q Mr. Woods, if we go to your email though, you say – the email says [counsel then refers to the paragraph about his professional designation].

A Yes, that's right. And this, this actually related I believe to the Genesis project itself. But also my comment there was just an indication to them that it's important that we're – when new information becomes available, we assess that and determine the impact on our, on our future estimations. You know, I like to be accurate"

¶ 117 On April 16, Lathigee emailed Pasquill, Woods and Rea, proposing an offering to FIC Group members for equity participation in Genesis. The next day, all three responded with strongly negative reactions. Woods replied:

"No way I am having anything to do with getting our members into FIC's Vietnam!

I can see the lawsuits coming now.

. . .

No more good money at troubled money!"

¶ 118 During his testimony, Woods was asked about this response:

"Q And so what did, what did your comment mean when you said, 'no more good money at troubled money'?

A Well, at this point, we've obviously been having – we've had challenges with the trades, keeping them moving along. We were having uncertainty as to – we still believe the project to be overly – overall profitable, but we may not know what that figure actually is. And so I don't think it's the best time, for, for that reason, to – for members to take a direct investment in a very subordinate position.

. . .

Q [in reference to Woods' 'Vietnam' metaphor] What were you making reference to here? What are you talking about?

A . . . Bringing them in as – with a direct equity interest in Genesis. Um, putting them at the lowest ranking. There's, there's so many issues surrounding that, that it's not – no go.

And my comment about that, um, I am meaning there that the project is obviously partway completed, and the most – the option we always were pursuing was obviously bringing the project to completion. We did explore other alternatives as we went along. So, that's sort of my, my comment there."

¶ 119 Rea's response was this:

"I APPRECIATE THE IMPORTANCE OF SOLVING OUR CHALLENGES!!!!

> AND – I ALSO AM AWARE OF THE HUGE RISKS ASSOCIATED WITH THIS PLAN.
>
> . . .
>
> 1. We cannot market "Profit Participation" because THERE IS NO PROFIT in Phase 1A/1B. Our profit will not be realized for 3 to 4 years from now; and at this time our best return is maybe 10M (excluding financing charges etc.).
> 2. Unless we TELL THE WHOLE STORY to members; I don't support 'selling' them on the idea of investing…how can they invest in a ship taking on water right now w/o knowing the risks?" [*emphasis in the original*]

¶ 120 Pasquill added, ". . . attracting capital to a project that, at best, would have a rate of return under 10% – and maybe zero – is very difficult."

¶ 121 In his testimony, Pasquill was asked about the comments in Rea's email about the profitability of the Genesis project:

> "Q So Mr. Rea was aware obviously by that point in time there could be no profit whatsoever on Genesis?
> A No, that's not true, he said no profit on phase 1A and B, which is the issue. . . . There's still profit on the entire project.
>
> Q So possibly $10 million three to four years from now?
> A Yeah, and that's consistent with John's comments. Around this time he was predicting 10 to $20 million of profit, perhaps more . . .
>
> Q . . . So you were obviously aware -- alive to the fact that at that point in time there could be no profit potentially?
> A No, we're talking about the phase 1A, 1B. There was profit in the larger picture."

¶ 122 The equity idea was not pursued.

¶ 123 We did not find Woods' explanation of his concerns at the time credible. At the relevant time, he emails Lathigee, the CEO, directly, that he feels "a high degree of uncertainty" about FIC Group's real estate projects. He thinks there is a chance that FIC Group's profit projections are "way off". He worries it could make him "look like a chump" – so much so that it could possibly affect his professional designation. Now, he suggests that his concern was simply that he likes having the "best information" and likes "to be accurate", a remarkably benign view of events and a view completely inconsistent with the serious language he used at the relevant time.

¶ 124 Similarly, given the opportunity to explain his reaction to Lathigee's equity proposal, his testimony was vague and non-responsive. In our opinion, his use of "Vietnam" as a metaphor for the project was intentional, as was his use of the phrase "No more good money at troubled money!"

¶ 125 Like Pasquill's testimony, Woods' explanations about the language he used in emails at the time in general does not withstand scrutiny. His testimony about the clear and apparently straightforward language in emails he composed and sent at the time was generally hesitant, vague, and not persuasive.

¶ 126 On April 16, the day the email about the equity idea were exchanged, was the same day on which Pasquill asked Rea and Woods not to panic about the TD's request for control over the 076 investment portfolio. In that email, he was also thinking about Genesis. He said:

> "One of the biggest unknowns to me is Genesis sales - namely a) to date & where the money is and b) how quickly we could sell and get payment for $8-10 million in lot sales."

¶ 127 On May 5, Pasquill sent an email to Lathigee that he testified was a draft of an email for Lathigee to send to Tansowny. It included this sentence: "Genesis has turned out to be a financial disaster." Lathigee returned the email with some suggested changes. His version left that sentence unchanged. Pasquill testified he thought that Lathigee's version was the one ultimately sent to Tansowny, but could not "categorically" say so.

¶ 128 In his testimony, Pasquill said it was necessary to "clarify" what he meant when he said Genesis had turned out to be a "financial disaster":

> "What we knew about Genesis was that we were – we were promised and, you know, right up until the beginning of March, that the profit in Genesis would be in the 20 to 30 million dollar range. It was now looking like it was going to be more like $10 million. To my mind, that constituted in itself a disaster. That doesn't mean that couldn't still make profit. . . . Nobody should allow that on their watch. . . .
>
> The reporting we got from John was not good enough and one could reasonably argue that in the context of what had happened that was a disaster.
>
> So those are the kind of things that I am talking about by disaster. I don't mean this is a wipeout, we're going to lose money on it, that kind of disaster. But any time you can't account for over spending by $10 million and cut your profits lower in half, that to my mind is a disaster."

4.1.1.4.2 Conclusions and findings

¶ 129 The Genesis project was FIC Group's biggest. It represented its largest expenditures and secured its largest debt. The evidence is clear that Genesis was in serious trouble during the relevant period, and so, as a result, was FIC Group.

¶ 130 We find that:

- Genesis incurred $10 million in cost overruns that Pasquill said FIC Group could not account for, including $8 million in outstanding contractor invoices that did not qualify for funding under the TD facility.
- There was no other source to fund the $8 million. Woods was happy to get $700,000 from the proceeds of the FIC Foreclosure offering to try to make the smaller contractors "happy", albeit only "for the time being."
- The profit expectations for Genesis were dashed. There was no longer any profit expectations for Phase 1, meaning any profits could not be realized for three or four years out, when Phase 2 would pay out. The profit projections for Phase 2 were at least cut in half, and could have been "zero", according to Pasquill in the email exchange about Lathigee's equity offering idea.

¶ 131 Pasquill's description of Genesis as a "financial disaster", Rea's as "a ship taking on water", and its comparison by Woods to the war in Vietnam, were apt.

4.1.1.5 FIC Group's cash flow position

4.1.1.5.1 Management communications about cash flow

¶ 132 In January 2008, FIC Group owed its brokerage firm $210,000 for investments FIC Group had made in private placements. On January 24 Woods emailed Pasquill:

> "We have to ensure that Mike and the brokers are fully aware that we are not presently in a position to get into private placements. In fact, even with funds already in the brokerage accounts, we may find ourselves in a position where we need to collapse some of the positions. The private placements are impossible to collapse and we may need the cash over the next couple of months.
>
> This $210,000 has to be the last.
>
> You or Mike need to speak with each and every broker ensuring that liquidity is available if needed. I fully concur that this reality stinks but I have to be 100% honest with the situation. Any private placements are horrible for cash flow right now."

¶ 133 Pasquill forwarded Woods' email to Lathigee, adding:

> "We've told Rick that we can only give him $150,000 and to re-deploy the stock elsewhere. But, it means that $150,000 of the 0760838 cash will have to go to Canaccord.
>
> Mike: Graham's point about private placement cash calls is an important one going forward – at least until we get enough real estate proceeds to breath [*sic*] easy."

¶ 134 Pasquill testified that his statement that FIC Group needed to wait until there were "enough real estate proceeds to breathe easy" was accurate, but "requires some explanation of the context." He went on to provide that explanation:

> "That's what it says, but when I talked about breathing easy, as I mentioned before there are – we have to pay close attention to the day-to-day kind of cash flows and their ups and downs. Not that we didn't have the ability to cover them but we just had to be cognizant of them, and to go heavily into private placements would reduce our flexibility."

¶ 135 This is an excerpt from a document headed "Executive Management Minutes" and dated February 5, 2008:

> "2. Cash Flow / Calmar
> Mike will try to raise cash at upcoming meetings.
> Operating side – amounts are there
> Big numbers in real estate – John reports that we are still in struggling mode.
> Solutions to cash sits in Calmar – well over 30 sold lots ($6m). Money flowing in should solve our short term issues.
> John anticipates several million collected by end of February.
> 1 M vendor take back mortgage which was differed. Still behind on cash flow.
>
> 1. Closing Calmar (Solves short term)
> 2. Financing letter ($2M)
> 3. TD Financing approval (taken a long time to complete)
> 4. Leduc & Willow Park money flowing in as well. John to have firm date with a few million dollars.
>
> Bottom line – no emergencies at this moment. For larger payments we will need an inflow of cash.
> 20 new subscription agreements came in from Jan 28th Econ Call and WBIC subscriptions to be sold tonight in Vancouver will ease short term cash flow."

¶ 136 By February 27, FIC Foreclosure had raised $845,000. The next day Woods transferred $700,000 of the funds to FIC Group's Crossroads project.

¶ 137 Pasquill replaced most of the $700,000 with proceeds from the FIC Projects distribution.

¶ 138 As described earlier, Woods emailed Lathigee, Pasquill and Rea on March 1, asking about using FIC Foreclosure funds to pay Genesis contractors. Lathigee replied that he was in agreement. On March 2, Lathigee sent a second reply, this time copying Tansowny. Lathigee said:

> "Our first priority is to save the company. If Genesis loan is to be called by TD which is a real possibility we have to factor then we are "doomed". Given the extreme circumstances that we have only fully known this week the plan below suggests all our conversations this week will only relate to sales and bringing in cash everything else is secondary."

¶ 139 On March 3, Tansowny sent Pasquill invoices for meeting fees and his March retainer. In his reply, Pasquill told Tansowny that Lathigee was looking for some other information. Tansowny responded. In his response to Tansowny, Lathigee said:

> "Other than monthly retainers there is no other outgoing funds at this point due to the very difficult situation FIC is in. You will receive $21000 until FIC has caught up on its payments to suppliers, contractors, etc in Edmonton."

¶ 140 When Tansowny questioned Lathigee's email, Lathigee responded forcefully, copying Pasquill:

> "Earle,
> I am on overload trying to get cash into FIC. I don't have time for this to address until Wed.
>
> John,
> ORGANIZATION IS SUCKED DRY OF CASH!"
> [*emphasis in the original*]

¶ 141 The exchange continued between Tansowny and Lathigee, with Pasquill copied:

> Tansowny:
> "I have brought to your attention many times that the cash needs were reported and known for many months.
>
> In the last two months, I have sold well over $7M in Calmar lots, over $2.5M in Blackhawk and Willow Park transactions as well as facilitated over $7M in loans through my contacts.

That's well over $16M in total.

How much more do we need?"

Lathigee:
"These issues and many others will be addressed at the management retreat. I will speak with you then. In the meantime I have instructed Earle to hold all cash. Your 21K is released and that is it. We are in a very bad situation and I can't waste my time other than focusing on saving FIC for the next 30 days. You are to keep this email confidential as an internal email only. Focus on sales and bringing in cash and nothing else. If it relates to that I am happy to chat anything else I do not have the time or interest."

Tansowny:
"I was serious and am out of the loop.

How much more do we need?"

Lathigee:
"John there was much cash that was said to be coming in from you and it has not or it has been delayed by months. We need about 10m to stay solvent. I am all over this right now and don't have any time to focus on anything except this. The TD loan is a serious concern and the dominoes that would fall. Just create pressure to buyers to get funds in where you can and you come to the man meeting on Wed.

Please allow me to go back to getting money in for FIC. This is the worst situation we have ever been in. Earle will be your point of contact as I don't have any time to tie up if it is not bringing in cash."

¶ 142 Later that afternoon, Pasquill sent an email to Lathigee, Woods, Tansowny and Rea, detailing the terms of the FIC Projects promissory note offering.

¶ 143 Another series of emails between Lathigee and Tansowny culminated in this email from Lathigee at midnight on March 5, the day of the management retreat:

"John the seriousness is that the company is close to insolvency with a TD loan that could be called. We have no cash flow. There was much talk from yourself about delivery of cash but the results are not there. We are suffering from no cashflow [sic] and now in desperation we are doing a promissory note offering that will encompass the entire staff for one month to save the company. As stated the best thing you can do is focus on sales, rezoning and get in money that is owed to us in the fastest manner possible. Call on favors,

pressure those who owe us money and do your best to stave off those we owe money. I am expecting everyone to burn the midnight oil until results are attained. The last week while you were on vacation has been very hard on the entire management team to deal with the reality of what is going on but they have worked diligently on a plan to save FIC. I am going to bed now and will see you tomorrow."

¶ 144 Pasquill testified that FIC management, including Lathigee and him, had become frustrated with Tansowny over management issues, the Genesis cost overruns, and expense claims. These are excerpts from his testimony about his interpretation of Lathigee's emails:

"Q Now, Mr. Lathigee in his email . . . says . . . 'If Genesis loan is to be called by TD which is a real possibility we have to factor then we are "doomed".' . . . Did you understand the . . . FIC Group of companies . . . were 'doomed'?
A No . . . I didn't take that word very seriously . . . .
we actually had some pretty good hope of some good sales. We had the prospect of revenue coming. When we get to the financial statements, you will see that our equity and our cash and our assets were in a reasonably healthy state. I knew the facts.
And I also knew that Mike here was responding emotionally. He was addressing it to John Tansowny. I knew that he was preparing for negotiations with John coming up on the 5th of March. And in fact he called me on or around, I don't know whether it was the 2nd or 3rd or 4th of that month, to tell me basically, don't worry, don't take this too literally, this is targeted to John to light a fire under John.
. . . And I had absolutely no sense of doom or gloom during this period of time.
. . .

Q Now, the email I would like to focus on – [Lathigee is] talking about needing 10 million to stay solvent . . . . 'This is the worst situation we have ever been in.' . . . Did you agree with that assessment?
A No . . . this falls into the same category as the previous email. . . . what we see here is this kind of emotional response . . . and then him kind of saying, well, I am going to be negotiating with John and I am going to paint a bad picture here to soften up that negotiation. That's the way I read it.
Now he mentions . . . concerns about TD calling the loan. Again, to my mind, that's a tactical ploy in his dealings with John.
. . .
We had ongoing interactions with [TD]. They were an annoyance to us. We didn't like them particularly. . . . But I didn't believe for a minute they were going to call the loan."

¶ 145 Woods also testified that his reaction to Lathigee's reference to potential doom was that "we were not doomed". He said, " . . . this was one of the ways for Mike to attempt to motivate our real estate consultant to basically do his job." "We had cash flow to meet our short-term requirements, um, among other things," he said.

¶ 146 Woods was questioned further on Lathigee's email's to Tansowny:

> "Q . . . do you have any thoughts on this sentence here, "We need about 10 million to stay solvent"?
> A Yeah, I don't exactly know where that figure came from.
>
> Q But based on your recollection that this financial situation of the company was at the time, do you have any comment on the suggestion that some money was required to stay solvent?
> A Yeah. Well, further to my previous, previous documents, we had assets, we had unleveraged assets. We had cash for short term, short term requirements. So, I don't really agree that we were near, like, insolvency or, or need 10 million to avoid – to stay solvent at this point in time."
>
> Q What about the comment, "This is the worst situation we have ever been in?"
> A Again, further to motivating him to generate sales.
> . . .
> Q . . . Did you – do you agree that there was no cash flow at the time?
> A No, I do not.
>
> Q Well, why do you say that?
> A Because there was cash flow.
>
> Q What about the statement, the use of the word desperation?
> A I don't agree with that either. Again, and just further to that, um, this is the day before that, that, that management meeting that I mentioned previously. Um, again, more of a, of a, motivational factor is really the gist of this email, in my opinion."

¶ 147 The management retreat followed, on March 5 and 6. Present were Lathigee, Pasquill, Woods, Rea and Tansowny.

¶ 148 The minutes of the retreat are in the evidence. In his testimony, Pasquill testified about how they were prepared and their accuracy:

"Q Do you know who prepared [the minutes]?
A [LG], who was one of our assistants, sat in on the meetings and typed up minutes.

Q Okay. And you've had a chance to review these minutes prior to testifying today?
A Yes, I have.

Q And to the best of your recollection, do they accurately reflect the gist of what was discussed?
A Yes, they do."

¶ 149 FIC Group's financial condition, in particular its cash flow, was the first item on the agenda. These are excerpts:

"1. Overview
- 244K in interest payments alone for Genesis
- Steve, Graham and Earle [Rea, Woods and Pasquill] assembled a 4 month plan which outlines that we can get through the next 4 months without any new revenue. They have assembled an operating plan and financing plan that will sustain us in the next 4 months (conservative plan).
- They believe the next 4 months is pivotal in the course of FIC's lifespan
- Clean up problem issues ie: liens to be removed

- Four main areas:
1. Cash flow (generating sales)
. . .
3. General Management . . . in the next 4 months all new projects need to be monitored and approved (any non-liquid investment) . . . .
4. Workload. Exec team operating at maximum capacity."

¶ 150 By early March, FIC Group's management knew that 076 had a $2.2 million tax bill coming due that it could not pay in full. This was reflected in the minutes from the retreat:

"2.2M – need to file by the end of March 08
Question is how we spread the payments out. If you don't file by end of March we will incur 10% interest that is not tax deductible.
ACTION: Graham to speak to Gov't and see when we can pay the minimum amount with an attached action plan as we are in a cash crunch." [*bold face in the original*]

¶ 151 At the hearing, Pasquill was asked if it was true that FIC Group did not have the cash to pay the full $2.2 million, given that it was "in a cash crunch". He said:

"I assume so, although I can't be absolutely sure about the way you stated it. Clearly we would like to have a payment plan, and that – I guess maybe what I should do is just pause for a second to back up a little bit and say we really need to make a distinction here between the pressures of the day-to-day cash which we had every confidence we could meet . . . [a]nd the larger picture of whether or not we were solvent . . . ."

¶ 152 Counsel for the executive director pressed Pasquill on the phrase "as we are in a cash crunch":

"Q . . . That minute says that because FIC was in a cash crunch at the time, wasn't it?
A There was a need to manage the short term cash, yes.

Q That was a cash crunch?
A You call it whatever you want. Obviously somebody there called it, I didn't make the minutes, but, yeah, there was an upcoming payment due and like any upcoming payments, we had to manage it and make sure do it in the best way . . .
. . .
Q What was the cash crunch at the time?
A I don't recall off the top, except that – no, I'm not going to speculate . . .

Q So from this executive committee retreat meeting the reference to cash crunch, you don't recall what that relates to? There was a cash crunch, you just don't recall what that relates to? There was a cash crunch, you just don't know what it was?
A Yeah, we keep coming back to the term cash crunch. I'll come back to the term of cash management."

¶ 153 When Woods testified, he was also asked about the use of the phrase "cash crunch". He said, "I think I'm more – I'm not really – nobody liked the use of that term there. I didn't type it up." Asked, "Were there no cash problems?", Woods replied, "Well, there's cash – there was all – you know, cash problems throughout, but we've always, we viewed them as short term in nature, as I mentioned previously."

¶ 154 The operating plan and financing plan that the minutes describe as having been "assembled" by Rea, Woods and Pasquill was not entered into evidence. In any event, FIC Group's cash flow problems continued.

¶ 155 On March 14, Rea emailed Pasquill, noting, "As of 12pm today we have $611,879 in promissory note money in hand" and asking if he can use the funds to pay off Genesis trade

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creditors in order to remove liens. Pasquill replies, "Sorry Steve" and explains that the funds must be held until a closing on April 1.

¶ 156 A few days later, on March 28, Woods is juggling cash to pay 076's taxes. In an email with the subject line "Cash calls . . . are killing us", he writes:

> "Earle,
>
> Please ensure from Mike [Lathigee] that the recent request for $200,000 has not been delayed as I must see that amount in [076's account] by the end of Wednesday. I have printed the tax return and the balance owing exactly matches the figure that I had accrued within the accounts of 0760838. . . .
>
> Going forward, I envision funds being loaned from FIC Real Estate Projects Ltd. to 0760838 to pay the remaining taxes. HOWEVER, ultimately, within a reasonable time, 0760838 must pay back the amount to FIC Real Estate Projects Ltd. What has to happen to accomplish this within 0760838 is, first and foremost, no private placements which is what we have been saying for several months. As (a) private placements become publicly traded and (b) hopefully other holdings rise again then (c) the positions are sold and FIC Real Estate Projects Ltd. is repaid. Ideally, all is repaid by 30-Sep-2008."

¶ 157 On March 15, in reference to the FIC Projects distribution, Woods emailed Lathigee and Pasquill:

> ". . . we are in a tight cash situation. People cannot view this promissory note money as 'free money' as it is 'desperation money'. In effect, this money is already spent."

¶ 158 During Woods' testimony, respondents' counsel referred him to this email, asking, "what are you saying here?" The following exchange took place:

> "A I'm – it is obviously a poor choice of terminology, but as I indicated, I was quite upset when I put this email together. What I'm saying, what I – the gist of it is, this money is earmarked for the real estate projects, and I want to, you know, move as much of that as I can to that, and not have it eroded by other, by other parties taking some of it. . . .
>
> Q Well, at the time, Mr. Woods, did you think FIC was in . . . desperation?
>
> A No, not at this time. Still, we obviously still, we had cash. We had short term issues. But as we mentioned previously, um, and the item is

of a long term nature. We could refinance. We had assets. We had assets to leverage."

¶ 159 Pasquill also testified about Woods' March 15 email:

"Q Mr. Pasquill, the $10 million raised for the promissory notes – that was desperation money, wasn't it.
A I wouldn't use the term desperation, no. It was certainly advantageous to have it, there's no question.
. . .
Q Mr. Tansowny is not on this email, is he?
A No, he's not.
. . .
Q [After quoting the email] . . . Mr. Woods was correct, wasn't he?
A Mr. Woods was correct that it was already spoken for or spent. He's correct that it's free money [*sic*]. I don't agree it was desperation money.

Q This email wasn't part of some secret plot to trick Mr. Tansowny about how the company was doing, was it?
A No, not this one. The other ones were intended to influence Mr. Tansowny. I wouldn't use the word trick, but they were different emails. I just want to make sure that we're clear about the intent of the other ones.
. . .
Q Mr. Woods is telling yourself and Mr. Rea, reminding you that the promissory note money was not free money, it was desperation money?
A You will also note the term desperation money is in quotation marks. He could very well have been quoting Mr. Lathigee's term."

¶ 160 On April 15, Pasquill emails Lathigee to tell him the disposition of the proceeds of the FIC Projects offering, as follows:

$ 3,000,000	To top up the 076 account to TD minimums
$ 2,000,000	To Genesis trade payable to remove liens
$ 1,695,000	As a reserve "for interest payments and operations"
$ 1,675,000	To FIC Foreclosure
$ 660,000	To operations
$ 230,000	To payment on Crossroads
$ 240,000	To "CD and WBIC for Rick Langer"
$10,000,000	

¶ 161 On the same day, Lathigee emailed Pasquill and Woods:

> "I need as much money as possible to buy foreclosures. I believe I can make 100% on the money I receive no matter what the amount in less than a year. This is the best use of proceeds and I don't want to put all our money in things that are not generating income. Let me know all our assets and what I can get cash immediately or soon. How much of the 10m can I have?"

¶ 162 Woods replied:

> "The $1M that I moved to Prospera foreclosure yesterday. That is it!"

¶ 163 Lathigee responded:

> "sorry guys not good enough. putting the 10m into something that is going to generate less profit makes no sense. I want a meeting . . . to discuss where I can get funds. My responsibility is to maximize gains for shareholders and so we have to take out cash on underperforming assets."

¶ 164 Pasquill then joined the conversation:

> "Just a reminder Mike that we raised the $10 million to solve our cash flow pressures related to the real estate – not for new investments. . . ."

¶ 165 Woods emailed Pasquill, saying, "Call him and indicate that we have a plan and cannot use any more money. As CFO, I am keeping a reserve for promissory note financing and financing interest and it will not be touched."

¶ 166 In this testimony, Pasquill was asked about his statement to Lathigee that the $10 million was raised to "solve our cash flow problems." He answered:

> "A As I said there was cash flow pressures in the short run related to the real estate, and that was – and we stated that that was the purpose for the real estate investment and that's what enabled us to do.
>
> Q Neither yourself nor Mr. Lathigee mentioned on that call that the $10 million being raised was to solve FIC's cash flow pressures related to the real estate, did you?
>
> A That was a consequence."

¶ 167 On April 15, funds started to flow in from the WBIC distribution. Pasquill emailed Lathigee and Woods that "we will have some WBIC funds flowing soon." On April 17, he emails

them again, saying: ". . . if we have to along the way, we could use the $1 million coming to WBIC . . . ."

¶ 168 In Pasquill's April 20 email to Lathigee about "roles" (referred to earlier), concluded, "This real estate crisis needs to be #1 priority". This is what he said about that language in his testimony:

> "Q The real estate crisis you were talking about of course was FIC's real estate crisis?
> A Well, again, crisis may be an overstatement. But FIC's real estate challenges relative to making the payments on some purchases, and moving forward, which is part of the day-to-day, week to week, month to month cash management that I spoke about.
> . . .
> Q The word you put in there this real estate crisis needs to be number one priority.
> A Those are the words. I don't want to overstate the word crisis because I think some of these words have been overused, but that's what the words say.
>
> Q That's because it was true, correct?
> A Well, depends, crisis is very subjective term. You obviously attach more to it than I do.
>
> Q That's a term you just throw around?
> A No, but there is some range of interpretation of it."

¶ 169 On May 6, Lathigee was looking for cash to invest in foreclosures. He emailed Pasquill and Woods under the caption "all funds must participate in the foreclosure opportunity:

> "The foreclosure deal is the most profitable I have ever seen. We are letting cash sit idle and not proactive enough to earn profits for our members.
> . . .
> "By the end of tomorrow I would like to know how much available cash we have in other funds that can be used for the foreclosure opportunity."

¶ 170 Woods replied, predictably:

> "There is no cash available from any of the other funds at present.
>
> All amounts are presently spoken for with various required payments.

> As bulks of funds become available, I will indicate so and we can consider the foreclosure deal accordingly.
>
> Mike, please remember that despite the good feeling around the sale of foreclosure fund right now, there are many moving parts and payment requirements that Steve, Earle, and myself monitor on a daily basis. I like the foreclosure deal and would certainly tell you if we have money available to invest."

¶ 171 Lathigee responded:

> "Gents,
> I need your help to get funds. Edmonton is not going well and better we plug into something that makes money. I trust your judgement and need to be kept updated."

¶ 172 The next day, May 7, Pasquill emailed Woods. The caption was "Foreclosure Fund":

> "Smile! We got $1 million in cheques today.
>
> FYI: Mike is wanting to do some foreclosure 'short' sales to the tune of about $2 million as funds are available."

¶ 173 Woods replied along the same lines as he did the day before:

> " . . . I am willing to commit the $1,400,000 to Mohawk next week and the amount that Rogue needs in the Bank of America account but that is it until the week after next.
>
> We are still in serious dire straights [*sic*] here with Genesis and other payments that need to be made before any 'short' sales. Unfortunately, we cannot forget about Genesis and must still consider that we may need to use foreclosure funds. Also, on the horizon is the June 1st interest payments to the first promissory note round.
>
> I don't mean to be the one peeing in the pool but I am firm on this until we have clarity around Genesis, in particular."

¶ 174 This was Woods' testimony about his statement that FIC Group was in dire straits:

> " . . . at this point . . . with Genesis still, you know, believed to be profitable. But again, with what's happening with the trades and, and the work that's been done and hasn't been done yet, you know, there's not an absolute certainty

> regarding the outcome of the project. So, I'm just sort of being, being, I would say conservative, in that I want to preserve as much, have as much cash available to meet those requirements as I, as I possibly can, or as we possibly can."

¶ 175 Pasquill forwarded Woods' reply to Lathigee and added:

> "Graham is correct. We need to be sure about the real estate situation before more funds are released."

¶ 176 Lathigee responded:

> "I understand the situation and have frustration that with [InvestFest] coming I have a great way to generate at least another $1 million in profit and cannot as we have to use elsewhere. I need to be kept closely updated what funds are available and when."

¶ 177 Two months later, cash was still the concern. On July 28, Woods is bothered that Lathigee has him working on things that do not deal with cash flow. He emails Pasquill:

> "You and I are both aware that priorities right now are as follows:
> - Cash balances (bank accounts);
> - Cash liquidity;
> - SB1 filing w/ FIC USA 30-Apr-2008 audited financial statements; and
> - FIC Canada audit.
>
> Overall, any piece of workload that helps us with either (a) cash balances or (b) cash liquidity are priorities. The above four all fall into this area. . . ."

¶ 178 Pasquill forwards Woods' email to Lathigee in an attempt (ultimately unsuccessful) to intercede on Woods behalf, saying, "Graham is right. There is far too much urgent stuff that can impact cash and profits."

4.1.1.5.2 Cash management practices

¶ 179 The evidence, including the communications among FIC Group's management described in the previous section, shows that FIC Group was run, from a financial point of view, as one entity. Cash obtained through financings or otherwise by individual FIC Group companies was distributed among other FIC Group companies on the basis of where cash was needed. FIC Group distributed cash among the companies through a web of inter-company loan arrangements.

¶ 180 Woods described in his testimony about how FIC Group allocated cash among the companies in the group:

> "Q . . . we have heard earlier evidence at this hearing describing . . . 'intercompany loans'?
> A Yes.
>
> Q Is that a term you are familiar with?
> A Yes, it is.
>
> Q Can you explain to me how that worked?
> A Sure. There would be funds available in the various companies. And as part of our decision, we would use those funds for the various real estate projects. And it would, in effect, be a, a movement of cash down from the, um, different – from the top companies down to the different real estate projects.
>
> Q And what would be the terms of those loans?
> A Uh, I believe they, during this period, would have been one per cent per month . . . .
> . . .
>
> Q Yes. And would there have been a, a length of time, a term on these loans?
> A The term, we, obviously as the projects were realized, then, then the repayment would have happened. So, there wasn't really no – wasn't really a term attached to them, a set, like, three months or six months. We just envisioned that, obviously, when, when the projects realize the profits, and the funds come in, it would be, you know, the loans would be repaid."

¶ 181 Woods testified that he prepared a cash report that listed the cash balances in all of the FIC Group companies' bank account every morning:

> ". . . I did them every day. In fact, I believe I started doing them, as one of my first duties, I wanted to, when I first started there, get a sense of obviously what your different cash balances are. To me, it was very important to know that. And so I believe I began this in May of, of 2007, and would, would, would do it as a daily exercise at the start of each day."

¶ 182 An examination of these reports reveals information that may have motivated Woods to keep such a close eye on cash flow.

¶ 183 The first report in evidence is that for February 3, 2008. It shows a total of $2.6 million in cash balances in 32 accounts for 12 FIC Group companies. Of this, only $800,000 is free cash (our term, not Woods'), that is, cash available to meet general cash flow requirements. The balance, $1.7 million, was held in the accounts for the Genesis project and carried the notation, "Use is restricted".

¶ 184 The report for February 21 shows free cash unchanged at $800,000; the report for February 24 shows free cash at $900,000; and the reports for February 28, March 9, and 16 show free cash at $1 million.

¶ 185 In the report for April 6, free cash rises to $8.6 million, the improvement almost entirely attributable to $7.6 million raised from the FIC Projects distribution.

¶ 186 The report for April 10 shows free cash of $8.9 million, $5 million of which was the FIC Projects proceeds.

¶ 187 Although all of these cash reports had notations indicating the cash balances that were restricted, the notations in the April 14 report were much more detailed. Woods testified that this was because this report "was a special one where I wanted to reiterate what was available and what wasn't for different purposes."

¶ 188 The April 14 report showed total cash balances of $12.7 million, less:

- $0.3 million in FIC Management, labelled "Operations"
- $3 million in 076 "gone to Wood Gundy for TD security"
- $3.3 million Genesis on the Lakes, labelled "CAN'T TOUCH"
- $1.3 million in FIC Foreclosure, labelled "YES"
- $4 million in FIC Projects, labelled "$2.5 million of this to Genesis, the rest is interest reserve"

¶ 189 In determining the free cash identified in this report, we have excluded the $1.3 million in FIC Foreclosure that Woods labelled "YES". As we have found in the analysis of the second alleged fraud, those funds were not available to FIC Group for general cash flow requirements. On that basis, the free cash shown on the April 14 report was $800,000 – where it was on February 3.

¶ 190 On April 15 Woods emailed this report to Pasquill and Rea with the notation, "To reiterate my position." Pasquill forwarded the email to Lathigee the same day. During his testimony, Woods was asked about this email:

> "Q . . . I take it, your position was that there was not a lot of cash available at that point in time?
> A I don't, I don't know what I was saying there when I am saying that. Obviously, the, that cash debt cash flow was attached and I, I think I

am more saying, here's the situation. I don't recall my, my thinking at the time on that, on that issue.

Q Well, maybe this will help refresh your memory. . . . The bottom of the page shows an amount . . . roughly 12.652 million? Do you see that there?
A Yes, I do.

Q And the only non-minimal amounts which are available or where you have a "yes" next to, are the $1.3 million approximately raised in FIC Foreclosure Fund.
A Yes.
. . .
Q So does that help perhaps refresh your memory about what you were reiterating, as far as your position goes in the email, by setting this and by adding those notations?
A I'm, I'm not sure. I'm just – I think I am reiterating whether there's cash available or whether there's not cash available, yeah."

¶ 191 The last cash report in evidence, the one for May 1, showed free cash of $1.4 million; only $400,000 was left of the FIC Projects money.

4.1.1.5.3 Conclusions and findings

¶ 192 Pasquill and Woods testified that FIC Group was experiencing what they described as "short term cash flow problems" and the respondents concede that in their submissions.

¶ 193 In their testimony, both Pasquill and Woods attempted to play down the severity of FIC Group's cash flow problems.

¶ 194 At the relevant time, Pasquill told Lathigee that FIC Group had to avoid investment in private placements until FIC Group had "enough real estate proceeds to breathe easy". In his testimony, he said by "breathing easy" he meant that "we had to pay close attention to the day-to-day kind of cash flows" and "[n]ot that we didn't have the ability to cover them."

¶ 195 Pasquill and Woods testified that they didn't take Lathigee's use of the word "doomed" seriously. Nor did they agree with his statements that FIC Group needed $10 million "to stay solvent", that it had "no cash flow" and that "it was the worst situation [FIC Group] have ever been in." Pasquill said that was because the financial statements showed that FIC Group's cash (among other things) was "in a reasonably healthy state." Woods said it was because FIC Group had enough cash flow to meet short term requirements.

¶ 196 Pasquill and Woods also testified that Lathigee, in the emails he sent to Tansowny in early March, deliberately exaggerated FIC Group's financial problems. This they say, was part of a

strategy to address performance issues with Tansowny, although their theories about the details of that strategy differ. Pasquill testified it was to soften up Tansowny in anticipation of negotiations he and Lathigee would be having about his compensation. Woods testified it was to motivate Tansowny to perform better.

¶ 197 The minutes of the March management retreat say, in the context of 076's $2.2 million income tax liability, that FIC Group "was in a cash crunch." When these words were put to Pasquill and Woods in their testimony, both prevaricated. Pasquill, when pressed about whether that statement was true, said, "You call it whatever you want. Obviously somebody there called it, I didn't make the minutes, but yeah, there was an upcoming payment . . . . we keep coming back to the term cash crunch. I'll come back to the term of cash management."

¶ 198 Woods testified that "nobody liked the use of that term there" and that "there was . . . cash problems throughout . . . but . . . we viewed them as short term in nature . . . ."

¶ 199 At the time, Woods emailed Lathigee and Pasquill that FIC Group was "in a tight cash situation" and that the FIC Projects money was "desperation money". In his testimony, he described this as a "poor choice of terminology", and what he really meant was that the FIC Projects money was "earmarked for the real estate projects".

¶ 200 Pasquill testified that he would not use the term "desperation" money to describe the proceeds from the FIC Projects distribution, although allowed that it was "certainly advantageous to have it." He suggested that maybe Woods was quoting Lathigee when he used the term "desperation" in one of the Lathigee emails.

¶ 201 At the time, Pasquill emailed Lathigee. "Just a reminder Mike that we raised the $10 million to solve our cash flow pressures related to the real estate . . . ." In his testimony he admitted that was the purpose of the FIC Projects funds raised.

¶ 202 Pasquill emailed Lathigee that "This real estate crisis needs to be #1 priority." In his testimony, he said, Well, again, crisis may be an overstatement . . . . I don't want to overstate the word crisis because I think some of those words have been overused . . . crisis is a very subjective term."

¶ 203 Woods emailed Lathigee that FIC Group was in dire straits. Asked in his testimony what he was talking about, he said " . . . I'm just sort of being . . . conservative, in that I want to preserve as much, and have as much cash available to meet . . . requirements."

¶ 204 In several instances, Pasquill and Woods testified that they believed FIC Group's cash flow problems would be solved by Investfest events and lot sale revenue from projects under development supplemented, if necessary, by other asset sales or borrowings secured by unencumbered assets.

¶ 205 We did not find Pasquill's and Woods' evidence credible. It contradicts the record of all that was said and done by them and other members of FIC Group management during the relevant period. In our opinion, the interpretations in their testimony of the events during the relevant period can best be described as revisionist.

¶ 206 Their evidence boils down to explanations that the language used in the correspondence among FIC Group's management was a poor choice of words, was not what they really meant to say, or was capable of an interpretation at odds with the plain meaning of the words used. Those kinds of explanation could perhaps be credible had all of that correspondence included only occasional overstatements but appeared otherwise to be consistent with the facts generally, but that is not the case.

¶ 207 In our opinion, the evidence is clear and unambiguous that FIC Group was experiencing severe cash flow problems during the relevant period.

¶ 208 The evidence includes a steady stream of emails from January through July 2008, among Lathigee, Pasquill, Woods, Rea (and, sometimes, Tansowny) about FIC Group's cash flow position.

¶ 209 The emails start in January, with Woods warning Lathigee and Pasquill that private placement investments are "horrible for cash flow." Pasquill agrees that cash must be preserved until revenue flows in from the real estate projects. Then they can "breathe easy".

¶ 210 The executive management minutes from February 5, referred to earlier, show cash flow is being given close attention. Management's conclusion? "Bottom line – no emergencies *at this moment. For large payments we will need an inflow of cash.*" [our emphasis]

¶ 211 In February, Genesis contractors file $5 million in builders' liens against the Genesis project. FIC Group management learns of $10 million in cost overruns on the project, and is facing invoices of $8 million with no source of funding in sight. Meanwhile, 076 owes income taxes totalling $2.2 million. According to Woods' daily cash reports, free cash balances during February and March range from $800,000 to $1 million.

¶ 212 In early March, cash flow concerns are acute. Woods wants to use FIC Foreclosure money to pay Genesis creditors. Lathigee authorizes $700,000, saying they can repay FIC Foreclosure "after we raise 10m."

¶ 213 In a later response, Lathigee frames the issue around the salvation of the company. He worries that TD may call the loan. He says FIC Group has "no cash flow", is "sucked dry of cash" and in a "very bad situation". He says, in fact, that FIC Group is "close to insolvency" and needs $10 million to stay solvent. "[I]n desperation," he says, FIC Group is doing a promissory note offering.

¶ 214 At the March management retreat, cash flow issues dominate the first item on the agenda, "Overview". The minutes speak of a plan to "get through the next four months" which time period is described as "pivotal". At the top of the list in "Four main areas" is "Cash flow (generating sales)." In the section dealing with 076's $2.2 million income tax liability, the minutes state that FIC Group is "in a cash crunch."

¶ 215 A few days after the retreat, Woods describes FIC Group as being "in a tight cash situation". He says the FIC Projects money is "desperation money" and "is already spent".

¶ 216 In April, funds from the FIC Projects distribution flow in. Lathigee wants to use it to buy foreclosures (the FIC Foreclosure funds, as noted later in these Findings, having been dissipated on other things). Woods and Pasquill both remind Lathigee that the FIC Projects money was raised to solve FIC Group's cash flow problems. On April 14 Woods prepares a special cash flow report because he "wanted to reiterate what was available and what wasn't . . ."

¶ 217 Also in April, Pasquill emails Lathigee that "This real estate crisis needs to be #1 priority."

¶ 218 In May, Lathigee is looking for cash for foreclosure investment. Woods tells him there is none available. Lathigee responds, noting that "Edmonton is not going well." Wood says that FIC Group is "still in serious dire straits". He reminds Lathigee that FIC Foreclosure funds may be needed to make Genesis payments. Pasquill agrees.

¶ 219 By July, little has changed. Woods and Pasquill remind Lathigee that the priorities are "cash balances" and "cash liquidity".

¶ 220 The respondents would have us believe that all of this evidence grossly overstates FIC Group's cash flow problems, yet have entered no evidence to support that position.

¶ 221 They say that FIC Group's cash flow problems were short term, and that it had sources of cash to address them but, as we noted near the beginning of these Findings, there are no detailed cash flow statements to show how they could be confident at the time that the amount and timing of cash inflows would match those of cash requirements. All we have is Pasquill's and Woods' bald assertions, years after the fact, that FIC Group had sufficient cash flow.

¶ 222 The respondents say that FIC Group had plans to manage its cash flow. None was in evidence.

¶ 223 The respondents say that FIC Group could have covered cash requirements through revenues from lot sales, other asset sales, and borrowings secured by unencumbered assets.

¶ 224 The evidence shows that revenue from lot sales was not likely to begin flowing until the summer of 2008. As far as Genesis goes, the cost overruns cast considerable doubt about how much revenue would be available to fund other cash demands.

¶ 225 There is evidence that FIC Group had unencumbered assets that could have been sold or used for security, but little reliable evidence about the realizable value of those assets at the time. Nor is there any evidence about the time it would have taken to liquidate them or, in the case of assets to be used for security, the level of borrowing they would have supported or the time frame that would have been necessary to conclude financing transactions. In short, there is considerable doubt about whether strategies dependent on asset sales or asset-backed financings could realistically have been implemented in a time frame short enough to stave off collapse.

¶ 226 In the event, none of those items proved to be sources for cash during the relevant period.

¶ 227 The evidence is clear that FIC Group was facing severe cash flow problems. The first thing the CFO did every day was count the cash and juggle it around to cover immediate needs. The language used by FIC Group management during the relevant period was redolent with concern and crisis, and is consistent with the objective facts of FIC Group's critical cash situation at the time.

¶ 228 Finally, we do not find remotely convincing the testimony that Pasquill and Woods gave about a purported scheme related to Tansowny, in an attempt to explain away what Lathigee wrote in his emails.

¶ 229 There are only three sources of evidence about Lathigee's motivations in writing the emails.

¶ 230 The first is Pasquill's testimony. He testified that Lathigee called him to tell him "don't worry" and not to take what he was writing to Tansowny "too literally". He testified that Lathigee told him it was to "light a fire under John", although he also testified that the object of Lathigee's emails were "an emotional response" to soften Tansowny up for negotiations.

¶ 231 None of this testimony makes sense. Pasquill knew all about FIC Group's financial condition, and Lathigee knew that. Why would Lathigee think he needed to reassure Pasquill that he was exaggerating the problems? Would Pasquill think Lathigee knew something Pasquill did not? Did Lathigee want to "light a fire" under Tansowny, or did he want to soften him up for negotiations? If the latter, wouldn't Lathigee's motivation be a considered strategy, not an "emotional response"? And in any event, how does any of that prove that Lathigee did not believe what he was saying?

¶ 232 The second source is the email, in which Pasquill described Genesis as a financial disaster, that he drafted for Lathigee to send to Tansowny. This proves, at most, that Pasquill was

helping Lathigee prime Tansowny for negotiations. It does not prove that the content of the email was not true.

¶ 233 The third source is Woods' testimony. There is no evidence that Woods had any direct knowledge of Lathigee's motivations. His testimony was pure speculation. Even if believable, it would not prove that Lathigee believed what he said was untrue.

¶ 234 Only Lathigee knows what he believed at the time, and why he wrote what he did in the emails, but he did not testify. What we do know is that what he wrote was consistent with objective facts at the time: TD was in a position to call the Genesis loan, and FIC Group was facing $8 million in unbudgeted invoices from Genesis and a $2.2 million income tax liability in 076 when its available cash was down to about $1 million, according to Woods' February 28, 2008 cash report.

¶ 235 Taken on their face, these emails reflect Lathigee's opinion about FIC Group's financial condition on the dates they were written. The language they contain is clear and unambiguous. There is nothing on their face to suggest they should be interpreted any differently that the ordinary meaning of the words suggest, nor is there any cogent evidence to support a different interpretation.

¶ 236 We find that FIC Group was experiencing severe cash flow problems during the relevant period.

4.1.1.6 Finding – important fact

¶ 237 We have found that FIC Group was in material default of two material provisions of the TD facility. There was a reasonable possibility that TD might call the loan, for that and other reasons. Had TD done so, FIC Group would have immediately become insolvent.

¶ 238 We have found that the Genesis project was overspent by $10 million dollars. FIC Group was facing $8 million in invoices with no available cash to meet them. The cost overruns were so severe that the first phase of the project was no longer profitable and FIC Group's projected profit for the project as a whole was at least cut in half, and could have been nothing.

¶ 239 We have found that FIC Group experienced severe cash flow problems during the entire relevant period. Assessing the cash position was the first thing Woods did every day. It was a subject of constant discussion and concern among Lathigee, Pasquill, Woods and Rea. The plans described in the evidence to stabilize cash flow were not in the evidence. The strategies that Woods and Pasquill testified were available to address cash flow were, in the end, either not implemented or, if so, not successfully.

¶ 240 The only ways FIC Group was ultimately able to meet its cash demands was by:

- raising money from new and existing investors in the FIC Foreclosure, FIC Projects and WBIC,

- defaulting on the TD facility by constantly dipping into the 076 investment portfolio, and
- improperly diverting cash from FIC Foreclosure.

¶ 241 Lathigee was speaking the truth when he said FIC Group was "in a very bad situation", had no cash flow", and was "close to insolvency".

¶ 242 It is trite that the financial condition of an issuer is of paramount importance to a reasonable investor. In general, there is no factor on which the value of a security is more dependent.

¶ 243 In our opinion, the defaults under the TD facility, the status of the Genesis project, and the severity of FIC Group's cash flow problems, were each important facts because they would have affected a reasonable investor's decision whether to invest in the FIC Foreclosure, FIC Projects, or the WBIC distributions. The financial condition of an issuer is of paramount importance to a reasonable investor's decision to invest in that issuer: in general there is no factor on which an investment decision is more dependent.

¶ 244 In combination, we find that these facts revealed an important fact about FIC Group's financial condition: the reasonable possibility that FIC Group could have become insolvent during the relevant period. A relatively small number of potential events could have triggered insolvency in a very short time frame.

4.1.1.7 Dishonest conduct

4.1.1.7.1 Disclosure

¶ 245 FIC Group's cash management practices, described above, were inconsistent with how FIC Group described itself to its members. This is an excerpt from its website:

> "Each fund that we operate has specific guidelines that dictate the investment decisions made by that fund. Our investments are intended primarily to be for no more than a term of 24-36 months, ensuring reasonable liquidity and ability to respond to changing market conditions. For certain funds, such as those targeting long-term returns in foreign markets (such as the China Dragon Fund), investment horizons may be longer than 24-36 months.
>
> We are very conscious of the need for diligent risk management. That is why there is such a good due diligence process in place, designed to protect our Members and minimize any risk that may exist on any particular investment."

¶ 246 On March 7, 2008, Lathigee held a conference call and webcast to promote the FIC Projects distribution, which he described as a "cash flow opportunity." FIC Group's website advertisement for the call stated:

> "The FIC Group of Companies has over $100 million in Real Estate Assets. With spring nearly upon us, we wish to quickly develop a few projects and

> reap huge profits from the clubs. The $10 million we are raising will be used to assist on some of these projects. You read that right, members. We have over $100 million in Real Estate Assets and the loan amount we are seeking is $10 million."

¶ 247 The conference call was recorded, and a transcript, prepared for the purpose of the hearing, was entered into evidence.

¶ 248 Lathigee opened the call by saying "hundreds and hundreds and hundreds and hundreds" of FIC Group members were participating on the call. He set the stage with an explanation of why, considering the state of the markets, "it makes so much sense for the member, on an individual level, to do this opportunity right now. . . ."

¶ 249 Lathigee then noted, "Members, times are very tough if you're invested in the wrong areas." He reminded members that "the sectors I've guided you is where you would have been and achieved the best returns", and cited those sectors.

¶ 250 Lathigee then embarked on an overview of the economy, culminating in two conclusions: First, that the Alberta real estate market, where FIC Group "leverage fully to be involved in" was the best real estate market to be in, and second, cash was the right asset class for investment in March 2008: "Members, holding a much higher than normal amount of your portfolio in cash, in this market environment, makes complete sense."

¶ 251 Complete sense, that is, if the yields were high enough:

> "So members, what does all this mean to you? How do we put it all together?
>
> It means that all your money in GICs in Canada and treasury notes in the United States and corporate bonds and dividend stock yields, are actually losing you money, year after year.
>
> . . .
>
> With inflation running out of control, you are actually losing purchasing power if your cash flow investments do not pay a minimum of 9 per cent per year.
>
> Members, you must invest in higher-yielding vehicles."

¶ 252 The FIC Projects promissory notes paid interest at 12% for investments up to $50,000 (the minimum investment was $10,000), 13% for investments between $50,000 and $100,000, 14% between $100,000 and $200,000, and 15% for investments of $200,000 and higher.

¶ 253 Lathigee then repeated the comparison made in the advertisement of FIC Group's real estate assets compared to the amount being raised in the distribution:

> "The FIC group of companies has over $100 million of real estate projects in Edmonton, Alberta. Once again, this is the best real estate market in North America FIC could have invested in the last few years.
>
> We are raising $10 million only through a promissory note, with a two-year term, and the ability for FIC to redeem the funds or return the funds after six months.
>
> . . .
>
> Like the last seven previous cash flow offerings, the note is not secured, but the asset base of FIC real estate alone is ten times bigger than the total amount being raised for the promissory note."

¶ 254 It is not in dispute that Lathigee's reference to $100 million in assets did not take into account encumbrances associated with those assets, which at the time were about $50 million.

¶ 255 Lathigee told conference call participants this about how the proceeds of the offering would be used:

> "The purpose of this promissory note is so that FIC can more quickly develop our Edmonton real estate projects and realize the profits for all members."

¶ 256 Pasquill spoke as well, mostly about the mechanics of how to invest. In the course of his remarks, he said:

> "On this – on this opportunity, this cash flow opportunity, Mike's done – you did a great job, Mike, in explaining to – to everybody how – how absolutely appropriate it is for right now in these times – a spectacular opportunity to do exactly what you need to do at this time."

¶ 257 Lathigee then summed up the call. His concluding remarks included the following:

> "The final thing, members, is the – I have been – I've been working on launching this opportunity for a year. What has occurred is I've been waiting in the market for the perfect time.
>
> . . .
>
> And the – the other super win now, is we're also coming into spring and summer in the Edmonton real estate market, which is the absolute hub of activity. That's the time when everything gets bought. And so what we want to do is quickly get our development projects underway and reap huge profits for everyone in the – who's a shareholder in the FIC group of companies."

¶ 258 Lathigee made no mention of FIC Group's financial condition in the conference call. In his testimony, it was put to Pasquill that FIC Group's "cash crunch" or cash flow problems were

not disclosed. He answered, "I would not have disclosed them because I wasn't speaking to the topics. But I don't think there was any mention of cash flow issues within our company."

¶ 259 In the offering memorandum (OM) for the WBIC distribution, FIC Group also failed to disclose FIC Group's financial condition. The same is true of the OM and other documentation FIC Group gave investors in FIC Foreclosure (described in more detail below).

4.1.1.7.2 Dishonesty

¶ 260 What Lathigee said in the FIC Projects conference call was untrue and grossly misleading.

¶ 261 He positioned the offering as something that he had been working on for a year, just waiting until market conditions were right for the product. In fact, the offering was coopered together in haste in early March to raise money to solve FIC Group's cash flow problems. In his March 5 email, Lathigee said, "We are suffering from no cash flow and now in desperation we doing a promissory note offering that will encompass the entire staff for one month to save the company."

¶ 262 Even the description of the investment as a "cash flow opportunity" was misleading. The evidence, cited above, is clear that FIC Group solicited this investment to solve its cash flow problems, not to make any new investments that would yield cash flow to investors. To FIC Group, the money raised in the distribution was "desperation money".

¶ 263 This was borne out by how the money was used. None of it was spent on anything that was going to produce cash flow for these investors. Half of it, $5 million, was used to top up the 076 investment portfolio and to pay the Genesis contractors so the liens could be removed. Another $3.4 million was split between funds returned to FIC Foreclosure and funds held in reserve to pay interest on the promissory notes themselves. That left $1.6 million, which went to overhead and third-party payments.

¶ 264 In reference to the juxtaposition of FIC Group's $100 million in gross assets and the $10 million being raised in the distribution, the respondents say that investors in FIC Projects were not misled because it was disclosed that the promissory notes were not secured, and because it was true that FIC Group had real estate assets in excess of $100 million.

¶ 265 We disagree. Although it is true that it was disclosed to investors that the promissory notes were unsecured, it was misleading to represent that FIC Group had $100 million in real estate asset value to cover a $10 million debt. That was not true: after accounting for encumbrances, the net value of those assets was more like $50 million.

¶ 266 That is secondary, however. The disclosure focused investor attention on asset value, and omitted entirely any mention of the important fact of FIC Group's financial condition, including its severe cash flow problems. As a result, the FIC Projects investors were misled

about a matter at the heart of any decision to purchase an investment promoted as a "cash flow opportunity".

¶ 267 Finally, the statement that the proceeds of the offering would allow FIC Group to "more quickly develop" its real estate projects in Alberta was an outright lie. Not a penny of it was ever destined for expedited work on real estate development, nor is that where any of it was ultimately spent.

¶ 268 The respondents say that disclosure about FIC Group's financial condition was available on its website if investors wanted more information about its assets and liabilities. This argument is so flawed it is hard to know where to begin to refute it:

- As we noted at the beginning of these findings, it was not possible to know the truth about FIC Group's financial condition by looking at the financial statements alone.
- The financial statements were not available on the website until weeks or months after the investments were made.
- FIC Group did not publish its combined financial statements on its website. An investor would have had to construct the combination from the statements of eight FIC Group companies (remembering to eliminate offsetting entries associated with inter-company loans).

¶ 269 The respondents also say that investors could have discovered the encumbrances associated with the FIC Group real estate assets because they were a matter of public record. All investors had to do was to undertake searches of FIC Group's properties at the Alberta land registry to discover them: a patently ridiculous proposition that needs no further comment.

¶ 270 The respondents also say that investors were not misled because they were told, and acknowledged, that their investments were extremely risky.

¶ 271 In support of this assertion, the respondents point to boilerplate risk factor language in the WBIC and FIC Foreclosure OMs telling investors that the investment was "highly speculative", and that they should not invest unless they could afford to "lose the whole of their investment".

¶ 272 These general statements of risk in the offering memoranda afford the respondents no defence to the alleged fraud. The question is whether the respondents disclosed to investors the important fact of FIC Group's financial condition. They did not – the offering memoranda contained no disclosure about that, and it was not included among the host of risks that the OMs did disclose.

¶ 273 Similarly, the risk acknowledgement forms signed by investors offer the respondents' no defence. It is based on the disclosure the investors' received, disclosure that failed to include any information about the important fact of FIC Group's financial condition.

¶ 274 In our opinion, a reasonable person would stigmatize as dishonest the respondents' failure to disclose to investors the important fact of FIC Group's financial condition and we so find.

4.1.1.8 Finding – prohibited act

¶ 275 We have found that FIC Group's financial condition was an important fact. We have found that the respondents failed to disclose that fact to the investors in FIC Foreclosure, FIC Projects, and WBIC, and that their failure to do so was dishonest.

¶ 276 We find that the respondents' dishonesty in failing to disclose the important fact of FIC Group's financial condition was a prohibited act for the purposes of applying the test for fraud in *Théroux*.

4.1.2 Deprivation

¶ 277 We have found that FIC Group's financial condition was an important fact because the financial condition of an issuer is of paramount importance to a reasonable investor's decision to invest.

¶ 278 Investors in the corporate respondents invested without knowing the truth about FIC Group's financial condition. As a result, they assumed substantial risks associated with those investments – risks unknown to them because the respondents dishonestly failed to tell them.

¶ 279 As a consequence of the respondents' dishonesty, the pecuniary interests of the investors in the corporate respondents were clearly put at risk. The 698 investors invested, and have lost, $21.7 million. It would be difficult to find a more compelling example.

¶ 280 We find that the dishonesty of Lathigee, Pasquill, FIC Foreclosure, FIC Projects and WBIC in failing to disclose FIC Group's financial condition to investors caused deprivation to those investors by putting their pecuniary interests at risk.

4.1.3 Subjective knowledge

¶ 281 Under *Théroux*, the executive director must prove that the respondents had subjective knowledge of the prohibited act – FIC Group's financial condition, and that it was not disclosed.

¶ 282 Based on our findings, the evidence is clear that Lathigee and Pasquill had subjective knowledge of FIC Group's financial condition.

¶ 283 The evidence shows that they knew that the market value of the 076 investment portfolio was almost perpetually below the minimum required under the terms of the TD facility. They knew that because they were aware that FIC Group regularly dipped into that account to fund cash demands for other companies in the group. They knew that FIC Group's failure to keep the market value of the investment portfolio at the required level was a breach of the terms of the facility. When FIC Group used funds from the account in January 2008 to repay a loan,

Pasquill kept Lathigee informed. Pasquill wanted to ensure that the account be re-funded as soon as possible, before TD found out and so that TD didn't "get upset".

¶ 284 Lathigee and Pasquill knew that the $5 million in builders' liens filed against the Genesis project was a breach of the terms of the TD facility and caused FIC Group to take steps to reach an agreement with the contractors to discharge the liens.

¶ 285 Lathigee and Pasquill knew that the $8 million in cost overruns on the Genesis project, in combination with other cash demands, including 076's unfunded $2.2 million income tax liability, put impossible demands on FIC Group's cash flow. They knew that the only way out of the cash flow problem was to raise $10 million in new capital through the FIC Projects distribution.

¶ 286 Lathigee and Pasquill also knew that all of this had fundamentally undermined the economics of the Genesis project. They knew that there would now be no profit on Phase 1, and that projected profit on Phase 2, three or four years out, was at best cut in half. Woods described Genesis as FIC Group's "Vietnam". Rea described it as "a ship taking on water." Pasquill described it as "financial disaster", a description from which he did not resile in his testimony.

¶ 287 Lathigee and Pasquill also knew that cash flow problems were chronically acute. Email correspondence among FIC management, cited above, spans almost the entire relevant period. The language in the emails is rife with words and phrases stressing urgency. The priority of having a plan to deal with the TD was repeatedly described as "urgent". FIC Group management described it as being in a "cash crunch" and in "dire straits". They repeatedly described the maintenance of cash balances and liquidity as priorities.

¶ 288 All of this is most clearly demonstrated in Lathigee's emails in early March. It was then that the Genesis cost overruns (and associated liens) came home to roost, coinciding with FIC Group's ongoing failure to maintain the 076 investment portfolio at the required level. He recognized the risk that TD could call the loan. He recognized that without an immediate injection of cash, FIC Group could easily have become insolvent.

¶ 289 Lathigee and Pasquill also knew that, if TD were to call the loan, FIC Group had no arrangements in place to fund the call. It would have been at the mercy of TD to gain the time necessary to obtain replacement financing, to sell assets, or to effect asset-backed financing.

¶ 290 We find that Lathigee and Pasquill had subjective knowledge of FIC Group's financial condition.

¶ 291 The evidence is clear that Lathigee and Pasquill knew that FIC Group's financial condition was not disclosed to the corporate respondents' investors. Lathigee ran the conference calls,

and Pasquill was centrally involved in the drafting of the OMs. Pasquill testified that he knew that nothing was said on the conference call or the OMs about the important fact of FIC Group's financial condition.

¶ 292 We find that Lathigee and Pasquill had subjective knowledge that FIC Group's financial condition was not disclosed to the corporate respondents' investors.

¶ 293 The executive director must also prove that the respondents had subjective knowledge that the prohibited act – the failure to disclose FIC Group's financial condition – could have, as a consequence, deprivation. In *Théroux*, the court said (at pages 18-19):

> "The test is not whether a reasonable person would have foreseen the consequences of the prohibited act, but whether the accused subjectively appreciated those consequences at least as a possibility.
>
> . . .
>
> The fact that the accused may have hoped the deprivation would not take place, or may have felt there was nothing wrong with what he or she was doing, provides no defence."

¶ 294 First, Lathigee. The evidence shows that he fully understood what was at stake. In his emails in early March 2008, he says that the "first priority is to save the company." He says FIC Group needs about $10 million "to stay solvent", and is in the "worst situation [it has] ever been in." He says that the company is "close to insolvency".

¶ 295 Lathigee could not have known these things without also knowing that the pecuniary interests of anyone who invested in any FIC Group company would be put at risk, especially if they were not told about FIC Group's financial condition.

¶ 296 As for Pasquill, he was, as we explained above, equally aware of the gravity of FIC Group's financial condition. The essence of his testimony was that he did not believe that FIC Group was close to insolvency or that TD would call the loan. He says he believed that revenues coming in the summer of 2008 would solve FIC Group's cash woes. Even if they did not, he says he believed that FIC Group had assets to sell or to borrow against to raise cash. He also says he believed that there would be opportunities to replace the TD financing if it became necessary to do so.

¶ 297 We have rejected this evidence from Pasquill, but even if it were believable, it would fall into the category of hoping that "deprivation would not take place," as the Court put it in *Théroux*. In our opinion, a business executive of Pasquill's experience, knowing of FIC Group's financial condition, had to know that there was at least a possibility that investors' pecuniary interests would be put at risk if they invested in an FIC Group company, especially if they were not told about FIC Group's financial condition.

¶ 298 We find that Lathigee and Pasquill had subjective knowledge that the respondents' failure to disclose FIC Group's financial condition could have as a consequence the deprivation of the investors in the corporate respondents.

¶ 299 Lathigee and Pasquill were the acting and directing minds of the corporate respondents, so their state of mind is attributable to those companies. We find that FIC Foreclosure, FIC Projects, and WBIC had subjective knowledge of FIC Group's financial condition and that it was not disclosed to their investors. We find that those companies had subjective knowledge that this dishonesty could result in deprivation to their investors.

4.1.4 Finding – fraud

¶ 300 We have found that FIC Group's financial position was an important fact, that the respondents failed to disclose that fact, that their failure to do so was dishonest and, accordingly, their dishonesty was a prohibited act for the purposes of applying the test for fraud in *Théroux.*

¶ 301 We have found that, as a result of the respondents' prohibited act, the pecuniary interests of the investors in FIC Foreclosure, FIC Projects, and WBIC were put at risk.

¶ 302 We have found that the respondents had subjective knowledge of their prohibited act and had subjective knowledge that the prohibited act could, as a consequence, put the pecuniary interests of those investors at risk.

¶ 303 We find that the respondents perpetrated a fraud on those investors, contrary to section 57(b) of the Act.

4.2 Second Alleged Fraud: Misuse of Funds by FIC Foreclosure

4.2.1 Prohibited act

¶ 304 In February through April 2008 FIC Foreclosure raised $1.5 million through the distribution of Class A shares to 39 investors under the accredited investor exemption. In April through June 2008 FIC Foreclosure raised another $8.4 million through the distribution of Class A shares to another 292 investors under the offering memorandum exemption.

¶ 305 The executive director alleges that Lathigee, Pasquill and FIC Foreclosure perpetrated a fraud when they used the funds of investors in FIC Foreclosure to make unsecured loans to other FIC Group companies instead of making investments in foreclosure properties in the US residential housing market.

¶ 306 In this Part of these Findings, "respondents" refers to Lathigee, Pasquill, and FIC Foreclosure.

¶ 307 The respondents say that FIC Foreclosure was entitled to use the funds for loans to other FIC Group companies and that was disclosed to investors.

4.2.1.1 Disclosure

¶ 308 The evidence contains three sources about what Lathigee, Pasquill and FIC Foreclosure told investors about FIC Foreclosure. The first source is the subscription agreement for the $1.5 million distribution under the accredited investor exemption.

¶ 309 The second source is an offering memorandum (OM) that FIC Foreclosure filed with the Commission in April 2008 for the $8.4 million distribution under the offering memorandum exemption.

¶ 310 The third source consists of statements made by Lathigee in a conference call with FIC members, also in April 2008. Pasquill testified that he was not in attendance during the call. There is no direct evidence about how many people were on the call, but Lathigee described the turnout as follows:

> "Tonight's conference call is the most important educational conference call event the Freedom Investment Club has ever done. Make sure you have a pen in hand. Make sure you take notes and make sure, most importantly, you're an action-taker.
>
> We have over 2,000 attendees registered for tonight's call, which makes this the largest attendance we have seen in the history of the Freedom Investment Club."

¶ 311 The conference call was recorded and a transcript, prepared for the purpose of the hearing, was entered into evidence.

¶ 312 The OM contained several statements, and Lathigee made several statements in the conference call, about FIC Foreclosure's formation and purpose, its business, risks, and its intended use of investors' funds.

4.2.1.2 Formation and purpose

¶ 313 This is what the OM said about FIC Foreclosure's formation and purpose:

> "In March, 2007 the FIC Group decided to incorporate a company solely for the purpose of providing real estate as an investment vehicle for potential investors. More recently, the sub-prime mortgage crisis in the United States has created significant opportunity to acquire foreclosed property at deeply discounted prices. So, on January 24, 2008, the Corporation was incorporated in the province of British Columbia."

¶ 314 These are excerpts from the conference call that relate to how Lathigee described the purpose behind the formation of FIC Foreclosure:

> "For three years, I have been stating for members to sit on the sidelines until the time is right to enter the US housing market. I have said to members that many geographical pockets of the US real estate market still are incurring massive declines, and this trend will continue.
>
> However, 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 Club has already been testing this opportunity and the returns are spectacular".
>
> "Over the last weekend, I was examining the Mid-Quality Sub-Prime Debt Index, and discovered that these debts are now selling for 10 to 20 cents on the dollar. These mortgage debts are being sold as if they are worth nothing."
>
> "The banks have written tens of thousands of properties completely off their balance sheets, and are happy to recover any capital that they can."
>
> "The banks are hurting and they are hurting badly. Lenders are overwhelmed by their workloads and bankers are finding it impossible to deal with the massive number of foreclosures. Some banks are now making policies to dump inventory for pennies on the dollar, and the Freedom Investment Club is sitting on the front lines of this happening."

4.2.1.3 FIC Foreclosure's business

¶ 315 Both the OM and Lathigee's statements in the conference call contain extensive descriptions of FIC Foreclosure's intended business. These are excerpts from the OM:

> "Management believes the Corporation has the capacity and has established the necessary relationships and network skills to source and screen foreclosure opportunities and real estate, conduct the due diligence and manage the appropriate exit strategies."

¶ 316 In the conference call, Lathigee described FIC Foreclosure's business in considerable detail. Here are excerpts:

"Already, we are buying bundles of homes for pennies on the dollar, and have the homes rented and they are kicking out fantastic cash flow.

Members, the banks are ready to wheel and deal."

"When we negotiate with the banks, we are negotiating the purchase of several hundred properties. The market niche where I see the greatest opportunity - listen, members - is homes that sold in the 100,000 to the $150,000 range a few years ago, and are in foreclosure."

"It is too costly for the banks to maintain these homes, and so they are motivated to deal with the Freedom Investment Club. The Freedom Investment Club is negotiating buying most of these homes for under $20,000 a home. We are then researching the local market rent and have an excellent system for locating a buyer of the home."

¶ 317 Lathigee then described in some detail how FIC Foreclosure would attract buyers, grant them mortgages, and sell the mortgages at a discount. Using an example, he described how FIC Foreclosure could earn an annualized rate of return of 132%, "using the most conservative calculations" over a period of six months. "The profits are massive when you repeat this process several hundred times," he said.

¶ 318 Lathigee went on:

"We've been doing it dozens of times. Now the Freedom Investment Club is going to move into hundreds of times.

And now, obviously, members, that's why I wanted you all on the phone tonight. I want you to get rich with the Club.

Members, this is the perfect storm. Banks are hurting and there is too much inventory for sale and not enough buyers who can manage the process. The Freedom Investment Club must act quickly to be very early to the game.

Legislation could also close down this opportunity. For example, new laws could force banks to offer payment extensions to anyone who owns a home that is appraised at less than $100,000. This would dry up inventory supply and this opportunity would no longer be available in the near future. So the Freedom Investment Club must be an action-taker now."

"As stated earlier we are already buying properties in small numbers and making this work but the huge profits will come from bulk buying to get a better price from the bank."

> "Members, the numbers are astounding and I think you can now understand why I've never seen a better deal in my entire career. With bulk buying, we will be able to buy the houses cheaper.
>
> Once again, this is not a time to sit on the sidelines."
>
> "This is absolutely the most important time to be an action-taker."

4.2.1.4 Risk factors

¶ 319 The OM contains an extensive discussion of a broad range of risk factors. This is a summary:

- FIC Foreclosure may not have sufficient funds from the financing "to fund all of the Corporation's objectives over the next twelve months" and may not be able to do so. Conversely, there may be too few opportunities "to enable the Corporation to invest all of its available capital . . . ."
- Risks associated with investment in real estate generally.
- Risks associated with FIC Foreclosure's status as a start-up company. The OM describes the offering as speculative, and states, twice, that investors should not invest if they "cannot afford to lose the whole of their investment".
- Potential conflicts of interest because FIC Foreclosure, together other FIC companies, "are 'sister' companies with similar business activities and overlapping management and shareholders"

4.2.1.5 Intended use of proceeds

¶ 320 Paragraph 6(y) of the FIC Foreclosure subscription agreement states that the proceeds "will be used to purchase tax liens, tax deeds and foreclosure properties in the United States, th[r]ough a joint venture agreement between FIC, Rogue Investor LLC and 0749885 B.C. Ltd."

¶ 321 A chart in the OM entitled "Use of Net Proceeds" describes the use of proceeds as "Foreclosures and other real estate investments." Below the chart is the statement: "The Corporation intends to spend the net proceeds as stated and will reallocate funds for sound business purposes as market opportunities dictate."

¶ 322 This excerpt from the OM is under the heading "Development of Business":

> ". . . In the mid to longer term, the Corporation intends to invest 100% of the net proceeds in foreclosed properties. In the short run, until such time as enough foreclosure properties can be located to absorb all of the proceeds, the Corporation may apply some of the funds to other real estate investments and/or short term interest bearing vehicles. Management intends to monitor and reassess its investments periodically, and furthermore expects that the investments will be adjusted from time to time to reflect changes in the

investment climate, the dynamics of the real estate market, and the interests of the shareholders."

¶ 323 This is how Lathigee described the use of proceeds on the conference call.

> "The Freedom Investment Club is raising $10 million for the purchase of approximately 400 homes in the new FIC Foreclosure Fund, with the remaining funds to be used for other real estate deals. The purchase is to occur in just a few weeks, as we are at the final stages of negotiation with a few major banks.
>
> Of any deal I have ever explained to members, this is the best."

4.2.1.6 Dishonest conduct

4.2.1.6.1 Actual use of proceeds

¶ 324 The evidence shows that of the $9.9 million raised from investors, FIC Foreclosure spent $1.4 million to acquire foreclosure properties, and another $751,000 on rental properties and tax liens.

¶ 325 FIC Foreclosure transferred the rest, about $7.8 million, to other FIC Group companies to fund, among other things:

- payments due on third-party loans
- payment of outstanding trades invoices on Genesis and other properties owned by other FIC Group companies
- payment towards the 076 tax liability
- payment of salaries and other overhead expenses of the FIC Group

¶ 326 The transfers of FIC Foreclosure funds to other FIC Group companies were booked as intercompany loans through the process described by Woods in his testimony (cited earlier).

¶ 327 FIC Foreclosure bought only 100 foreclosure properties. That it bought no more is curious, because FIC Group, not FIC Foreclosure, had at least 1,200 foreclosure properties that it was selling directly to FIC Group members at investor meetings in early June 2008. FIC Group sold 500 of the properties at one event in June and had available another 700 for sale at events later that same month.

4.2.1.6.2 Dishonesty

¶ 328 Whether the respondents acted dishonestly turns on an assessment of what they told investors about how FIC Foreclosure would spend its funds compared to how the funds were actually spent.

¶ 329 The executive director says that dishonesty (the prohibited act of this allegation of fraud) happened when Lathigee, Pasquill and FIC Foreclosure diverted FIC Foreclosure's funds to

other FIC Group companies instead of investing them in US foreclosure properties and other real estate investments, as described in the OM and by Lathigee in the conference call.

¶ 330 The respondents say there was no dishonesty, and therefore no prohibited act, because the OM "makes it clear that FIC Foreclosure was authorized to invest the money in inter-company loans." They point to these statements in the OM:

- "The Corporation intends to spend the net proceeds as stated and will reallocate funds for sound business purposes as market opportunities dictate."
- "the Corporation may apply some of the funds to other real estate investments and/or short term interest bearing vehicles"
- Management . . . expects that the investments will be adjusted from time to time to reflect changes in the investment climate, the dynamics of the real estate market, and the interests of shareholders"
- "There can be no assurance that there will be a sufficient number of suitable investment opportunities that satisfy the Corporation's investment objectives . . ."

¶ 331 The respondents would have us focus on these discrete statements in the OM, without considering the context, but the OM must be read as a whole.

¶ 332 The OM must be considered along with what the investors were told from all sources. That includes Lathigee's statements on the conference call, something the respondents largely ignored in their submissions.

¶ 333 Considering the statements in the OM, the statements made by Lathigee on the conference call, and to some extent the language in the subscription agreement, the following is how we would describe what FIC Foreclosure investors would have understood about how FIC Foreclosure funds were to have been spent:

<u>FIC Foreclosure was formed to take advantage of foreclosure property opportunities in the US housing market brought on by the sub-prime mortgage crisis</u>.

- The OM states that in March 2007 the FIC Group decided to form a company "solely for the purpose of providing real estate as an investment" and notes that the US sub-prime mortgage crisis "has created significant opportunity to acquire foreclosed property at deeply discounted prices." The OM states the "primary emphasis" of the business will be "identifying foreclosure investment opportunities" in the US.

- Lathigee repeated that thought in the conference call, and described it as "an opportunity for members where we can all make a fortune" adding, "In fact, in my entire career I have never seen a better opportunity."

- It is clear that the primary business of FIC Foreclosure was meant to be investment in US foreclosure properties, and that is just what investors were told, both in the OM and by Lathigee.

There was significant inventory available and plenty of sellers, and an urgency to invest in these opportunities immediately.

- Lathigee told the conference call, "some banks are now making policies to dump inventory for pennies on the dollar, and FIC was "sitting on the front lines of this happening". "The banks are hurting and they are hurting badly," he said, and "are happy to recover any capital they can". He said, "When we negotiate with the banks, we are negotiating the purchase of several hundred properties." "The banks are ready to wheel and deal," he said.

- "Members, this is the perfect storm," Lathigee said. "Banks are hurting and there is too much inventory for sale and not enough buyers who can manage the process," and so FIC had to "act quickly to be very early to the game." Lathigee also warned that "Legislation could close down this opportunity . . . new laws could force banks to offer payment extensions – this would dry up inventory supply and this opportunity would no longer be available in the near future." "So the Freedom Investment Club must be an action taker now," he said.

The investment program was well underway. Arrangements were in place, some properties had already been acquired, and FIC Foreclosure was on the verge of spending around $8 million to acquire 400 properties.

- The OM says that FIC Foreclosure Fund had "the capacity and has established the necessary relationships . . . to source . . . foreclosure property opportunities and real estate . . . ."

- Lathigee said, "already we are buying bundles of homes for pennies on the dollar" and that FIC had done it "dozens of times".

- Lathigee told the conference call that FIC was raising "$10 million for the purchase of approximately 400 homes in the new FIC Foreclosure Fund" and that "the purchase is to occur in just a few weeks, as we are at the final stages of negotiation".

If some funds were not immediately deployed, they would be spent on other real estate investments or bona fide third-party short-term interest paying vehicles.

- Anyone listening to Lathigee on the conference call would have concluded that FIC was indeed moving quickly. The 400-home deal was to close in a matter of weeks. That, it seems, would have utilized almost all of the funds FIC Foreclosure raised: earlier in the call Lathigee had identified the ideal properties as those that could be acquired for around $20,000 on average. On that basis, the purchase of the 400 homes would have consumed $8 million.

- When Lathigee mentioned the goal of raising $10 million for the purchase of the 400 homes, he said the remaining funds would be used for "other real estate deals". He made no mention of short term interest bearing vehicles.

- The OM, however, does mention short term interest bearing vehicles. It said that "until such time as enough foreclosure properties can be located" FIC Foreclosure "may apply some of the funds to other real estate investments and/or short term interest bearing vehicles." It said that the investments would be allocated "to reflect changes in the investment climate, the dynamics of the real estate market, and the interests of shareholders."

- In our opinion, no one who heard Lathigee on the conference call would likely have had any concerns along those lines. They were told that there was plenty of inventory available (as seems corroborated by the 1,200 properties FIC Group managed to acquire before June 2008). The worry, if any, was whether FIC Foreclosure could move fast enough to snap them up, not whether it would have funds lying dormant while it was searching for investment opportunities.

- In fact, the circumstances described in the OM under which FIC Foreclosure would allocate funds to short term interest bearing vehicles never came to pass. Those were described as the inability to invest in foreclosure properties, changes in the investment climate, the dynamics of the real estate market, or the interests of the shareholders. We have observed above that there was no difficulty in achieving full investment in foreclosure properties, either in timing or quantity. (FIC Group itself was able to acquire 1,200 properties by June 2008.) Nor is there any evidence that there were changes during the relevant period in the investment climate, that the dynamics of the real estate market, or that the interests of the shareholders required the re-allocation of funds that would otherwise have been invested in foreclosure properties.

- Even if the evidence had shown that there was a "sound business reason" to allocate the FIC Foreclosure funds to short term interest bearing vehicles, there is nothing in the OM to suggest the choice of vehicle would be inter-company loans to other FIC Group companies. To start, the prescribed form for offering memoranda requires that if any proceeds of the offering are to be paid to a related party, specific disclosure of that is required. No such disclosure was made.

¶ 334 In summary, investors were told that:

- FIC Foreclosure was formed expressly for the purpose of investing in foreclosure properties in the US residential real estate market;
- There were large inventories available and FIC Foreclosure had to move quickly to invest in them;
- FIC Foreclosure had the necessary preparations in place to do so, and in fact was already engaged in acquisitions; and

- FIC Foreclosure was on the verge of acquiring 400 foreclosure properties (closing was expected in "just a few weeks") that would absorb essentially all of the funds raised in the OM offering.

¶ 335 Although the OM contained statements about allocating funds to other real estate investments and short term interest bearing vehicles, the circumstances under which it stated that could happen were not the circumstances described to the investors. To the contrary, investors were led to believe that FIC Foreclosure would be investing all of its funds into foreclosure properties as quickly as possible, and in any event, within a few weeks.

¶ 336 Even if some investors did believe that funds would be temporarily allocated to short term interest bearing vehicles, the OM did not disclose that those vehicles would consist exclusively of unsecured loans to other FIC Group companies.

¶ 337 In short, everything investors were told would have led them to believe that their funds 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.

¶ 338 The respondents say that FIC Foreclosure's use of its funds for intercompany loans was disclosed to investors because it posted on its website financial statements for the periods ended May 31, August 31, and November 30 that disclosed the loans. This argument is no more valid in this context than was the parallel argument the respondents made in the context of the first fraud. Here, the argument also fails because it ignores the fact that the prohibited act is based on FIC Foreclosure's misuse of the funds, which we have found. This cannot be cured by subsequent disclosure.

¶ 339 Above we noted that *Zlatic* cited, with approval, *Currie*, which held that the use of funds in a manner that was not authorized was sufficient ground for finding dishonesty. Here, the respondents used the proceeds of the FIC Foreclosure distribution to make unsecured loans to other FIC Group companies – a use completely different from what the respondents told investors about how the proceeds would be used. In addition, in our opinion, a reasonable person would stigmatize that conduct as dishonest.

¶ 340 We find that the respondents acted dishonestly when they used the proceeds for that purpose, instead of investing them in foreclosure properties in the US real estate market, as they told investors they would.

4.2.1.7 Finding – prohibited act

¶ 341 We have found that the respondents' failed to use the proceeds of the FIC Foreclosure distribution as they told investors they would be, and that their failure to do so was dishonest.

¶ 342 We find that the respondents' dishonesty in using the proceeds of the FIC Foreclosure for purposes other than those they disclosed to the investors was a prohibited act for the purposes of applying the test for fraud in *Théroux*.

4.2.2 Deprivation

¶ 343 We have found that Lathigee, Pasquill and FIC Foreclosure dishonestly misused FIC Foreclosure's funds. As a result of that dishonesty, the investors in FIC Foreclosure were denied the investment opportunity in US foreclosure properties that they expected. Lathigee had made it clear in the conference call that FIC Foreclosure had to act quickly to maximize the opportunity. The diversion of its funds was inconsistent with that objective. Lathigee described the risks to FIC Foreclosure, and accordingly the investors' stake in the company, if the investments were not made quickly. By diverting FIC Foreclosure's funds to other companies in the FIC Group, the respondents exposed the investors to those risks, which put their pecuniary interests at risk.

¶ 344 As a result of the respondents' dishonest misuse of the investors' funds to make unsecured loans to other FIC Group companies, those investors were also exposed to business and credit risks of other FIC companies, risks that were not disclosed to them. That put the investors' pecuniary interests at risk.

¶ 345 We find that the dishonesty of Lathigee, Pasquill and FIC Foreclosure in misusing FIC Foreclosure's funds caused deprivation to the investors in FIC Foreclosure by putting their pecuniary interests at risk.

4.2.3 Subjective knowledge

¶ 346 Under *Théroux*, the executive director must prove that the respondents had subjective knowledge of the prohibited act – the respondents' improper use of FIC Foreclosure's funds.

¶ 347 Based on our findings, the evidence is clear that Lathigee and Pasquill had subjective knowledge that the respondents made improper use of FIC Foreclosure's funds.

¶ 348 They knew that they told the investors that the proceeds of the FIC Foreclosure distribution would be invested in foreclosure properties in the US real estate market. They knew that because that is what Lathigee told investors in the conference call, what the OM prepared under Pasquill's supervision told them, and what the subscription agreement stated.

¶ 349 Lathigee and Pasquill knew that was not how the FIC Foreclosure funds were being used. Woods asked them for permission to divert FIC Foreclosure funds to other FIC Group companies and they agreed. They knew that FIC Group used inter-company loans as a standard operating procedure at FIC Group, and the evidence is that they did not treat FIC Foreclosure any differently. To the contrary, the evidence is that they treated FIC Foreclosure as just another source of cash for FIC Group.

¶ 350 Lathigee and Pasquill were the sole directors and officers of FIC Foreclosure and FIC Group. They caused FIC Foreclosure to make the inter-company loans.

¶ 351 Lathigee and Pasquill also knew that they were putting the FIC Foreclosure investors' pecuniary interests at risk, because they knew that the investors were being denied the foreclosure property investment opportunity – an opportunity Lathigee had told investors must be acted on quickly. They also had to have known that, as a result of the investors' funds having been used for unsecured loans to other FIC Group companies, the investors were now exposed to the business and credit risks of the FIC Group as a whole.

¶ 352 We find that Lathigee and Pasquill had subjective knowledge that their dishonesty put the investors' pecuniary interests at risk when they misused the FIC Foreclosure funds.

¶ 353 Lathigee and Pasquill were the acting and directing minds of FIC Foreclosure, so their state of mind is attributable to FIC Foreclosure. We find that FIC Foreclosure had subjective knowledge that its funds were improperly used. We find that FIC Foreclosure had subjective knowledge that this dishonesty could result in deprivation to their investors.

4.2.4 Finding – fraud

¶ 354 We have found that Lathigee, Pasquill and FIC Foreclosure acted dishonestly when they loaned investors' funds to other FIC Group companies instead of investing them in foreclosure properties or other real estate investments and, accordingly their dishonesty was a prohibited act for the purposes of applying the test for fraud in *Théroux*.

¶ 355 We have found that, as a result of the respondents' prohibited act, the pecuniary interests of the investors in FIC Foreclosure were put at risk.

¶ 356 We have found that the respondents had subjective knowledge of their prohibited act and had subjective knowledge that the prohibited act could, as a consequence, put the pecuniary interests of those investors at risk.

¶ 357 We find that the respondents perpetrated a fraud on those investors, contrary to section 57(b) of the Act.

4.3 Summary of Findings

¶ 358 We have found that:

- Lathigee, Pasquill, FIC Foreclosure, FIC Projects and WBIC perpetrated a fraud, contrary to section 57(b), when they raised $21.7 million from 698 investors without disclosing to those investors the important fact of FIC Group's financial condition; and

- Lathigee, Pasquill and FIC Foreclosure perpetrated a 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.

5 Submissions on Sanction

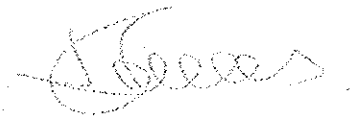
¶ 359 We direct the parties to make their submissions on sanctions as follows:

By July 29	The executive director delivers submissions to the respondents and to the secretary to the Commission
By August 12	The respondents deliver response submissions to the executive director, to each other, and to the secretary to the Commission Any party seeking an oral hearing on the issue of sanctions so advises the secretary to the Commission
By August 19	The executive director delivers reply submissions (if any) to the respondents and to the secretary to the Commission

¶ 360 July 8, 2014

¶ 361 **For the Commission**

Brent W. Aitken
Vice Chair



Judith Downes
Commissioner

Audrey T. Ho
Commissioner

JAX821

EXHIBIT 14

JAX821

Citation: 2014 BCSECCOM 419

Hearing Notice – Hearing Date

Michael Patrick Lathigee and Earle Douglas Paquill, FIC Real Estate Projects Ltd., FIC Foreclosure Fund Ltd., WBICCanada Ltd. (collectively, the Respondents)

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

¶ 1 On February 13, 2015 at 10:00am, the Panel will hear the parties' oral submissions on sanctions.

¶ 2 October 16, 2014

For the Commission

Audrey Ho
Commissioner

JAX823

EXHIBIT 15

JAX823

(DRAFT TRANSCRIPT)
Vancouver, B.C.,
February 13, 2015
(PROCEEDINGS COMMENCED AT 10:00 A.M.)

THE HEARING OFFICER: Would everyone please rise.
THE CHAIR: Good morning.
MR. CHAPMAN: Good morning.
THE CHAIR: Please be seated. Appearances, please.
MR. CHAPMAN: Derek Chapman for the Executive Director.
MR. ANDERSON: Please, Ms. Ho, my name is Anderson, my initials are H.R. With me is Mr. Ahmed, initial O, and we appear for the respondents in this matter.
THE CHAIR: Thank you. One preliminary matter I note is that both parties have additional evidence. I assume we want to enter those.
MR. CHAPMAN: Yes.
THE CHAIR: I think you might be more efficient to enter them now and then you can proceed with submissions.
MR. ANDERSON: I'm fine with that.
THE CHAIR: Okay. So, Mr. Chapman, your exhibits are -- you have an affidavit of David Inglis, dated September 19th, 2014.
MR. CHAPMAN: Yes.
THE CHAIR: It is suggested that you also have a video. I'm not sure if you're intending to enter that.

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MR. CHAPMAN: Yes. The intention was the affidavit was the evidence to show where this video came from and when, and then Mr. Inglis, who is an investigator here, he was the one that captured the video and downloaded it. So, yeah, I guess there would be the video and the affidavit as two separate exhibits, please.
THE CHAIR: All right. Any objections, Mr. Anderson?
MR. ANDERSON: I don't have any position on that.
THE CHAIR: Thank you. And then I think those are the only new evidence that you seek to enter.
MR. CHAPMAN: Yes.
THE CHAIR: And, Mr. Anderson, I am going to deal with yours as well. I believe you have four documents. You have an appendix A.
MR. ANDERSON: Yes.
THE CHAIR: Which contains Mr. Pasquill's income tax return.
MR. ANDERSON: Right.
THE CHAIR: A first affidavit of Mr. Baker dated September 10, 2014.
MR. ANDERSON: Yes.
THE CHAIR: A first affidavit of Karen Buquet, dated September 10, 2014.
MR. ANDERSON: Yes.
THE CHAIR: And a second affidavit of William Donald Baker

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dated February 11, 2015.
MR. ANDERSON: Yes.
THE CHAIR: Mr. Chapman.
MR. CHAPMAN: I have no objection to them going in. I have

made my comments in my submissions about weight.
THE CHAIR: Thank you. Madam Hearing Officer, I believe the exhibit number is 498.
THE HEARING OFFICER: Correct.
THE CHAIR: So, for the record, we are entering as Exhibit 498 the first affidavit of David Inglis, dated September 19, 2014, that's tendered by the Executive Director. As Exhibit 499, the YouTube video that is referenced in that first affidavit. As exhibit 500, the Appendix A to the respondent's submissions containing Mr. Pasquill's income tax return excerpts for 2008 to 2010 inclusive. As Exhibit 501 first affidavit of William Donald Baker, dated December 10, 2014. Exhibit 502, first affidavit of Karen Buquet, dated September 10, 2014. And lastly, Exhibit 503, the second affidavit of William Donald Baker dated February 11, 2015. With that, Mr. Chapman, and for your benefit and Mr. Anderson's, the panel has read through all of your submissions in detail.
MR. CHAPMAN: Thank you.

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The panel has found that the respondents committed, to my knowledge, the third largest fraud in British Columbia's history by dollar amount. My understanding is the Samji matter would be number 1, at least $100 million, number 2 would be the Michaels matter, which was $65 million, and that would bring us to third place, this matter at $21.7 million. Manha I think it was 16 and then it was Kim, which is 16.7, so to my -- this is, to my knowledge, the third largest fraud in our province's history and, given that, this is a matter that demands very serious sanctions, sanctions which are proportionate to a fraud of that magnitude.

It was a fraud two ways, if you will. There was the initial fraud that was perpetrated on 698 people who invested $21.7 million when the respondents withheld the important fact of the actual financial situation of the company, that of course being that it was teetering on the brink, it was close to insolvency, and in fact one of the investments in issue at FIC Projects was specifically crafted to deal with the company's cash-flow problems. Ironically it was "Cash flow investment for investors", when in fact the cash

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flow it was hoping to help was for the company.

The second aspect with the fraud was with respect to FIC Foreclosure, who raised $9.9 million from 331 investors. The investors were told that this was going to buy foreclosed properties, that there was an imminent purchase of 400 properties, which was going to take up almost all that money, and the evidence showed and the

panel found, in fact, only a hundred properties were purchased. Almost all the money with the exception of $1.4 million went to purchase foreclosed properties. There was another 750,000 I think for tax links. Other than that, the rest was all diverted to what I would say was plugging the holes in the FIC group ship.

So it is massive fraud based on the amount of dollars that were involved, based on the number of investors that were involved, the fact that the contrast with what was taking place internally amongst the respondents, knowing what was happening versus what was presented outwardly to investors, this one investment is the best time for this to come around, Mr. Lathigee was waiting for the right moment, hence the FIC Foreclosure investment came about. The website for FIC, which

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members, these were club members who thought they were joining a club to get empowerment and education, were told specifically, "Here is the different types of investments that we have. They all have different goals, targets, find the one that suits your needs most appropriately," when in fact the findings were the money came in and it was used like one big pot of money. It was intermingled from the very beginning of our relative period.

So the panel is well aware of the Eron Mortgage factors when it comes to sanctioning. It doesn't -- it barely needs mentioning, but obviously fraud is the most serious form of misconduct under our Act, and that perpetrating a $21.7 million fraud is extremely serious misconduct. That is the why the Executive Director is seeking what I will say is the usual permanent ban against the respondents, individually and corporately.

I am aware that it was sometime ago that my submissions were done, my written submissions, and since there has been this Michaels case and the Samji case which has come out since, I know my friends will be referring to, but both of those

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cases make it clear, as well in particular Michaels, that when you're dealing with fraud it's a permanent ban. My friends are seeking a ten-year ban on the respondents, and in my submission, that this should be a nonissue in my submission for the panel. It's fraud, it is the third largest fraud in our history of British Columbia, permanent bans. There is no case law that's been referred to where a fraud of any magnitude, let alone this size, warranted less than a permanent ban, so, in my submission, that is the easy part of the panel's decision

respectfully today, and I expect that there will be questions when I come to other portions of the actual sanction, but on the permanent-ban portion, in my submission it should be basically cut and dry. This is a massive fraud, permanent bans are warranted, and the case law repeatedly over and over again supports the fact that once you're dealing with a fraud it is a permanent ban. Michaels reminded us of that, as did Samji.

Again, harm to investors, damage to the markets, again 698 investors. They have not recovered the principal of their investments. The people that invested in FIC Projects were supposed

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to get quarterly payments of 12 to 15 percent, depending on how much they invested. That stopped after the first two payments. There is no evidence that any FIC security has any present or future value and there is no evidence of any credible hope that investors will recover any part of their investments, so very serious harm to investors.

With respect to enrichment, the evidence with respect to enrichment, FIC Foreclosure banking records show that, as of May 5, 2008, once the money starts to come in, $990,000 was transferred to FIC Management to pay for various expenses. That included Mr. Pasquill's pay, expenses. There is an amount that was paid to Mr. Pasquill on November 14, 2008, which would have been just before the end of the TD loan expiring, for $242,000, simply referred to as "Expenses", I don't know what that's for. 150,000 -- $150,675 went to Mr. Lathigee's numbered companies, 0749885 and 0779243. Now, 140,000 of that $150,000 was two payments, July 10 and August 1st, 2008 to the 885 company, his personal company, specifically commission on Mohawk home sales. And the panel will recall that there was -- it was a bit of a

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mystery why, when the FIC Foreclosure investors were told that FIC was going to be investing in 400 foreclosed properties why they only got 100 properties. And there was evidence that that same summer FIC group had access to hundreds and hundreds of other foreclosed properties and that these were being sold for, Mr. Lathigee's website letter explained, from him on the floor from him on the stage to the investors, no one involved in between. Of course, he also mentioned in there there was no commissions, but we know there were because of the general ledger which the respondents put into evidence, which showed specifically commission on Mohawk home sales. So that is a form of enrichment. $28,600 went to Mr. Lathigee or his numbered company, the 85 company,

between October 1st and September 1st, 2008. And we also have Mr. Pasquill received an $87,000 simply referred to as a payable in December of 2009 and then gave himself a $2,000 monthly raise as of January 2010 to pay off a loan for his share options. So the panel will recall that his share options were about to expire. They were exercised without paying for them, and then about eight months later this was raised and there was an

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exchange of e-mails between both himself and Mr. Woods and Mr. Baker saying, "Let's do it this way, let's say I exercised it back on this day back in April, you owe me this much, my shares are this much, so I will get a check for my portion now and I will put the other portion, I will increase my salary." And this is Exhibit 326, page 2, so there is enrichment in that sense.

Mr. Pasquill continued to draw a comfortable salary once keeping in mind that the financial crisis has now happened as of September 2008. The bank is circling. In 2009 he drew $130,000 salary, 2010 roughly 105,000, and from 2011 onwards $60,000. Mr. Lathigee -- sorry, so there is enrichment, but in the grand scheme of things, that in my submission is not going to be the key factor when we come to disgorgement or when we come to the admin penalty. And I will get to that in a bit when we talk about Michaels and the factors or the principles behind disgorgement orders.

Anyways, so with respect to past misconduct, we have that here as well. We have the cease-trade order against WBIC, FIC Investment and China Dragon back in December of 2005, we have the

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settlement, that involving Mr. Lathigee and Mr. Pasquill, China Dragon and WCIB back in June of 2007. So roughly six, seven months before we get into our relevant period. That was a $60,000 fine for Mr. Lathigee and a $30,000 fine for Mr. Pasquill. The infractions were illegal distribution during the period of cease-trade orders, making unwarranted claims about no management expense ratio, and improperly exercising and cashing out options.

Now, there was a further cease-trade order against WBIC issued in September 2008 which related to the subject investment of the hearing, so that has now past -- further past misconduct.

With respect to the risk to investors on its -- in my submission, the fact that you perpetrated a $21.7 million fraud against 698 people means that you are a risk to investors into capital markets by your participation. And the -- I talked to my friend briefly before this, and I

am prepared to play it now, but my friend, in his submissions, talked about the conduct of Mr. Lathigee since the relevant period as a mitigating factor.

And so in my reply materials we have the

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YouTube video, and I am happy to play it now. I'm not going to play all of it, you will be happy to know, but 12 minutes of it. It is about a half an hour video and it was posted April 16, 2014, so it was posted after our hearing, it was posted before the findings, but as far as -- and this one obviously is specific to Mr. Lathigee. And subject to my comments earlier, which I again stress that we should be clearly in a permanent ban area here for this type of a fraud and this size of a fraud, but if there is any doubt, if the hear officer can bring up Exhibit 499. And Mr. Inglis' affidavit just shows the screen capture of where this video came from, and it was YouTube, and it was posted on YouTube on April 16, 2014. Mr. Lathigee states in the video, at the 15-minute mark, which I won't show you, that the actual date of the interview is April 10, 2014. So, again, this is long after our hearing and less than a year ago. And so if the hearing officer is able to bring up the video, and I am going to ask if the first 12 minutes could be played.

And just as a bit of sort of to set this up, there is a -- it is a series of videos called Experts of Southern Nevada, and this particular

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one is an interview of Mr. Lathigee, and the panel may recognize some of the things that Mr. Lathigee is saying in this video. So first 12 minutes, please.

(VIDEO PLAYED)

MR. CHAPMAN: Thank you. So risk to investors. Obviously some striking similarities in that video to the evidence and the findings in this matter. Mr. Lathigee is referred to at some points as an economist and a financial analyst for some reason, now living in Las Vegas. He is the cofounder and leader of the Las Vegas Investment Club. There was initially a $400 membership fee to join and that has since been waived.

A big part of the Las Vegas Investment Club is educational content for members at club meetings. The club meetings have seating for 250 people and they're always full, they're growing, they're moving to larger venues. Currently investing on tax liens and tax deeds, and that of course was the first investment of FIC Foreclosure using the accredited investor subscription agreements. So there is that similarity.

You will, of course, have noticed the

reference to Mr. Lathigee having previously built

the largest investment club in North America that grew to a hundred million dollars in assets under their management. I wonder what's that in reference to? FIC group. So he is still trading, if I can use that word, on his involvement with the FIC group, which led to this hearing matter ultimately. And, again, there was no reference to how that ended up going. And, again, this is 2014. So the panel hadn't issued its findings yet, but obviously the Genesis project, we know what happened to the various investments. And then he had that saying, "There is a lot of way to do business, it's how you choose to do it, with morality or without it or somewhere in between." So it looks like Mr. Lathigee is doing something very very similar to what he was doing here with FIC group, except now he is doing it in Las Vegas. So if there is any doubt, if there is any doubt at all that a permanent ban is required here and that there is a risk to investors going forward, this April 2014 posting should remove any of that doubt. It sounds -- you can see where that's going basically, you can see where that's going based on the findings the panel has had in this matter.

Going back now to the Eron Mortgage factors. Again, the panel is well aware of specific and general deterrents. The sanction must be sufficient enough to ensure that the respondents and others will be deterred from engaging in similar conduct.

With respect to being a registrant or bearing the responsibilities associated with being a director, officer or issuer to advisors, again, by perpetrating a $21.7 million fraud, the respondents personally are unfit to be registrants or directors or officers or advisors to issuers. And with respect to similar orders made in the past, I cited at the time the IAC decision, which again says that, when you're dealing with fraud, it is a permanent ban, and I have since referred to the two subsequent decisions of note, Michaels and Samji, which underscore that idea.

So there should be a permanent -- orders against all of the respondents under all of 161, permanent bans.

That brings us to the disgorgement sanction under Section 161(1)(G). Now, the findings for that, the respondents fraudulently raised $21.7 million on behalf of three FIC companies, and then

perpetrated a second fraud when they raised $9.9 million from the FIC Foreclosure investors. It's

in the public interest that there be a disgorgement order here when you have been involved in perpetrating the third largest fraud in British Columbia's history, and the question is what amount?

And the Michael decision has laid down, since my written submissions, principles that are relevant under a disgorgement order under Section 161(1)(G). I'm just going to refer to it. I don't know if the panel needs to refer to this or not, but it is paragraph 42, 43 of Michaels. The panel -- just a quick reminder, Michaels was a $65 million fraud by someone who fashioned himself as an advisor, so there was no legal advising finding, there was misrepresentation finding and there was a fraud finding. Mr. Michaels was advising people to move their money into investments of various issuers that he was receiving commissions for. So the money never went to Michaels directly. People wrote the cheques to the issuers, real companies, many instances failed, but they were real companies, and the average age of those clients was 72.

So in the Michaels case the panel there laid out the principles. The first one said:

> The focus of the sanction should be on compelling the respondents to pay any amounts obtained from the contraventions of the Act.

And under that first principle, that's got to be the full amount, $21.7 million. That's the full amount obtained to pay any amounts obtained from the contraventions of the Act. The panel is aware that Section 161(1)(G) is written very broadly, it is not limited to any amount obtained by that specific respondent or to a narrow concept of any kind of benefits or profit. So that's the first principle that the Michael panel laid down.

The second one is that the sanction is not focussed 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 contraventions of the Act.

The third one says the section should be read broadly to achieve the purposes set out above and should not be read narrowly, and as I said earlier, by any respondent or by that respondent or to the narrow concept of benefits or profits.

Now, it is obviously a discretionary order that the panel has full discretion in deciding if and how much of a disgorgement order should be made, but it has got to be applied in the individual circumstances of each case. So in the Michaels case, because of the individual circumstances of that case, because the money --

because Mr. Michaels was not a director or an officer or was not -- was not running the show of the various issuers he was selling, the -- he instead was paid commissions after the fact from the issuer, so the money never went through him, he received commissions after the fact, and the panel there determined that for that reason his starting place -- or the commission should be the disgorgement order, the actual amount he obtained.

The panel agreed -- when they applied these principles to the situation in Michaels, they agreed that they had the discretion to order the full 65 million, that Section 161(1)(G) was worded broadly enough, that even though the money never was paid to him directly, he was simply a salesman, advisor as well, but the money went directly to the issuers, even though there was that gap, Section 161 (1)(G) was still broad enough to order the full amount to be paid.

Now, it says in the second finding that the panel in Michaels made, that the losses of the investors as of the date of the liability hearing, which was found to be $40 million, might have ended up being more than that, was to be considered only for the purposes of determining whether it is in the public interest to make a Section 161(1)(G) order and does not correlate to the amount of the order. So using that finding here, $21.7 million, a very large fraud, large loss, that money is lost, that obviously goes to it being in the public interest that there be a disgorgement order being made. And, again, in that case, the panel found that, because the only amount he obtained was the commissions, that should be the amount ordered for disgorgement.

With respect to the Samji matter, the Samji matter, which was the hundred million dollar Ponzi scream, so that was alive from the get go, there was no real investment, unlike Michaels, the panel made a finding based on a forensic expert's report that looked at the money in and out and said that there was $11 million unaccounted for based on the money in and out, and that money of $11 million, that was the number -- the number the panel decided was the appropriate amount to order disgorgement there. So how do we take those two cases and bring it back to this case?

I guess we go back to the larger principles in Michaels. This is a very different case, this is not a situation where the respondents were getting commissions for raising money for FIC or at least weren't supposed to get commissions. It's not a situation where they were raising money for these various companies and then they received

commissions for doing so, so it's not a Michaels situation that way. It's not a situation where -- it wasn't a Ponzi scheme where money coming in was being paid, there was no finding by the panel that this was a Ponzi scheme, and there was some assessment of money in, money out, how much was retained. That's not the situation here. The situation was the company was teetering on the brink and moved to various to try to plug the holes while it was happening while being dishonest with the investors about that, what the money was being used for. So it is a different situation, it's not a Michaels, it's not a Samji, it is a situation where the personal respondents had complete control over the corporate company.

Money came in, it was $21.7 million that was dishonestly raised, and in my submission, in that situation, keeping in mind that the main principle was laid out by the panel in Michaels, being that the focus of the sanction should be on compelling the respondent to pay any amounts obtained from the contraventions of the Act. That brings us back to the number that I initially sought, the $21.7 million. That was the amount that the panel has found was obtained by fraud, contrary to Section 67.B.

There is not -- I made reference earlier to the personal enrichment aspect of it. There is not a lot, frankly, there is not a lot of evidence here of that, so if you were to simply say and say well, let's call that -- let's say this is a Michaels-type case and equate commissions paid by issuers with their salary or their other amounts obtained, you get a very very small number. And in my submission, that's not -- it's contrary to the principles laid out in Michaels, and it 's contrary to the purpose of why disgorgement orders are made.

So, as I said, it's -- it's tricky in the sense that, since our submissions were first made

there has been these two cases that have come out that have sort of stated these principles or restated them perhaps, but in my submission, the two subsequent cases are different. And, as the panel said in Michaels, this sanction is an equitable remedy and must be applied in the circumstances of the case. So, as I said, it's not a commission case like Michaels, it's not a Ponzi scheme like in Samji, where there is some accounting of money in, money out and how much is unaccounted for to be the basis for the disgorgement order. So, in my submission, the principles in Michaels support the amount that I initially sought on behalf of the Executive

Director, the $21.7 million.

And I will move on to the next section, which is the admin penalty under 162. Again, this section of the sanction has also been clearly impacted by the Michaels and Samji decisions. Prior to those cases, I cited the Independent Academies Canada case, which it summarized cases involving fraud from the last number of years before the Commission, and those cases supported the proposition that, where there is a fraud involved, the administrative penalty of two to

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three times of the amount fraudulently raised was a common sanction. Now, those were smaller amounts than the amounts we're dealing with here, and that was a comment echoed by the panel in Michaels and Samji, that using that doubling or tripling gets into -- at least with Michaels and Samji, got into, you know, huge numbers, hundreds of millions of dollars literally. So we're left with having to deal with those decisions in this case.

Now, I initially sought a doubling of the amount raised, and I think, quite frankly, based on what the panel said in Michaels and Samji, I suspect the panel will be uneasy going that far based on the comments of the panel in Michaels and Samji, that $42 million is too much. I mean the tricky part again, because of disgorgement being such a customized type of sanction that is specific to the facts of the case, the panels in Samji and Michaels did not set out a principle, did not set use as a principle for the administrative penalty that you take the disgorgement order and you triple it, that was not -- unlike the IAC case, where the panel said that there is this common thread of cases that you

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take -- where you take the amount fraudulently raised and you double it or you triple it, that's not -- at least the panel -- neither panel in those two cases came out and said that. That, of course, doing the math, is what happened. The $5.28 million that was ordered to be disgorged in Michaels was tripled to get $17.5 million for the admin penalty, and the $11 million approximately that was ordered to be disgorged in Samji was tripled to get the administrative penalty. Now, if that is actually a principle going forward, then arguably, you know, the amount that I am seeking for disgorgement will be doubled and tripled, and that will get us back to 40 or even $60 million. But, again, in light of those decisions, I don't think that's going to be the case here.

So I am going to suggest at least an equal

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amount of disgorgement order and an admin penalty here would be a suitable penalty, so a $21.7 million disgorgement order and equal amount for the admin penalty, that takes us into -- obviously it is a big number, but this was a big fraud, and the reason that we're getting into big numbers and admin penalties is that these are big fraud

numbers. So that's my -- so that's my rationale of how I am claiming a $21.7 million admin penalty. I mean it's a tricky proposition, quite frankly, based on the last two decisions which dealt with larger frauds, you know -- it just so happened that as the findings come out with this panel in this matter, the second and first largest frauds in our history happen to have come down and sanctions happen to have been issued, so obviously we're in a different -- I'm not suggesting in any way that we have to ignore those cases. I mean that's silly. Obviously they're laying down principles going forward for these cases.

So with respect to the admin penalty, again, those two cases happen to have taken the disgorgement amount and tripled it, but the panel there didn't set that out as a principle going forward, and I think the reason in my submission why they didn't or shouldn't have as a principle, in some cases there is not necessarily going to be a disgorgement order possibly or the disgorgement might be an amount where tripling it would get you to a much much too small a number for an admin penalty. So, for example, here, if we were to equate the personal enrichment amounts in the

hundreds of thousands of dollar range, for example, and said, "Well, that's the same as a commission that Michaels got, which in my submission they're not, then we just triple that, then you're still going to be getting -- that would end up with potentially a fine here of maybe a million dollars, a million and a half, which for the third largest fraud in B.C.'s history, that just doesn't -- that shouldn't be the result. I mean when these decisions go out to the public and go out to people in the markets, there should be some rationale between the various decision that is going to come out, and some sort of way that people going forward can get some sort of sense of what could happen to them if they were to breach our Act and end up with a disgorgement order and with a fine.

So that's one reason in my submission why simply setting out a principle of whatever the disgorgement is, you triple it and get the fine, one side fits all approach. Why that wouldn't work, simply because there could be cases where

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the panel won't order disgorgement for whatever reason. I mean the panels have that discretion, but will still say, "Well, there has got to be a

fine here." The fact that there wasn't an amount to be disgorged based on those particular circumstances, does not mean that sometimes it's three times zero and therefore it's zero, that can't be the case. So I mean at the end of the day it comes down to the individual circumstances of each of the cases, and in my submission, this is one of the largest frauds ever, it's not Samji, it's not Michaels, and that's why the panel has to come up with a very customized sanction. And in my submission, the amount that I initially sought for disgorgement and my low number that I sought for the admin penalty can still fit into those principles and won't violate the concerns that the panel had in Michaels and Samji of getting an astronomically huge number.

So, in my submission, that's what an appropriate sanction should be, a permanent order against all respondents, a disgorgement order for the full amount illegally obtained, $21.7 million, and an equal amount for the admin penalty.

So unless the panel has any questions at this stage before Mr. Anderson speaks, I --

THE CHAIR: Just to be clear, the ED wants administrative penalty that's an equal amount of the 21.7 million

disgorgement amount.

MR. CHAPMAN: Yes. And that's largely in view of the comments made by the panels in Michaels and Samji, once we're getting into these large amounts, there has got to be some -- simply just doing the math and getting into these large numbers is not -- the panel said basically it is so big that it loses any kind of --

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THE CHAIR: I understand your rationale. Let me ask if Ms. Downes has any questions.

MS. DOWNES: No.

THE CHAIR: Thank you.

MR. CHAPMAN: Thank you.

THE CHAIR: Mr. Anderson.

MR. ANDERSON: Thank you.

I don't intend to -- I intend to follow to some extent my argument, but I do not intend to read from it, and I want to start out in a generic way.

I agree with what Mr. Chapman says in a sense that the Michaels and Samji cases have modified the law from perhaps where it was when these written submissions were filed to the Commission, and I will address that in due course.

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The first thing I want to say is this, this is not the third largest fraud. I don't know where my learned friend gets that from, but I can think of two right off the top of my head that are larger than Samji and Michaels and this one, and they would include John Patterson's settlement, would also include the Eron Mortgage case, and there is probably others too. So I wouldn't put any weight on this number 3 thing as a starting point.

Number 2, I am going to say, and I conceded in my argument, that these are two serious frauds, I don't quarrel with that. But what I do say is this, is that there were real and substantial underlying businesses here. The FIC group had real and substantial assets and, as you found, the most significant one was the development in Alberta at Genesis on the Lakes. They had interest in equities, securities and you even found there is $900,000 worth of diamonds.

At paragraph 265 of your ruling you found that FIC group had, at the relevant time, net assets of approximately 50 million. There is no question in my submission that, I'm not trying to detract from the seriousness of this, but I think

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from almost everybody's point of view, unforeseen credit collapse in the fall of 2008 had a significant impact on the losses here, and in particular, was a primary contributor to the problems caused by Genesis on the Lakes.

You found as a fact, in my submission, that the money raised here was raised because of the financial condition of SIC, and I think my friend and I both characterized in our arguments, your basic generic findings as they relate to fraud with respect to the financial condition on the three corporate entities that raised the money and a separate and distinct fraud on the same amount the money raised by foreclosure. So one has to e a little bit careful there, although you did find two distinct frauds, I suppose, or fraudulent conduct, there is a certain element of double counting you have to be careful of because of the same investors and same money for disclosure.

You -- and I am going to come to this in more detail as I get into this argument, but you basically found how the money raised in each of these offerings was spent, and I don't think, and I mean I'm going to belabour when I get into this a little bit more what the amounts personally

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obtained or indirectly through private companies by Mr. Lathigee or Mr. Pasquill, but my friend is right, they're not large amounts, and I am going to come to it, but my position is they weren't --

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my friend in his reply describes the amount as handsome. For people involved in a financial endeavour as large as this, it's my submission they were reasonable.

Unlike the Michaels case, where the fraud alleged was a three-and-a-half-year one, unlike Samji, which was something around nine years, the conduct in question here is February 2008 until August 21, 2008, and on your findings of liability those are your bookend dates, and it is paragraph 17 of the liability findings.

So also in Michaels and Samji, in my submission, those cases had elements of breach of trust that you don't have here. And I know my friend quarrels about this too, which it surprises me, but Mr. Lathigee and Mr. Pasquill did not abandon the investors in this case, they carried on and stuck around to do their best to help what could be recovered, and those efforts, as you heard, are ongoing, and there is the lawsuit in Alberta, its trial is finishing shortly, for

example. And those things are set out in paragraphs 7 through 14 of my submissions on sanctions, and --

MS. DOWNES: Mr. Anderson, I will stop you there, because as you are aware, there were comments of similar submissions in Samji, but Ms. Samji's conduct in the subsequent proceedings were a negative factor, and of course the panel found that conduct in the proceeding is not a mitigating factor when considering sanctions. So can you comment on that and the context of this argument?

MR. ANDERSON: Well, I disagree with it, to be frank, and I know that both of you decided it. I think this is a much different case than those other two in some respects. Here you didn't make a finding that -- at least not that I could discern from your findings of liability, that these frauds in this case were designed to personally enrich either Mr. Lathigee or Mr. Pasquill. I think the thrust of what you found was that, because of the unstable financial condition of the group, there needed to be money obtained, as a result the frauds occurred and the money flowed in to solve some of those problems. I think that's the thrust of almost all of it.

And so I say that conduct in terms of saving this company both before and after the fact is mitigating, it's got to be relevant. I can't see how it isn't. Is that to say that in terms of assessing what orders you would make, how much the fine would be, that somebody that is making an effort, not really taking hardly any money out, trying to save a structure, is the same as

somebody who just takes the money and runs? I'm thinking, for example, the Thow case. Substantially differently. I can't conceive of how when you're considering what orders to make in a public interest, that somebody sticks around to try to make things better isn't pertinent? And I know you found that, and of course this was written before that was decided as well, but I do have a lot of difficulty that conduct designed to try to make things better somehow doesn't fit in the framework.

And I might add that Eron Mortgage I don't think purports to be an all-inclusive list of factors, because I think you will find cases that will come up where there will be other things that nobody thought of that will come to someone's mind and that you might agree fit in the context of

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making orders in the public interest.

But I have laid out here what's happened and we -- in these paragraphs. I'm not going to belabour them, but I do want to make one point about Mr. Baker here.

Now, you may recall in your findings on liability disbelieve Mr. Pasquill. What we did, in terms of whatever money came out of these companies or from these funds, what we did is we got somebody who is an accountant, professional, has no skin in the game, and asked him to provide the evidence of what these gentlemen were paid directly or indirectly out of that company to get around the issue of your findings of credibility already, and I can tell you from a counsel's point of view, to have that criticized in a sense in my friend's reply I find surprising, because there is no motive on the part of Mr. Baker to put his professional accreditation at risk by lying on an affidavit, and nor is it hearsay, and I will come to the numbers later. But what he does depose, based on personal knowledge, is that these are the things that Mr. Pasquill and Mr. Lathigee did subsequent to 2008.

And I think the other thing you have to

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remember, like my friend talks about, you know, what happened after we already had the hearing, but we didn't have this hearing until, if my memory serves me right, it was 2014. I can't remember what the date of the Notice of Hearing is off the top of my head, but it -- it's not all that long ago compared to the dates we're talking about here, like 2008, 2009, 2010, 2011. The Notice of Hearing really wasn't out there, so when you're looking at the conduct, it's not -- you shouldn't be looking at it in the context that this was -- you know you've got a problem already.

I mean the Commission -- it was knowledge the Commission was looking at, but nobody was interviewed, nobody was called in, it wasn't anything like the normal type of situation. So I think if you look at the conduct in that context, and like I say, I will get the date of the Notice of Hearing before I'm finished, but it's not done kind after a discovery sort of thing.

At paragraph 12 some of the stuff that's been done, I mean if you wanted to duck it, why would you participate in regular meetings, later quarterly meetings, to keep people up to date with respect to what's happening, pursue lawsuits in

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Alberta?

And as part of what Mr. Pasquill's done, and I am looking a little bit at paragraph 13 on page 4 of my submission, but he basically has been the person primarily responsible for the day-to-day management since January 2010. The panel had communications with investors, done all the various corporate filings to keep the companies up to date, tax returns and the like. He worked with the receiver trying to provide information needed, and submitted a proposal to try to let the group recover property, but unfortunately that was not accepted.

Now, my friend -- in paragraph 14 I say that Mr. Lathigee and Mr. Pasquill were not under any obligations to do any of the above, but I think that's true, they didn't have to do anything. If they resigned as a director they could walk away. The fact of the matter was they didn't, they stuck at it to try to get something back for these people.

Administrative penalties. Now, I understand that the argument that we have put forward a couple of times now, unsuccessfully, with regard to the meaning of Section 162 of the Act has been

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rejected, so I am not going to belabour the point, but I am not abandoning that position. It's my submission that on a clean reading of this section is here you have two frauds alleged, not put multiple ones, over and above that, but I'm not going to belabour the point. But that's my formal position.

And I say that in -- when you analyse it, I mean how -- if truly that was the case, how would you know whether, without one single investor being called, it would be appropriate to impose the maximum with respect to each and every single investor? How would you be in a position to distinguish between investors? Like, for example, what if somebody invested in foreclosure and didn't listen to the conference call? You know,

given some of your findings, that person's position might be quite different. So I think that the problem with these global numbers is that you really, other than just guesswork and pulling stuff out of the air, is virtually impossible to make a decision if each contravention is a single investor putting in his money into the foreclosure, for example. And I think that's what's wrong in it, and what I find even more odd

is for each offence under Section 155 of the Act the maximum per offence is $3 million fine and/or three years in jail or both. And so if this was alleged as an offence, a one-count offence, that would be the maximum exposure. Now, if it was 313 different counts it might be higher, but then each individual contravention would be weighed. So that's my formal position, but I appreciate that there is some effort being made to reach decisions which provide guidance on a go-forward basis, and I anticipate that you will probably not accept my submission in that regard.

And based on the Executive Director's position in this case, and I find it surprising that the maximum amount that could be imposed here would be 1 million -- excuse me, 1 billion 29,000 -- well, 1.029 billion at 1 million account when you double up the 331 on foreclosure finding, which, based on I think the reasons in both Samji and Michaels and/or any of the other recent cases, is way off the map.

Now, I also take from Michaels and Samji to some extent the way that the Commission is articulating things at this point is to say, well, in imposing the disgorgement on one hand, which I will come to, has got nothing to do with any kind of deterrent effect really, because it's just to recover what ought not have to have been obtained in the first place. But with respect to the administrative personalities, I mean in order to keep it -- to satisfy the element of general deterrents and specific deterrents to the extent necessary, you can't get too large because -- because at some point you hit a space where it becomes punitive, not preventative and remedial in nature. And so I think the line that was used in both cases was it ought not to be so excessive that you go beyond any meaningful bounds of deterrence for the respondents and others. And so I think in terms of assessing this case, you have some principles there that will assist you.

And so I know what my friend is saying on the Samji and Michaels matter, because I think that's what appears to have happened is it's three times the amount in those instances personally obtained

or unaccounted for, because in Samji there were some looseness in the numbers that are not in this case or Michaels. I don't know if that's exactly what was intended, because you might -- you could look at it the other way. I initially looked at

it more like in Samji I'm talking about now, that it was more like the third of the amount raised, because it broke almost into exactly that number too. And I also, like Mr. Chapman said, it could be the other way around, because it is a global number that is picked out.

It is going to be my submission that the penalties in this case should be quite a bit less than that, but I just want to say something about the corporate respondents. I am thinking predominantly of paragraph 52 of the Saafnet decision, and in the circumstances of this case or the hope that some money will ultimately be recovered at some point, I would submit that an administrative penalty is unnecessary and not appropriate with respect to them, and it would only serve to punish the investors and not contribute anything in the public interest.

Now, I am going to come back to the question of administrative penalty, but my ultimate submission is that it not -- ought not on the individuals be more than a million for the reasons I have already said, and if -- and I think what my friend was trying to say is the most it can really be showed these men obtained, directly or

indirectly personally, is several hundred thousand dollars, so that's not a large enough money, so the Samji/Michaels formula doesn't work here. I think you could craft a penalty, if that was your view, because I don't think you are stuck by any particular previous ruling or any formula, and I -- what I have seen here time and time again, and it's just 1998 or '99, whenever did the first case here, is that every time there is a principle set that kind of gets in stone is that something comes up where it doesn't really fit. And here, in my submission, you ought not to go -- if you give any administrative penalty on the individuals, it ought not to be more than twice as much as they personally received. And I will deal with those exact numbers.

THE CHAIR: Mr. Anderson, if you're going to move on, just go back to your comment about the corporate respondent. I don't believe we have any evidence suggesting that the corporate respondents have any ongoing business at this time; is that correct?

MR. ANDERSON: Yes. I should just get a confirmation on that. I think you're speaking directly of the three named respondents.

THE CHAIR: Correct, thank you.

MR. ANDERSON: All the companies exist and are in good standing in the sense of filings and that. And I am probably going to get some more information when we take a break, but of course the Foreclosure fund did have several million dollars of foreclosed properties it still has.

THE CHAIR: I think it is probably a good time to take the morning break at this point, so we will come back in 15 minutes. So twenty-five to twelve.

(RECESS TAKEN AT 11:17 A.M.)

(PROCEEDINGS RESUMED AT 11:40 A.M.)

THE HEARING OFFICER: Every one please rise.

THE CHAIR: Mr. Anderson.

MR. ANDERSON: With respect to the assets of the two other companies such as they exist, the other two corporate respondents, basically intercompany loans that were described I think in the evidence you had before you at the liability hearing, and they will be repayable to the extent that the other entities recover assets from their ongoing endeavours.

Anyway, my position is that on the individuals at 500,000 each is an appropriate administrative penalty, and that it's not in the public interest to impose administrative penalties on the corporate respondents.

I know, and I am looking at paragraph 22 through -- well, 25 through 30 predominantly of my submissions with respect to the development in terms of the law of disgorgement, and I do want to say that my formal position, which I expect you won't accept, is that Section 161(1)(G) is limited to the amount obtained directly or indirectly by the person didn't comply with the Act. And I just take that formal position and I'm not going to develop it at this point other than to say I rely upon what is in my submission.

I suppose for what we're dealing with here today, if you don't accept that position, it strikes me that the principles or procedure, however you want to describe it, from the Michaels case is the way that we seem to be going, I suppose, but there is I think a lot of -- it's hard to say exactly where one fits and one doesn't, because both Samji and Michaels came to the amount that the individual basically received personally, with the exception being in the Samji case, there was a dispute as to what that amount was, but I think in principle that's what it was. And so the question that I think you really have to determine in this case is that what amounts were received, and then I think the next question

is is there any reason, policy reason, of any sort whatsoever to depart from what appears to be a kind of a procedure to look at these things, and if you accept what my friend says in big fraud cases, what then would there be any reason to depart from the norm? And I want to just take you to a couple of -- sand I should say, my position is that what we have here is we don't really have any evidence that any of the payments made to Mr. Lathigee or Mr. Pasquill actually came from any of the funds that were raised by these three corporate respondents, but I mean we're going to deal with that, because it is important.

What you found -- what you found in paragraph 263 of your ruling was this:

> This was borne out by how the money was used. None of it was spent on anything that was going to be produce cash flow for these investors. Half of it, 5 million, was used to top up the 076 investment portfolio --

And you might recall that's the one that was supposed to be at nine million:

> -- as part of the TD credit facility and to pay the Genesis contractors so the liens could be removed. Another 3.4 million was split between funds returned to FIC Foreclosure and funds held in reserve to pay interest on the promissory notes themselves. That left 1.6 million that went to overhead on third party payments.

Then at paragraph 324 and 325 of your ruling you said:

> The evidence shows that of the 9.9 million raised from investors FIC foreclosure spent 1.4 million to acquire foreclosure properties and another 751,000 on rental properties and tax liens. Foreclosure transferred the rest, about 7.8 million, to other FIC group companies, among other things, payments due on third party loans, payments of outstanding trade invoices on Genesis and other properties owned by the FIC group of companies, payment toward the 076 tax liability --

And you might recall that that was the tax liability being deferred and you picked it up in your ruling on liability as moneys that were needed regarding that.

THE CHAIR: Mr. Anderson, 325 also talked about part of the foreclosure funds being used for payment of salaries. It doesn't say whose salaries.

MR. ANDERSON: Right.

THE CHAIR: And 263 talks about money being raised for overhead.

MR. ANDERSON: Yes. I am going to try to break that down as I

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go here.
THE CHAIR: Okay.
MR. ANDERSON: Now, some of this stuff comes from Mr. Baker's evidence in his affidavit, and I am at page 10 of my submission.
And what I start off by saying is that where I want to start, you might recall Mr. Baker testified at the hearing and his evidence was, as far as I can tell from your ruling, not rejected. His credibility was not found wanting as far as I could tell in your reasons on liability. But he did testify at the hearing that FIC Management was a company used by the FIC group to many of the group's expenses, including management and administrative expenses. He further explained that the companies in the FIC group made payments to the FIC management so that FIC management could pay such expenses on behalf of the group. And my learned friend made reference to certain payments

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received by Mr. Pasquill and Mr. Lathigee from FIC Management, and the reference there is the time period May 31, 2008 to December 31, 2008. And that was Exhibit 497 and it was tendered into evidence.
It is acknowledged that FIC Management, during the period May 31, 2008 to December 31, 2008 received an aggregate of actually 1,050,000 in round figures. My friend I think said 900 earlier, but I think that's the right amount. And that's from FIC Foreclosure. And on June 30th, 2008 it received a transfer of 295 -- well, call it 300,000 from WBIC. During that same period of time, Mr. Pasquill and Lathigee received funds identified in paragraph 10 of the Executive Director's written submissions on sanctions, with the exception that -- and we're going to get into an argument over who had control of that 077, but I don't think that matters, because Mr. Baker's subsequent affidavit makes it quite clear that Mr. Lathigee didn't receive any payments from that company.
And then what I've done at paragraph 35 is set out there from the general ledger payments that were received from other entities that went

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into that account as well, and you can see from the same exhibit a total of 2.35 million was deposited into FIC Management's Canadian account from sources other than the corporate respondents, much of which appears to have come from the company's U.S. dollar account and is significantly greater than the amount deposited into that account by the corporate respondents and the amounts received from FIC by the individual respondents.

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Now, the funds at that point were commingled, and so I don't know how one could say that anything other than at least the one amount or the two amounts received from those two companies would be the maximum that that would flow through that account. And I say on the evidence of this case, there is certainly no evidence that the individual respondents received any of the $21.7 million personally. Now, I make the point when I talk about "personally", by that I mean the companies.

And with respect to the salary payments made in that time frame, Mr. Pasquill 58,931, is not unreasonable, nor are the payments received by Mr. Lathigee and his numbered companies. And we get

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down below what those exact amounts are, and I want to do that in a minute, but I want to talk about the 242,000, because it came up this morning in my friend's submission. What he has overlooked is the fact that Mr. Baker did explain when he testified before you that the 242,000 was the repayment to Mr. Pasquill that had been related to his entitlement to some sale proceeds from some lots in Alberta that he had personally purchased, and Mr. Baker explained that the sum was owed to Mr. Pasquill by Calmar Lakeside Developments and was paid on his behalf to him by FIC Developments. And the reference in the transcript is there, and that hasn't been, in my submission, challenged in any way by my learned friend to make it not credible. And I remind you that, you know, Mr. Baker is a C.A. and has no skin in this game.

So the next part we set out what they actually received, and I know that there is criticism of this letter from the chartered accountant, but it's found at Exhibit A to -- and I better get the exhibit number here -- 502, which would be the affidavit of Karen Buquet, number 1. Yes. If you could please go to the second page. This is the letter of Mr. Johal, who is a C.A.,

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and Mr. Lathigee had requested that Kanester Johal review his previously filed Canadian tax returns and the tax returns of 074, that's Mr. Lathigee's personal company, for those tax years, and separate out anything that had been received from the FIC group of companies. And now we're talking about, in accordance with this letter, previously filed tax returns. And you see the amounts that are set out there for 2008, 2009 and 2010, and I haven't told them, maybe I have it in my argument here, but in my submission they are not substantial amounts.

In 2008 that amounted to professional income of 18,000 from his group of companies, and his

numbered company received aggregate management fees of 214,000 and aggregate commissions of 75,000 in 2008. Of that, of those amounts, only 66,000 came from WBIC, being 5,000 paid to Mr. Lathigee personally and 55,000 paid to his numbered company. And that comes straight out of that letter as well.

And then you have the income received for the 2009 and 2010 years, but in my submission, that, premised on the evidence in this case, by the time 2008 had ended I don't think that there is any

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evidence that any of the funds that were raised on these three offerings were left in the company. It was the opposite.

You have Mr. Pasquill's tax returns for 2008 to 2010 and the corresponding T4S and Notices of Assessment, and that's Appendix A, which you marked as Exhibit 500 for the submissions. I don't intend to take you through that. I think that they're set out on page 13 of our argument accurately, and I submit that the only real money that he personally received that could be in play in terms of these three offerings is some or all of the 140,000 by reason of the way in which the moneys flowed to FIC Management and to him. I also say, and this is something that I have said before, is whatever Mr. Lathigee and Mr. Pasquill have done, the amounts of money that they were paid are not inconsistent with people in similar situate businesses and given the size of this operation and number of employees it had, et cetera.

Now, so therefore, my basic position is there ought not to be any disgorgement order made on the facts in this case against the individual respondents, but if there were, it would be, in my

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submission, only with respect to funds that came from these corporate respondents before you, which brings me to a point I would like to make about the 144,000 in commissions -- or the 140,000, excuse me, that my friend referred to this morning. Now, that, in my submission, because it didn't come from any of the corporate respondents in this case, therefore was not any moneys received by anybody in contravention of the Act, that it couldn't be subject to a disgorgement order in any way, because it just wouldn't apply.

And kind of a final point I want to make on this disgorgement issue is that, if you look at both the Michaels case and the Samji case and agree that in large cases, anyway, the principle seems to be going to take the number that the person actually received, and when I say "actually received", I want to be clear what I mean, by that

person or through their own company or something where it is immediately going to the benefit of that person. If that's the case, it would be odd indeed, in my submission, that my friend to come here today and say, "Well, look, because these people didn't take enough money out from the funds that were raised by the fraud, in order to make

this look better, they should pay the full amount." And to me that doesn't make much sense, because here, and I think you found this is kind of where it started the whole point, you found that these funds were raised to save this corporate structure, the group or whatever, and the fact that these men were not taking exorbitant amounts of money out ought to stand to some degree in their favour, and what they got out and the degree in which they benefitted of course is a factor that you can consider under the Eron Mortgage conditions, and so -- or Eron Mortgage factors.

Now, I made a submission that ten years kind of across the board is the right punishment in the circumstances of this case. I realize that there is some prior misconduct, but I am going to say that it appears that, except for the settlement, it was largely orders over deficiencies in offering documents. You did hear some evidence on that from Mr. Pasquill. You didn't expressly reject that evidence, but I think the more technical aspects of that, and I don't intend to dissect it, are many companies run into and suffer from cease-trade orders, and what was underlying

it was cleared up with the exception of the settlement and the money was paid.

I do have I think a couple of pits there be two sort of carve outs with respect to the conduct that you found to be contrary to the Act. I would respectfully submit to you that there would be no reason why, based on any of the misconduct in this case, that either of the individuals should not be able to trade through a regular dealer -- excuse me, a registered dealer in their own RSP and cash account, and in Samji, which was a significantly larger amount than this, that was granted.

The other exception I would say from whatever prohibitions you make under 161, that they ought to at least be able to have one private company where they own all the shares or if they share that with their immediate family members, and this is so they can trade for their own benefit in the future. It's basically because it is a registered dealer, it is supervised. Obviously there are good reasons to carry on business through limited companies in many situations, for limitations of

liability and tax reasons as well.
I know in the Samji case that particular carve out was not granted. In my submission, the

facts of the case and the reasons therefore are distinguishable because she had privately owned companies where she owned all the shares and the misconduct was carried out through those companies, which is not the case here.
I want to say a few things about my learned friend's reply.

THE CHAIR: Mr. Anderson, before you go there, just to be clear, on this carve out, am I correct that you're asking if there --

MR. ANDERSON: I didn't exactly follow you, because there is a little bit of noise behind he.

THE CHAIR: It sounds like you're asking for that so you can preserve some flexibility for the respondents going forward.

MR. ANDERSON: Yes.

THE CHAIR: But I don't think you have mentioned that they actually right now have family companies that have formed.

MR. ANDERSON: No. I'm not saying they do, but I was going to hopefully if there's a question, I was going to ask for a few minutes before I finish anyway.

MS. DOWNES: And are there any currently any specific instances where it is required, are there currently any plans?

MR. ANDERSON: I don't think Mr. Pasquill has any right now, but I will confirm that. I don't mind giving the name, they can be very specific to that.

THE CHAIR: Okay.

MR. ANDERSON: And if we could get up my learned friend's reply submission.
I find a lot of the reply to be essentially repetitive of what my friend's initial argument was, but I'm not going to object to that. I'm just not really go what I've already canvassed, not deal with it, but you shouldn't assume that that's because -- to the extent it contradicts my submission, I'm just doing it to save time.
On the points made in paragraphs 6 through 12, and this is the criticism of them having continued involvement in trying to assist with their recovery of money. This of course all happened before there was any finding of fraud, which I have already said today, and a good portion of it happened before there was any Notice of Hearing in this case. And so I don't think that the fact that they did it ought to be criticized at all.
The second thing I want to say is that the evidence of Mr. Baker set out in his affidavit is

not hearsay, and I don't -- unless you say it is hear say -- my friend says it is hearsay on the basis that Mr. Baker is here giving evidence, because he deposes to what is set out there and to be based on his personal knowledge, and that's not hearsay. I have already explained to you one of the reasons why we asked him to do that, and it relates to your findings with respect to the respondents' credibility.

I do want to say, and I don't know what my friend really means in paragraph 12, but when they were trying to save the group they hadn't been convicted of fraud, so I don't know why that they would be motivated at that time by remorse. But the fact that they did it and tried to advance the interests of the group is something, as I said earlier, you should consider.

At paragraphs 14 and 18, I have dealt with already, but of course my point is I don't think these were extravagant handsomely compensated salaries, but I think they were reasonable under the circumstances that prevailed at the time.

If we could go to Exhibit 503, which should be the Baker number 2 affidavit. And I really want to go back to this after we look at that. I

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am addressing paragraphs 22 and 23 of my learned friend's response. What we asked Mr. Baker to do is to provide some information regarding this company that was referred to initially in my learned friend's initial submission on sanction, and we asked Mr. Baker to review it. And if you can scroll down, please. Who got -- when Mr. Lathigee was involved with the company, and in paragraph 3 he said it was incorporated in early January, 2007. Mr. Lathigee served as a director from that date until November 30th, 2009, and the change is attached. I'm not going to go there. If you could go to the next page, please. As well, he was the president between the same dates, and by January the 10th, two thousand -- January 8th, 2010 he was no longer an officer. Mr. Pasquill remains that. In paragraph 6 he describes that what the purpose of that company was, and it was to allow FIC employees to invest in the various real estate developments that the group was involved in, and that it was called in the office the staff real estate fund. Paragraph 7 talks about the share register and if people made investments they would receive Class A shares. Mr. Lathigee never invested in that fund,

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consequently never received any payments or any form of compensation directly or indirectly from it. Mr. Pasquill invested 150,000 in the fund in February 2007, but has never received any payments

or any other form of compensation directly or indirectly from that company. And it goes on to talk about some Class B shares, and if you could go to the next page, please. And the Class B shares didn't entitle either Mr. Pasquill or Mr. Lathigee to have any interest in the fund, so they didn't receive anything from it.

My friend in some subsequent paragraphs here queries what happened to the $900,000. Obviously there is no evidence on that.

I think I've already made my points about the efforts that are addressed in paragraph 27.

I think paragraph 28 of his reply is utter speculation regarding Mr. Lathigee by my friend.

And now I want to address this issue of the Experts of Southern Nevada video. And what I am going to say is that the comments made about an economist and a financial analyst of course are put on the screen not by Mr. Lathigee, but they were the -- those words are never used in the actual interview. He is described right at the

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outset as an expert in economic analysis, so that's what it actually says when he is described in the very opening part of the video. It is true that he is living in Las Vegas and has been for a period of time. He did describe himself as a cofounder and leader of LVIC, but Mr. Ahmed tells me further on in the video Mr. Lathigee states that he is not part of management of LVIC. I don't know what the significance to this case of the initial membership fee of 400, but now it is free, where it takes us.

And I want to pause there to say that FIC, to the extent that it had those sorts of meetings and things, carried on an awful lot of business before it ran into trouble on these three matters, and you know, just to say that because these things happened that anything like this is somehow a problem and risk on a go-forward basis, I disagree with. Again, the number of people that are there and the purpose of the meeting, there is nothing wrong with. The fact that it is looking at tax liens and tax deeds there is nothing wrong with. What Mr. Lathigee said about the largest investment club in North America, I don't know whether or not that's true, but it did grow to 100

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million in assets under management, because we went through all that here.

But one thing I want to say is that, to say that further down that he is leaving out key details, bear in mind there had been no finding of fraud by this Commission when this interview was done. I think it belies the fact the man is using his own name, and it would be almost impossible to

imagine in this day and age that not one out of numerous people that attended these meetings would have thought not to Google him. So I really I don't think there is any hiding in this, this particular YouTube video.

The statement that Lathigee has had a lot of success in the past with tax liens and tax deeds, there is no evidence that's not the case. And this comment about morality, if you can give that any consideration at all, what I respectfully suggest you do is look at the context in which that was discussed and, in particular, there is a discussion about morality of a Christian context of Mr. Lathigee talking about where somebody -- if you get a tax deed you're taking the home from them, and what he is really talking about there are people like that and you work with them, but

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it's a question not -- he wasn't suggesting he does business in between. He says there is a number of different ways you could do it, and he explained what he was doing. I think to be reading anything more into that than that would be very dangerous indeed. And I say it's not an aggravating factor, and I would be amazed if the fact of your findings have not even been brought to the attention of the SEC and I would be assuming that if they think he is offside that they would deal with it anyway, because they tend to deal with things aggressively too.

The rest of my friend's submission is really a rehash of his earlier comments up to paragraph 45. The second bullet from the bottom, where there is this:

> FIC group investors on conference calls were shocked and disgusted.

That may be my friend's view, but there is not an iota of evidence of that, because not one single investor was called nor was any evidence put in. And the bottom bullet point in my view is true, it's not -- there is nothing wrong with that in terms of the investment club aspect of it.

Now, I am going to ask, I don't know how long

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my friend is going to be, but Mr. Ahmed has a couple of points and I was wondering if we can have a short lunch, come back and finish.

THE CHAIR: How long do you think you will be?

MR. CHAPMAN: Five minutes.

MR. ANDERSON: If he is going to be five minutes, what I could do is go quickly get his points.

THE CHAIR: Why don't we take a 15-minute break now.

MS. DOWNES: Will that be enough?

MR. ANDERSON: That will be enough. I thought if I was going to go on and Mr. Chapman was going to be half an hour I would rather have lunch.

THE CHAIR: Thank you.
(RECESS TAKEN AT 12:18 P.M.)
(PROCEEDINGS RESUMED AT 12:36 P.M.)
THE HEARING OFFICER: Please rise.
THE CHAIR: Okay. Mr. Anderson.
MR. ANDERSON: I'm going to try to be brief here. Mr. Pasquill is not an officer or director of any what I will call private companies in the context of maybe personal companies at this time and has no intention of having one at this moment.
Mr. Lathigee is a director and officer of the one company that's been raised here, the 0749885 B.C. Ltd., and the shareholders of that company

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are he and his brother Bob Lathigee.
Mr. Pasquill, as matters now stand, is the sole director and officer of the FIC group, but obviously that will end at some point.
Just a couple of points to summarize my position. In Mr. Chapman's reply particularly, he raises questions and the implications, as I mentioned before, with respect to the 900,000, and there is a few other comments like that, and what I want to say is that I think the burden of proof in some practical situations can shift, but the burden of proof doesn't shift to these respondents to prove that they got the money or didn't get the money. There is no evidence that they got the money personally I would say of that 900,000, so it's really the fact that it is recovered is there, but there is no suggestion that it went to their benefit. And there are a number of other items like that, and I would ask you to keep that in mind as you reach your decision.
So in summary what I am asking for is ten years across the board, the two carve outs I have request, although it's certainly not necessary for Mr. Pasquill, but if there if something changes, that would be useful. And what I say whatever

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disgorgement numbers you arrive at, bear in mind that it appears that none of the money was anything other than salary, and that it's virtually impossible to determine whether it came from funds from the three corporate respondents.
In my submission, any administrative penalty should be premised to some extent on what benefit you find they received from the fraud, but that it ought not to be anything worse than the Michaels/Samji process.
And those are my submissions.
THE CHAIR: Thank you. Mr. Chapman.
MR. CHAPMAN: Thank you. I want to just correct my opening statement. Although I have more grey hair than my friend, my friend is more senior, and he is correct that Eron Mortgage is a larger fraud, so

this will take it down to the number 4 fraud in our province's history. My friend refers to a settlement involving Mr. Patterson, but that number that he refers to, well, first of all, that was a settlement, not a finding, and he is referring to the loss of market capitalization in a single day after a report was issued having false results of mining reports. So obviously number 4, not number 3, perhaps. In Eron's

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mortgage case was in a previous -- well, the facts were from the 1990s. The decision is from 2000, and although the amount raised was larger in Eron Mortgage, I have 47 and a half million it looks like, it was such an old decision that at the time the maximum penalty was $100,000, just flat rate, and that's what the respondents got. So with respect to my opening comments about the largest frauds, with respect to those, that should be clarified to say sort of in modern, to fit the more modern times as far as being the Act having a $1 million ceiling for contravention. So I mean I can only guess what Eron Mortgage would have got if that had been available. But at the time, just as a reminder of how long ago that case was and how different the Act was, the maximum penalty was $100,000 flat rate, not for contravention, and that's what was awarded, so it doesn't assist as far as trying to assess the admin penalty. And, of course, there was no disgorgement section in existence at that point. So I wanted to clarify that.

With respect to just the larger picture, at the end of the day the respondents committed fraud, they perpetrated a fraud, and that means

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that you as a panel found that objectively they engaged in dishonest behaviour. So when my friend makes comments about that they were doing this to save the company, somehow that's a credit. It's not. At the end of the day objectively you found that this was dishonest behaviour, and that's the end of the story. There is no why they did it or whatever, it is no longer in any way relevant, because it was ultimately found to be dishonest, and that's why it was a breach of the Act.

With respect to what's happened since, the only reason that the Executive Director is putting any evidence, including the YouTube video and asking all these questions about, for example, what happened to the $900,000, which I would really like to know, is that in my friend's submissions it was put forward as a proposition that the respondents' behaviour since 2008, since the relevant period, is a mitigating factor, and hence we have affidavits not from Mr. Lathigee,

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there is no evidence from Mr. Lathigee or Mr. Pasquill, we have affidavits from Mr. Baker saying generically what they have done. There is no exhibits to his first affidavit which chronicles what they did. But they raised this issue, they

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raised their subsequent conduct as being a mitigating factor, and, in my submission, it's not. It's been pointed out already that that was rejected in Samji as being a mitigating factor, and in my submission it has raised more questions than it has answered about what has been happening. There is no evidence about how the companies are doing, there is no evidence about what hopes of any the investors have of getting money back. There is no evidence of where the $900,000 went. We do know from the facts in this case how the respondents dealt with these various companies. They dealt with it as one big pile of cash. And so when $900,000 comes in, it would be very interesting to know where that went. Did it go back to any investors, did it go to -- where did it go? We don't know. Like I said, the only reason that we have responded to that and tendered evidence, including this video, is that the respondents raised their subsequent conduct as a mitigating factor. So, in my submission it is not. At best, at very best, it is mutual. It could even be an aggravating factor. And so that's why we have dealt with this whole issue, that's why we responded to what we say is

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inadequacy of having affidavits from Mr. Baker as opposed to Mr. Pasquill, Mr. Lathigee either taking the stand or giving an affidavit saying here is what we have been doing, here is how we're trying to help the investors remain whole.

This wasn't an altruistic thing that they're doing. They have shares in all these companies, they're the founders of these companies, so they have all sorts of shares. So their attempt to try to keep these companies going isn't because out of just some altruistic issue, they were issued shares in all these companies at the beginning, and of course they were getting paid, getting salaries.

So with respect to -- there was a reference to the $242,000 amount owed to Mr. Pasquill that was paid out in November of 2008, well, a lot of people borrowed money by FIC in that period of time. That's just before the TD facility ended, and he is paid out, obviously other creditors weren't.

With respect to the amount of these -- the amounts that my friends have taken issue with with respect to this numbered company, and I will just

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go back to my initial submissions, paragraph 10, these are the commissions for selling foreclosed properties. And, again, this was evidence that was tendered by the respondents. $150,000 and some change went to Mr. Lathigee's numbered companies, the 885 company and the 9243 company for commissions on Mohawk sales foreclosed properties between July 10 and August 29, 2008. So nobody else, there is no evidence of anybody else selling houses, foreclosed property, other than Mr. Lathigee from this stage to his investors. His numbered company 885, there is no issue that that's his company, that's 140 of the 150,000 or so amount. And the affidavit, this new affidavit Mr. From Mr. Baker that talks about his subsequent resignation from the 0779243 company, well, that occurs in November of 2009 is when he steps down as a director. Well, this payment, it's only 10,500, but the payment that we're referring to was well before then when he was still involved with the company and obviously still running the show.

I'm not going to go into any -- I mean you have heard both of our written arguments about whether there is one or how many contraventions of the Act there were here, and in my submission Manha, Michaels, Samji all stand for the proposition that they are certainly the amounts being sought for administrative penalty by the Executive Director are well within your jurisdiction, it's not -- the claim that this was all one or two contraventions at best has been rejected by the panel at best. In my submission, that should be the case here as well.

The ability to pay is not a factor in a sanction, it's not under the Eron Mortgage factor. It would be hard to have specific and general deterrents if the ability to pay was a factor, because nine times out of ten, by the time we get to this stage, the money is all gone, it has been lost, the company has failed or it's left the jurisdiction or whatever, so ability to pay can't be a factor, because that would mean that we would start to have a long list of zero sanctions coming out from the panel decisions, and that can't be in the public interest, it can't provide any guidance, can't provide any deterrence to anyone.

And my friend made some comments about attempting to trace the funds and how we weren't able to trace amounts that came in from one of the entities into other hands or what have you. I mean Manha certainly stands for the proposition that the panel is not required in making orders to

trace investor funds into the hands of the respondents, and especially in this case, where the panel has found that it was just used as one big piggy bank in the sense of piggy bank for all the companies. It all came in from all different sources, all different investors, it was all used as one source, so to somehow say that that should go in favour of the respondents and against the Executive Director is nonsensical, because that's how they treated it, they treated it that way, and the fact we weren't able to go through and go line by line over the course of months or years for hundreds of -- for millions and millions of dollars is just a nonissue.

So I will just conclude with the two -- my friend's referred to the carve outs, so-called carve outs. In my submission there should be no carve outs for trading for any of the respondents. I understand that there was one given in Samji and in Michaels as well. I also note that given Mr. Pasquill's age perhaps there would be an RIF in any event, not an RRSP that that would relate to.

With respect to the ability to be an officer

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or director of a company, in my submission, there should be proper evidence before the panel of a need for that or the ability to a variation down the road, if that's what is being sought. But just on the bigger issue, this case, one of the key findings of this case, was that the respondents have no appreciation or respect for what a company is, what a legal entity is as a company. That in this case was just brushed aside, and it was just used as money from investors, so if there was a case where the respondents should not be able to remain as an officer or director of a company, this is that case, because, again, it demonstrated a lack of any sort of appreciation for what a limited legal entity company is.

So just to conclude, I have -- I mentioned in my first comments we're seeking a permanent ban against all the respondents, the $23 million disgorgement. Now, I just -- I want to clarify that, in my submissions that's against the personal respondents, but I had a breakdown in my written submissions for the corporate respondents, because those amounts -- those companies raised less amounts, so I just wanted to remind the panel

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of that.

If there are no further questions, those are all my submissions.

MR. ANDERSON: I may have one thing, if you can just bear with me, something Mr. Chapman said that hadn't really been raised before I just want to ask my client

about.
I think I already addressed it in my submission, and I disagree with Mr. Chapman on it, so I don't have anything to add.

THE CHAIR: Thank you. And thank you very much for your very helpful submissions today. We always find it helpfully for you to deliberate on your submissions. The hearing is concluded for today

(EXAMINATION CONCLUDED AT 12:55 P.M.)

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EXHIBIT 16

JAX859

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

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

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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Reasons for Judgment of the Honourable Madam Justice MacKenzie:

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:
>
> ...
>
> (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
>
> (a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security or exchange contract, or
>
> (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

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.

[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
>
> ...
>
> (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

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:
>
> ...
>
> (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

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.
>
> [24] In *Canada Trustco Mortgage Co. v. Canada,* 2005 SCC 54, the Court said at para. 10:
>
> > [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):
>
> 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.
>
> [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"

JAX912

EXHIBIT 17

JAX912

LVIC BLOCKCHAIN AND CRYPTOCURRENCY FUND LLC

Business Entity Information

Status:	Active	File Date:	12/20/2017
Type:	Domestic Limited-Liability Company	Entity Number:	E0589772017-4
Qualifying State:	NV	List of Officers Due:	12/31/2018
Managed By:	Managers	Expiration Date:	
NV Business ID:	NV20171815351	Business License Exp:	12/31/2018

Additional Information

Central Index Key:	

Registered Agent Information

Name:	EMPIRE ROCK HOLDINGS LLC	Address 1:	9404 EMPIRE ROCK STREET
Address 2:		City:	LAS VEGAS
State:	NV	Zip Code:	89143
Phone:		Fax:	
Mailing Address 1:		Mailing Address 2:	
Mailing City:		Mailing State:	
Mailing Zip Code:			
Agent Type:	Noncommercial Registered Agent		

Financial Information

No Par Share Count:	0	Capital Amount:	$ 0

No stock records found for this company

Officers

☑ Include Inactive Officers

Manager - MICHAEL LATHIGEE			
Address 1:	9404 EMPIRE ROCK STREET	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	
Status:	Historical	Email:	
Manager - PRAVEEN VARSHNEY			
Address 1:	9404 EMPIRE ROCK STREET	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	
Status:	Active	Email:	

Actions\Amendments

Action Type:	Articles of Organization		
Document Number:	20170536757-63	# of Pages:	1
File Date:	12/20/2017	Effective Date:	
(No notes for this action)			
Action Type:	Initial List		
Document Number:	20170536758-74	# of Pages:	1
File Date:	12/20/2017	Effective Date:	
(No notes for this action)			
Action Type:	Amended List		
Document Number:	20180004263-46	# of Pages:	1
File Date:	1/4/2018	Effective Date:	
(No notes for this action)			

ALLIANCE INVESTMENT SOLUTIONS LTD.

Business Entity Information

Status:	Permanently Revoked	File Date:	11/17/2008
Type:	Domestic Corporation	Entity Number:	E0702892008-6
Qualifying State:	NV	List of Officers Due:	11/30/2011
Managed By:		Expiration Date:	
NV Business ID:	NV20081554194	Business License Exp:	*Exempt* - 003

Registered Agent Information

Name:	THE CORPORATION TRUST COMPANY OF NEVADA	Address 1:	701 S CARSON ST STE 200
Address 2:		City:	CARSON CITY
State:	NV	Zip Code:	89701
Phone:		Fax:	
Mailing Address 1:		Mailing Address 2:	
Mailing City:		Mailing State:	NV
Mailing Zip Code:			
Agent Type:	Commercial Registered Agent - Corporation		
Jurisdiction:	NEVADA	Status:	Active

Financial Information

No Par Share Count:	0	Capital Amount:	$ 100,000.00
Par Share Count:	100,000,000.00	Par Share Value:	$ 0.001

Officers

☑ Include Inactive Officers

President - MICHAEL LATHIGEE			
Address 1:	2906 WEST BROADWAY #314	Address 2:	
City:	VANCOUVER BC	State:	
Zip Code:	V6K2G8	Country:	CAN
Status:	Historical	Email:	
Secretary - MICHAEL LATHIGEE			
Address 1:	2906 WEST BROADWAY #314	Address 2:	
City:	VANCOUVER BC	State:	
Zip Code:	V6K2G8	Country:	CAN
Status:	Historical	Email:	
Treasurer - MICHAEL LATHIGEE			
Address 1:	2906 WEST BROADWAY #314	Address 2:	
City:	VANCOUVER BC	State:	
Zip Code:	V6K2G8	Country:	CAN
Status:	Historical	Email:	

Director - MICHAEL LATHIGEE			
Address 1:	2906 WEST BROADWAY #314	Address 2:	
City:	VANCOUVER BC	State:	
Zip Code:	V6K2G8	Country:	CAN
Status:	Historical	Email:	

President - MICHAEL LATHIGEE			
Address 1:	8414 WEST FARM ROAD	Address 2:	SUITE 180583
City:	LAS VEGAS	State:	NV
Zip Code:	89131	Country:	
Status:	Active	Email:	

Secretary - MICHAEL LATHIGEE			
Address 1:	8414 WEST FARM ROAD	Address 2:	SUITE 180583
City:	LAS VEGAS	State:	NV
Zip Code:	89131	Country:	
Status:	Active	Email:	

Treasurer - MICHAEL LATHIGEE			
Address 1:	8414 WEST FARM ROAD	Address 2:	SUITE 180583
City:	LAS VEGAS	State:	NV
Zip Code:	89131	Country:	
Status:	Active	Email:	

Director - MICHAEL LATHIGEE			
Address 1:	8414 WEST FARM ROAD	Address 2:	SUITE 180583
City:	LAS VEGAS	State:	NV
Zip Code:	89131	Country:	
Status:	Active	Email:	

Actions\Amendments

Action Type:	Articles of Incorporation		
Document Number:	20080749995-63	# of Pages:	3
File Date:	11/17/2008	Effective Date:	

Initial Stock Value: Par Value Shares: 100,000,000 Value: $ 0.001 No Par Value Shares: 0 ---------- ---------- Total Authorized Capital: $ 100,000.00

Action Type:	Initial List		
Document Number:	20090218273-04	# of Pages:	1
File Date:	3/4/2009	Effective Date:	

2009-2010

Action Type:	Annual List		
Document Number:	20100228016-32	# of Pages:	1
File Date:	4/9/2010	Effective Date:	

(No notes for this action)

Action Type:	Annual List		
Document Number:	20110018988-58	# of Pages:	1

File Date:	1/11/2011	Effective Date:	
(No notes for this action)			

JAX917

JAX917

EMPIRE ROCK INVESTMENTS, LLC

Business Entity Information

Status:	Permanently Revoked	File Date:	8/6/2009
Type:	Domestic Limited-Liability Company	Entity Number:	E0421402009-0
Qualifying State:	NV	List of Officers Due:	8/31/2010
Managed By:	Managers	Expiration Date:	
NV Business ID:	NV20091281101	Business License Exp:	

Registered Agent Information

Name:	ROSENFELD RESIDENT AGENT CORPORATION	Address 1:	9029 S PECOS RD STE 2800
Address 2:		City:	HENDERSON
State:	NV	Zip Code:	89074
Phone:		Fax:	
Mailing Address 1:		Mailing Address 2:	
Mailing City:		Mailing State:	NV
Mailing Zip Code:			
Agent Type:	Commercial Registered Agent - Corporation		
Jurisdiction:	NEVADA	Status:	Active

Financial Information

No Par Share Count:	0	Capital Amount:	$ 0

No stock records found for this company

Officers

☑ Include Inactive Officers

Manager - MICHAEL LATHIGEE

Address 1:	9404 EMPIRE ROCK ST.	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	
Status:	Active	Email:	

Actions\Amendments

Action Type:	Articles of Organization		
Document Number:	20090601241-55	# of Pages:	1
File Date:	8/6/2009	Effective Date:	

(No notes for this action)

Action Type:	Initial List		
Document Number:	20090701051-75	# of Pages:	1
File Date:	9/24/2009	Effective Date:	

(No notes for this action)

9400 EMPIRE, LLC

Business Entity Information

Status:	Permanently Revoked	File Date:	1/6/2010
Type:	Domestic Limited-Liability Company	Entity Number:	E0004472010-5
Qualifying State:	NV	List of Officers Due:	1/31/2011
Managed By:	Managers	Expiration Date:	
NV Business ID:	NV20101011775	Business License Exp:	1/31/2011

Registered Agent Information

Name:	ROSENFELD RESIDENT AGENT CORPORATION	Address 1:	9029 S PECOS RD STE 2800
Address 2:		City:	HENDERSON
State:	NV	Zip Code:	89074
Phone:		Fax:	
Mailing Address 1:		Mailing Address 2:	
Mailing City:		Mailing State:	NV
Mailing Zip Code:			
Agent Type:	Commercial Registered Agent - Corporation		
Jurisdiction:	NEVADA	Status:	Active

Financial Information

No Par Share Count:	0	Capital Amount:	$ 0

No stock records found for this company

Officers

☑ Include Inactive Officers

Manager - MICHAEL LATHIGEE

Address 1:	9404 EMPIRE ROCK STREET	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	
Status:	Active	Email:	

Actions\Amendments

Action Type:	Articles of Organization		
Document Number:	20100007125-78	# of Pages:	1
File Date:	1/6/2010	Effective Date:	

(No notes for this action)

Action Type:	Initial List		
Document Number:	20100009761-16	# of Pages:	1
File Date:	1/8/2010	Effective Date:	

(No notes for this action)

MJ LATHIGEE EQUITY, LLC

Business Entity Information

Status:	Revoked	File Date:	8/6/2009
Type:	Domestic Limited-Liability Company	Entity Number:	E0421412009-1
Qualifying State:	NV	List of Officers Due:	8/31/2015
Managed By:	Managers	Expiration Date:	
NV Business ID:	NV20091281138	Business License Exp:	8/31/2015

Registered Agent Information

Name:	MJ LATHIGEE EQUITY, LLC C/O MANAGER	Address 1:	9404 EMPIRE RICK STREET
Address 2:		City:	LAS VEGAS
State:	NV	Zip Code:	89143
Phone:		Fax:	
Mailing Address 1:		Mailing Address 2:	
Mailing City:		Mailing State:	NV
Mailing Zip Code:			
Agent Type:	Noncommercial Registered Agent		

Financial Information

No Par Share Count:	0	Capital Amount:	$ 0

No stock records found for this company

Officers

☑ Include Inactive Officers

Manager - MICHAEL LATHIGEE			
Address 1:	9404 EMPIRE ROCK ST.	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	
Status:	Active	Email:	
Manager - MICHAEL LATHIGEE			
Address 1:	9404 EMPIRE ROCK ST.	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	
Status:	Historical	Email:	

Actions\Amendments

Action Type:	Articles of Organization		
Document Number:	20090601264-20	# of Pages:	1
File Date:	8/6/2009	Effective Date:	

(No notes for this action)			
Action Type:	Initial List		
Document Number:	20090701054-08	# of Pages:	1
File Date:	9/24/2009	Effective Date:	
(No notes for this action)			
Action Type:	Miscellaneous		
Document Number:	20140417221-14	# of Pages:	1
File Date:	6/6/2014	Effective Date:	
(No notes for this action)			
Action Type:	Reinstatement		
Document Number:	20140417222-25	# of Pages:	1
File Date:	6/6/2014	Effective Date:	
revoked 9/1/11 rein 6/6/14			
Action Type:	Acceptance of Registered Agent		
Document Number:	20140417223-36	# of Pages:	1
File Date:	6/6/2014	Effective Date:	
(No notes for this action)			

MJ LATHIGEE MANAGER, LLC

Business Entity Information

Status:	Permanently Revoked	File Date:	8/6/2009
Type:	Domestic Limited-Liability Company	Entity Number:	E0421382009-6
Qualifying State:	NV	List of Officers Due:	8/31/2010
Managed By:	Managers	Expiration Date:	
NV Business ID:	NV20091281091	Business License Exp:	

Registered Agent Information

Name:	ROSENFELD RESIDENT AGENT CORPORATION	Address 1:	9029 S PECOS RD STE 2800
Address 2:		City:	HENDERSON
State:	NV	Zip Code:	89074
Phone:		Fax:	
Mailing Address 1:		Mailing Address 2:	
Mailing City:		Mailing State:	NV
Mailing Zip Code:			
Agent Type:	Commercial Registered Agent - Corporation		
Jurisdiction:	NEVADA	Status:	Active

Financial Information

No Par Share Count:	0	Capital Amount:	$ 0

No stock records found for this company

Officers

☑ Include Inactive Officers

Manager - MICHAEL LATHIGEE

Address 1:	9404 EMPIRE ROCK ST.	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	
Status:	Active	Email:	

Actions\Amendments

Action Type:	Articles of Organization		
Document Number:	20090601226-68	# of Pages:	1
File Date:	8/6/2009	Effective Date:	

(No notes for this action)

Action Type:	Initial List		
Document Number:	20090701053-97	# of Pages:	1
File Date:	9/24/2009	Effective Date:	

(No notes for this action)

ML DEBT HOLDINGS, INC.

Business Entity Information

Status:	Revoked	File Date:	9/9/2008
Type:	Domestic Corporation	Entity Number:	E0571022008-4
Qualifying State:	NV	List of Officers Due:	9/30/2012
Managed By:		Expiration Date:	
NV Business ID:	NV20081520778	Business License Exp:	9/30/2012

Registered Agent Information

Name:	PETER RINATO	Address 1:	650 WHITE DRIVE SUITE 120
Address 2:		City:	LAS VEGAS
State:	NV	Zip Code:	89119
Phone:		Fax:	
Mailing Address 1:		Mailing Address 2:	
Mailing City:		Mailing State:	
Mailing Zip Code:			
Agent Type:	Noncommercial Registered Agent		

Financial Information

No Par Share Count:	0	Capital Amount:	$ 200,000.00
Par Share Count:	200,000,000.00	Par Share Value:	$ 0.001

Officers

Include Inactive Officers

Secretary - MICHAEL LATHIGEE			
Address 1:	9404 EMPIRE ROCK STREET	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	
Status:	Active	Email:	
Treasurer - MICHAEL LATHIGEE			
Address 1:	9404 EMPIRE ROCK STREET	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	
Status:	Active	Email:	
President - MICHAEL LATHIGEE			
Address 1:	9404 EMPIRE ROCK STREET	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	
Status:	Active	Email:	
Director - MICHAEL LATHIGEE			
Address 1:	9404 EMPIRE ROCK STREET	Address 2:	

City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	
Status:	Active	Email:	

Secretary - MICHAEL LATHIGEE

Address 1:	3444-8555 STATION VILLAGE LANE	Address 2:	
City:	SAN DIEGO	State:	CA
Zip Code:	92108	Country:	
Status:	Historical	Email:	

Treasurer - MICHAEL LATHIGEE

Address 1:	3444-8555 STATION VILLAGE LANE	Address 2:	
City:	SAN DIEGO	State:	CA
Zip Code:	92108	Country:	
Status:	Historical	Email:	

President - JENNIFER SURAVILLA

Address 1:	3444-8555 STATION VILLAGE LANE	Address 2:	
City:	SAN DIEGO	State:	CA
Zip Code:	92108	Country:	
Status:	Historical	Email:	

Director - JENNIFER SURAVILLA

Address 1:	3444-8555 STATION VILLAGE LANE	Address 2:	
City:	SAN DIEGO	State:	CA
Zip Code:	92108	Country:	
Status:	Historical	Email:	

Actions\Amendments

Action Type:	Articles of Incorporation		
Document Number:	20080601508-50	# of Pages:	5
File Date:	9/9/2008	Effective Date:	

Initial Stock Value: Par Value Shares: 2,000,000 Value: $ 0.001 No Par Value Shares: 0 ---------- Total Authorized Capital: $ 2,000.00

Action Type:	Correction		
Document Number:	20080606980-79	# of Pages:	1
File Date:	9/11/2008	Effective Date:	

Previous Stock Value: Par Value Shares: 2,000,000 Value: $ 0.001 No Par Value Shares: 0 ---------- Total Authorized Capital: $ 2,000.00 New Stock Value: Par Value Shares: 200,000,000 Value: $ 0.001 No Par Value Shares: 0 ---------- Total Authorized Capital: $ 200,000.00

Action Type:	Initial List		
Document Number:	20090218272-93	# of Pages:	1
File Date:	3/4/2009	Effective Date:	

2009-2010

Action Type:	Amendment		
Document Number:	20110896031-91	# of Pages:	1

File Date:	12/21/2011	Effective Date:	
(No notes for this action)			

Action Type:	Reinstatement		
Document Number:	20110896032-02	# of Pages:	1
File Date:	12/21/2011	Effective Date:	
REINSTATED/REVOKED 10-1-2010			

Action Type:	Acceptance of Registered Agent		
Document Number:	20110896033-13	# of Pages:	1
File Date:	12/21/2011	Effective Date:	
(No notes for this action)			

SPORTS ARENA FITNESS INVESTMENT GROUP LLC

Business Entity Information

Status:	Default	File Date:	10/20/2016
Type:	Domestic Limited-Liability Company	Entity Number:	E0460742016-6
Qualifying State:	NV	List of Officers Due:	10/31/2017
Managed By:	Managers	Expiration Date:	
NV Business ID:	NV20161621897	Business License Exp:	10/31/2017

Additional Information

Central Index Key:	

Registered Agent Information

Name:	JEFF CLARK	Address 1:	9404 EMPIRE ROCK STREET
Address 2:		City:	LAS VEGAS
State:	NV	Zip Code:	89143
Phone:		Fax:	
Mailing Address 1:		Mailing Address 2:	
Mailing City:		Mailing State:	
Mailing Zip Code:			
Agent Type:	Noncommercial Registered Agent		

Financial Information

No Par Share Count:	0	Capital Amount:	$ 0

No stock records found for this company

Officers

☑ Include Inactive Officers

Manager - JEFF CLARK			
Address 1:	9404 EMPIRE ROCK STREET	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	USA
Status:	Historical	Email:	
Manager - JEFF CLARK			
Address 1:	9404 EMPIRE ROCK STREET	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	USA
Status:	Active	Email:	
Manager - EMPIRE ROCK HOLDINGS LLC			

Address 1:	9404 EMPIRE ROCK STREET	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	USA
Status:	Active	Email:	

Manager - MICHAEL LATHIGEE

Address 1:	9404 EMPIRE ROCK STREET	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	USA
Status:	Historical	Email:	

Actions\Amendments

Action Type:	Articles of Organization		
Document Number:	20160462947-71	# of Pages:	1
File Date:	10/20/2016	Effective Date:	

(No notes for this action)

Action Type:	Initial List		
Document Number:	20160462948-82	# of Pages:	1
File Date:	10/20/2016	Effective Date:	

(No notes for this action)

Action Type:	Amended List		
Document Number:	20170032021-98	# of Pages:	1
File Date:	1/24/2017	Effective Date:	

(No notes for this action)

TAX LIENS AND DEEDS MANAGER LLC

Business Entity Information

Status:	Revoked	File Date:	2/15/2014
Type:	Domestic Limited-Liability Company	Entity Number:	E0081382014-1
Qualifying State:	NV	List of Officers Due:	2/28/2015
Managed By:	Managers	Expiration Date:	
NV Business ID:	NV20141108331	Business License Exp:	2/28/2015

Additional Information

Central Index Key:	

Registered Agent Information

Name:	MICHAEL LATHIGEE	Address 1:	9404 EMPIRE ROCK STREET
Address 2:		City:	LAS VEGAS
State:	NV	Zip Code:	89143
Phone:		Fax:	
Mailing Address 1:	9404 EMPIRE ROCK STREET	Mailing Address 2:	
Mailing City:	LAS VEGAS	Mailing State:	NV
Mailing Zip Code:	89143		
Agent Type:	Noncommercial Registered Agent		

Financial Information

No Par Share Count:	0	Capital Amount:	$ 0

No stock records found for this company

Officers

☑ Include Inactive Officers

Manager - ROBERT JONES			
Address 1:	9404 EMPIRE ROCK STREET	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	USA
Status:	Active	Email:	
Manager - MICHAEL LATHIGEE			
Address 1:	9404 EMPIRE ROCK STREET	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	USA
Status:	Active	Email:	

Actions\Amendments

Action Type:	Articles of Organization

Document Number:	20140112045-10	# of Pages:	1
File Date:	2/15/2014	Effective Date:	
(No notes for this action)			
Action Type:	Initial List		
Document Number:	20140112046-21	# of Pages:	1
File Date:	2/15/2014	Effective Date:	
(No notes for this action)			

JAX933

FEP FUNDING LLC

Business Entity Information

Status:	Default	File Date:	4/17/2017
Type:	Domestic Limited-Liability Company	Entity Number:	E0182762017-2
Qualifying State:	NV	List of Officers Due:	4/30/2018
Managed By:	Managers	Expiration Date:	
NV Business ID:	NV20171247383	Business License Exp:	4/30/2018

Additional Information

Central Index Key:	

Registered Agent Information

Name:	EMPIRE ROCK HOLDINGS LLC	Address 1:	9404 EMPIRE ROCK STREET
Address 2:		City:	LAS VEGAS
State:	NV	Zip Code:	89143
Phone:		Fax:	
Mailing Address 1:		Mailing Address 2:	
Mailing City:		Mailing State:	
Mailing Zip Code:			
Agent Type:	Noncommercial Registered Agent		

Financial Information

No Par Share Count:	0	Capital Amount:	$ 0

No stock records found for this company

Officers

☑ Include Inactive Officers

Manager - MICHAEL LATHIGEE

Address 1:	9404 EMPIRE ROCK STREET	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	
Status:	Active	Email:	

Actions\Amendments

Action Type:	Articles of Organization		
Document Number:	20170164017-29	# of Pages:	1
File Date:	4/17/2017	Effective Date:	

(No notes for this action)

Action Type:	Initial List		
Document Number:	20170164018-30	# of Pages:	1

JAX933

File Date:	4/17/2017	Effective Date:	

(No notes for this action)

FIC EDUCATION LTD.

Business Entity Information

Status:	Permanently Revoked	File Date:	10/6/2008
Type:	Domestic Corporation	Entity Number:	E0638402008-0
Qualifying State:	NV	List of Officers Due:	10/31/2009
Managed By:		Expiration Date:	
NV Business ID:	NV20081347929	Business License Exp:	

Registered Agent Information

Name:	THE CORPORATION TRUST COMPANY OF NEVADA	Address 1:	701 S CARSON ST STE 200
Address 2:		City:	CARSON CITY
State:	NV	Zip Code:	89701
Phone:		Fax:	
Mailing Address 1:		Mailing Address 2:	
Mailing City:		Mailing State:	NV
Mailing Zip Code:			
Agent Type:	Commercial Registered Agent - Corporation		
Jurisdiction:	NEVADA	Status:	Active

Financial Information

No Par Share Count:	0	Capital Amount:	$ 100,000.00
Par Share Count:	100,000,000.00	Par Share Value:	$ 0.001

Officers

☑ Include Inactive Officers

President - MICHAEL LATHIGEE			
Address 1:	2906 WEST BROADWAY, #314	Address 2:	
City:	VANCOUVER	State:	BC
Zip Code:	V6K 2G8	Country:	
Status:	Active	Email:	
Secretary - MICHAEL LATHIGEE			
Address 1:	2906 WEST BROADWAY, #314	Address 2:	
City:	VANCOUVER	State:	BC
Zip Code:	V6K 2G8	Country:	
Status:	Active	Email:	
Treasurer - MICHAEL LATHIGEE			
Address 1:	2906 WEST BROADWAY, #314	Address 2:	
City:	VANCOUVER	State:	BC
Zip Code:	V6K 2G8	Country:	
Status:	Active	Email:	

Director - MICHAEL LATHIGEE

JAX936

Address 1:	2906 WEST BROADWAY, #314	Address 2:	
City:	VANCOUVER	State:	BC
Zip Code:	V6K 2G8	Country:	
Status:	Active	Email:	

Actions\Amendments

Action Type:	Articles of Incorporation		
Document Number:	20080663932-99	# of Pages:	3
File Date:	10/6/2008	Effective Date:	

Initial Stock Value: Par Value Shares: 100,000,000 Value: $ 0.001 No Par Value Shares: 0 ---------- Total Authorized Capital: $ 100,000.00

Action Type:	Initial List		
Document Number:	20080815932-28	# of Pages:	1
File Date:	12/17/2008	Effective Date:	

(No notes for this action)

JAX936

JAX936

JAX937

FIC MANAGEMENT GROUP LTD.

Business Entity Information

Status:	Permanently Revoked	File Date:	3/26/2009
Type:	Foreign Corporation	Entity Number:	E0157692009-2
Qualifying State:	BC	List of Officers Due:	3/31/2010
Managed By:		Expiration Date:	
NV Business ID:	NV20091157604	Business License Exp:	

Registered Agent Information

Name:	ROSENFELD RESIDENT AGENT CORPORATION	Address 1:	9029 S PECOS RD STE 2800
Address 2:		City:	HENDERSON
State:	NV	Zip Code:	89074
Phone:		Fax:	
Mailing Address 1:		Mailing Address 2:	
Mailing City:		Mailing State:	NV
Mailing Zip Code:			
Agent Type:	Commercial Registered Agent - Corporation		
Jurisdiction:	NEVADA	Status:	Active

Financial Information

No Par Share Count:	40.00	Capital Amount:	$ 0

No stock records found for this company

Officers

☑ Include Inactive Officers

President - MICHAEL LATHIGEE			
Address 1:	6725 VIA AUSTI PARKWAY, SUITE 200	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89119	Country:	USA
Status:	Active	Email:	

Secretary - MICHAEL LATHIGEE			
Address 1:	6725 VIA AUSTI PARKWAY, SUITE 200	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89119	Country:	USA
Status:	Active	Email:	

Treasurer - MICHAEL LATHIGEE			
Address 1:	6725 VIA AUSTI PARKWAY, SUITE 200	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89119	Country:	USA
Status:	Active	Email:	

JAX937

Director - MICHAEL LATHIGEE			
Address 1:	6725 VIA AUSTI PARKWAY, SUITE 200	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89119	Country:	USA
Status:	Active	Email:	

President - MICHAEL LATHIGEE			
Address 1:	6725 VIA AUSTI PARKWAY, SUITE 200	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89119	Country:	USA
Status:	Active	Email:	

Secretary - MICHAEL LATHIGEE			
Address 1:	6725 VIA AUSTI PARKWAY, SUITE 200	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89119	Country:	USA
Status:	Active	Email:	

Treasurer - MICHAEL LATHIGEE			
Address 1:	6725 VIA AUSTI PARKWAY, SUITE 200	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89119	Country:	USA
Status:	Active	Email:	

Director - MICHAEL LATHIGEE			
Address 1:	6725 VIA AUSTI PARKWAY, SUITE 200	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89119	Country:	USA
Status:	Active	Email:	

Actions\Amendments

Action Type:	Foreign Qualification		
Document Number:	20090291203-08	# of Pages:	1
File Date:	3/26/2009	Effective Date:	
Initial Stock Value: No Par Value Shares: 40 ---------- Total Authorized Capital: $ 0.00			

Action Type:	Miscellaneous		
Document Number:	20090291206-31	# of Pages:	2
File Date:	3/26/2009	Effective Date:	
(No notes for this action)			

Action Type:	Admin Status Change		
Document Number:	20090382641-35	# of Pages:	1
File Date:	5/8/2009	Effective Date:	
E-CHECK RETURNED FOR INVALID ACCOUNT NO NSF FEE DUE C20090430-3343			

Action Type:	Initial List		
Document Number:	20090439695-87	# of Pages:	1
File Date:	5/27/2009	Effective Date:	

(No notes for this action)

JAX940

HIGHMARK REALTY PARTNERS, LLP

Business Entity Information

Status:	Revoked	File Date:	3/16/2009
Type:	Domestic Limited-Liability Partnership	Entity Number:	E0134922009-4
Qualifying State:	NV	List of Officers Due:	3/31/2016
Managed By:		Expiration Date:	
NV Business ID:	NV20091210337	Business License Exp:	3/31/2016

Additional Information

Central Index Key:	

Registered Agent Information

Name:	ROBERT C. HARRIS	Address 1:	564 WEDGE LANE
Address 2:		City:	FERNLEY
State:	NV	Zip Code:	89408
Phone:		Fax:	
Mailing Address 1:		Mailing Address 2:	
Mailing City:		Mailing State:	NV
Mailing Zip Code:			
Agent Type:	Commercial Registered Agent		
Status:	Active		

Financial Information

No Par Share Count:	0	Capital Amount:	$ 0

No stock records found for this company

Officers

☑ Include Inactive Officers

Managing Partner - RICHARD DUREPOS			
Address 1:	9404 EMPIRE ROCK STREET	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	USA
Status:	Historical	Email:	
Managing Partner - RICHARD DUREPOS			
Address 1:	9404 EMPIRE ROCK STREET	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	USA
Status:	Active	Email:	
Managing Partner - MICHAEL LATHIGEE			
Address 1:	9404 EMPIRE ROCK STREET	Address 2:	

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City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	USA
Status:	Historical	Email:	

Managing Partner - MICHAEL LATHIGEE

Address 1:	9404 EMPIRE ROCK STREET	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	USA
Status:	Active	Email:	

Actions\Amendments

Action Type:	Registration of LLP		
Document Number:	20090252825-05	# of Pages:	1
File Date:	3/16/2009	Effective Date:	

(No notes for this action)

Action Type:	Miscellaneous		
Document Number:	20090252826-16	# of Pages:	1
File Date:	3/16/2009	Effective Date:	

NAME CONSENT

Action Type:	Initial List		
Document Number:	20090331702-07	# of Pages:	1
File Date:	4/6/2009	Effective Date:	

ILO

Action Type:	Amended List		
Document Number:	20090836449-25	# of Pages:	1
File Date:	12/3/2009	Effective Date:	

(No notes for this action)

Action Type:	Resignation of Officers		
Document Number:	20100213966-10	# of Pages:	1
File Date:	3/15/2010	Effective Date:	

(No notes for this action)

Action Type:	Annual List		
Document Number:	20100218384-79	# of Pages:	1
File Date:	3/17/2010	Effective Date:	

(No notes for this action)

Action Type:	Annual List		
Document Number:	20110377100-32	# of Pages:	1
File Date:	5/20/2011	Effective Date:	

(No notes for this action)

Action Type:	Amended List		
Document Number:	20110812227-96	# of Pages:	1
File Date:	11/15/2011	Effective Date:	

(No notes for this action)

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Action Type:	Annual List		
Document Number:	20120314115-00	# of Pages:	1
File Date:	5/2/2012	Effective Date:	
(No notes for this action)			

Action Type:	Annual List		
Document Number:	20130199929-05	# of Pages:	1
File Date:	3/26/2013	Effective Date:	
(No notes for this action)			

Action Type:	Annual List		
Document Number:	20140233215-33	# of Pages:	1
File Date:	3/30/2014	Effective Date:	
(No notes for this action)			

Action Type:	Annual List		
Document Number:	20150138997-85	# of Pages:	1
File Date:	3/27/2015	Effective Date:	
(No notes for this action)			

FITNESS MANAGEMENT GROUP LLC

Business Entity Information

Status:	Default	File Date:	10/20/2016
Type:	Domestic Limited-Liability Company	Entity Number:	E0460732016-5
Qualifying State:	NV	List of Officers Due:	10/31/2017
Managed By:	Managers	Expiration Date:	
NV Business ID:	NV20161621884	Business License Exp:	10/31/2017

Additional Information

Central Index Key:	

Registered Agent Information

Name:	JEFF CLARK	Address 1:	9404 EMPIRE ROCK STREET
Address 2:		City:	LAS VEGAS
State:	NV	Zip Code:	89143
Phone:		Fax:	
Mailing Address 1:		Mailing Address 2:	
Mailing City:		Mailing State:	
Mailing Zip Code:			
Agent Type:	Noncommercial Registered Agent		

Financial Information

No Par Share Count:	0	Capital Amount:	$ 0

No stock records found for this company

Officers

☑ Include Inactive Officers

Manager - JEFF CLARK			
Address 1:	9404 EMPIRE ROCK STREET	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	USA
Status:	Historical	Email:	
Manager - JEFF CLARK			
Address 1:	9404 EMPIRE ROCK STREET	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	USA
Status:	Active	Email:	
Manager - EMPIRE ROCK HOLDINGS LLC			
Address 1:	9404 EMPIRE ROCK STREET	Address 2:	
City:	LAS VEGAS	State:	NV

Zip Code:	89143	Country:	USA
Status:	Active	Email:	

Manager - MICHAEL LATHIGEE			
Address 1:	9404 EMPIRE ROCK STREET	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	USA
Status:	Historical	Email:	

Actions\Amendments

Action Type:	Articles of Organization		
Document Number:	20160462945-59	# of Pages:	1
File Date:	10/20/2016	Effective Date:	
(No notes for this action)			

Action Type:	Initial List		
Document Number:	20160462946-60	# of Pages:	1
File Date:	10/20/2016	Effective Date:	
(No notes for this action)			

Action Type:	Amended List		
Document Number:	20170032019-55	# of Pages:	1
File Date:	1/24/2017	Effective Date:	
(No notes for this action)			

JAX945

FLYING ELEPHANT PRODUCTIONS L.L.C.

Business Entity Information

Status:	Default	File Date:	2/14/2017
Type:	Domestic Limited-Liability Company	Entity Number:	E0071582017-6
Qualifying State:	NV	List of Officers Due:	2/28/2018
Managed By:	Managers	Expiration Date:	
NV Business ID:	NV20171097361	Business License Exp:	2/28/2018

Additional Information

Central Index Key:	
Restricted LLC (YES if applicable):	YES

Registered Agent Information

Name:	RAJA RAHMAN	Address 1:	6639 WEATHER VIEW DRIVE
Address 2:		City:	LAS VEGAS
State:	NV	Zip Code:	89110
Phone:		Fax:	
Mailing Address 1:		Mailing Address 2:	
Mailing City:		Mailing State:	
Mailing Zip Code:			
Agent Type:	Noncommercial Registered Agent		

Financial Information

No Par Share Count:	0	Capital Amount:	$ 0

No stock records found for this company

Officers

☑ Include Inactive Officers

Manager - MICHAEL LATHIGEE			
Address 1:	9404 EMPIRE ROCK STREET	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	
Status:	Active	Email:	
Manager - JARRETT N PARKER			
Address 1:	6639 WEATHER VIEW DRIVE	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89110-4012	Country:	USA
Status:	Historical	Email:	
Manager - JARRETT N PARKER			
Address 1:	6639 WEATHER VIEW DRIVE	Address 2:	

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City:	LAS VEGAS	State:	NV
Zip Code:	89110-4012	Country:	
Status:	Active	Email:	

Manager - RAJA RAHMAN			
Address 1:	6639 WEATHER VIEW DRIVE	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89110-4012	Country:	USA
Status:	Historical	Email:	

Manager - RAJA RAHMAN			
Address 1:	6639 WEATHER VIEW DRIVE	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89110-4012	Country:	
Status:	Active	Email:	

Actions\Amendments

Action Type:	Articles of Organization		
Document Number:	20170065558-69	# of Pages:	1
File Date:	2/14/2017	Effective Date:	
(No notes for this action)			

Action Type:	Initial List		
Document Number:	20170065559-70	# of Pages:	1
File Date:	2/14/2017	Effective Date:	
(No notes for this action)			

Action Type:	Amended List		
Document Number:	20170173764-58	# of Pages:	1
File Date:	4/23/2017	Effective Date:	
(No notes for this action)			

JAX947

JAMACHA MANAGEMENT LLC

Business Entity Information

Status:	Default	File Date:	9/20/2016
Type:	Domestic Limited-Liability Company	Entity Number:	E0412812016-7
Qualifying State:	NV	List of Officers Due:	9/30/2017
Managed By:	Managers	Expiration Date:	
NV Business ID:	NV20161556099	Business License Exp:	9/30/2017

Additional Information

Central Index Key:	

Registered Agent Information

Name:	JEFF CLARK	Address 1:	9404 EMPIRE ROCK STREET
Address 2:		City:	LAS VEGAS
State:	NV	Zip Code:	89143
Phone:		Fax:	
Mailing Address 1:		Mailing Address 2:	
Mailing City:		Mailing State:	
Mailing Zip Code:			
Agent Type:	Noncommercial Registered Agent		

Financial Information

No Par Share Count:	0	Capital Amount:	$ 0

No stock records found for this company

Officers

☑ Include Inactive Officers

Manager - JEFF CLARK			
Address 1:	9404 EMPIRE ROCK STREET	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	USA
Status:	Historical	Email:	
Manager - JEFF CLARK			
Address 1:	9404 EMPIRE ROCK STREET	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	USA
Status:	Active	Email:	
Manager - EMPIRE ROCK HOLDINGS LLC			
Address 1:	9404 EMPIRE ROCK STREET	Address 2:	
City:	LAS VEGAS	State:	NV

JAX947

Zip Code:	89143	Country:	USA
Status:	Active	Email:	

Manager - MICHAEL LATHIGEE

Address 1:	9404 EMPIRE ROCK STREET	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	USA
Status:	Historical	Email:	

− Actions\Amendments

Action Type:	Articles of Organization		
Document Number:	20160413637-93	# of Pages:	1
File Date:	9/20/2016	Effective Date:	

(No notes for this action)

Action Type:	Initial List		
Document Number:	20160413638-04	# of Pages:	1
File Date:	9/20/2016	Effective Date:	

(No notes for this action)

Action Type:	Amended List		
Document Number:	20170032018-44	# of Pages:	1
File Date:	1/24/2017	Effective Date:	

(No notes for this action)

JAX949

LEOPARD 7 OIL LLC

Business Entity Information

Status:	Revoked	File Date:	8/20/2012
Type:	Domestic Limited-Liability Company	Entity Number:	E0432562012-6
Qualifying State:	NV	List of Officers Due:	8/31/2015
Managed By:	Managing Members	Expiration Date:	
NV Business ID:	NV20121507554	Business License Exp:	8/31/2015

Additional Information

Central Index Key:	

Registered Agent Information

Name:	PETER RINATO	Address 1:	4775 SOUTH DURANGO, STE. 200
Address 2:		City:	LAS VEGAS
State:	NV	Zip Code:	89147
Phone:		Fax:	
Mailing Address 1:		Mailing Address 2:	
Mailing City:		Mailing State:	
Mailing Zip Code:			
Agent Type:	Noncommercial Registered Agent		

Financial Information

No Par Share Count:	0	Capital Amount:	$ 0

No stock records found for this company

Officers

☑ Include Inactive Officers

Managing Member - MICHAEL LATHIGEE			
Address 1:	9409 EMPIRE ROCK ST.	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	USA
Status:	Historical	Email:	
Managing Member - MICHAEL LATHIGEE			
Address 1:	9409 EMPIRE ROCK ST.	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	USA
Status:	Active	Email:	
Managing Member - CURTIS OVERSTREET			
Address 1:	508 W. LOOKOUT DR. 14-3	Address 2:	
City:	RICHARDSON	State:	TX

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Zip Code:	75080	Country:	USA
Status:	Historical	Email:	

Managing Member - CURTIS OVERSTREET			
Address 1:	508 W. LOOKOUT DR. 14-3	Address 2:	
City:	RICHARDSON	State:	TX
Zip Code:	75080	Country:	USA
Status:	Active	Email:	

Actions\Amendments

Action Type:	Articles of Organization		
Document Number:	20120571522-77	# of Pages:	4
File Date:	8/20/2012	Effective Date:	
(No notes for this action)			

Action Type:	Initial List		
Document Number:	20120689385-94	# of Pages:	1
File Date:	10/9/2012	Effective Date:	
(No notes for this action)			

Action Type:	Amended List		
Document Number:	20120716870-64	# of Pages:	1
File Date:	10/22/2012	Effective Date:	
(No notes for this action)			

Action Type:	Annual List		
Document Number:	20130407927-15	# of Pages:	1
File Date:	6/20/2013	Effective Date:	
(No notes for this action)			

Action Type:	Annual List		
Document Number:	20140437050-66	# of Pages:	1
File Date:	6/16/2014	Effective Date:	
(No notes for this action)			

NEVADA MMA, LLC

Business Entity Information

Status:	Permanently Revoked	File Date:	12/3/2009
Type:	Domestic Limited-Liability Company	Entity Number:	E0624062009-3
Qualifying State:	NV	List of Officers Due:	12/31/2010
Managed By:	Managers	Expiration Date:	
NV Business ID:	NV20091580906	Business License Exp:	12/31/2010

Registered Agent Information

Name:	ROSENFELD RESIDENT AGENT CORPORATION	Address 1:	9029 S PECOS RD STE 2800
Address 2:		City:	HENDERSON
State:	NV	Zip Code:	89074
Phone:		Fax:	
Mailing Address 1:		Mailing Address 2:	
Mailing City:		Mailing State:	NV
Mailing Zip Code:			
Agent Type:	Commercial Registered Agent - Corporation		
Jurisdiction:	NEVADA	Status:	Active

Financial Information

No Par Share Count:	0	Capital Amount:	$ 0

No stock records found for this company

Officers

☑ Include Inactive Officers

Manager - MICHAEL LATHIGEE

Address 1:	9404 EMPIRE ROCK STREET	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	USA
Status:	Active	Email:	

Actions\Amendments

Action Type:	Articles of Organization		
Document Number:	20090836855-46	# of Pages:	1
File Date:	12/3/2009	Effective Date:	

(No notes for this action)

Action Type:	Initial List		
Document Number:	20090838329-14	# of Pages:	1
File Date:	12/4/2009	Effective Date:	

(No notes for this action)

VLOC LLC

Business Entity Information

Status:	Revoked	File Date:	6/15/2016
Type:	Domestic Limited-Liability Company	Entity Number:	E0269832016-4
Qualifying State:	NV	List of Officers Due:	6/30/2017
Managed By:	Managers	Expiration Date:	
NV Business ID:	NV20161352793	Business License Exp:	6/30/2017

Additional Information

Central Index Key:	

Registered Agent Information

Name:	EMPIRE ROCK HOLDINGS LLC	Address 1:	9404 EMPIRE ROCK STREET
Address 2:		City:	LAS VEGAS
State:	NV	Zip Code:	89143
Phone:		Fax:	
Mailing Address 1:		Mailing Address 2:	
Mailing City:		Mailing State:	
Mailing Zip Code:			
Agent Type:	Noncommercial Registered Agent		

Financial Information

No Par Share Count:	0	Capital Amount:	$ 0

No stock records found for this company

Officers

☑ Include Inactive Officers

Manager - EMPIRE ROCK HOLDINGS LLC			
Address 1:	9404 EMPIRE ROCK STREET	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	USA
Status:	Active	Email:	
Manager - MICHAEL LATHIGEE			
Address 1:	9404 EMPIRE ROCK STREET	Address 2:	
City:	LAS VEGAS	State:	NV
Zip Code:	89143	Country:	USA
Status:	Historical	Email:	

Actions\Amendments

Action Type:	Articles of Organization

Document Number:	20160269070-73	# of Pages:	1
File Date:	6/15/2016	Effective Date:	
(No notes for this action)			
Action Type:	Initial List		
Document Number:	20160269072-95	# of Pages:	1
File Date:	6/15/2016	Effective Date:	
(No notes for this action)			
Action Type:	Amended List		
Document Number:	20170032015-11	# of Pages:	1
File Date:	1/24/2017	Effective Date:	
(No notes for this action)			

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EXHIBIT 18

JAX955

JAX956

Electronically Filed
6/6/2018 7:30 PM
Steven D. Grierson
CLERK OF THE COURT

AANS

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Henderson, NV 89052
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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.

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¶ 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.

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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.

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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

JAX960