ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Currey, 2018 ABASC 34 **Date: 20180227**

Jason Michael Currey, The Healthy Retirement Group Inc., Sunset Creek Resources Inc. and 1826487 Alberta Ltd.

Panel:	Tom Cotter Trudy Curran Maryse Saint-Laurent
Representation:	Janet McCready for Commission Staff Jason Michael Currey for the Respondents
Hearing:	October 10, 2017
Decision:	February 27, 2018

TABLE OF CONTENTS

I. INTRODUCTION

[1] Alberta Securities Commission (**ASC**) staff (**Staff**) alleged that Jason Michael Currey (**Currey**), The Healthy Retirement Group Inc. (**HRG**), Sunset Creek Resources Inc. (**Sunset**) and 1826487 Alberta Ltd. (**182 Alberta**) (collectively, the **Respondents**) contravened the *Securities Act* (Alberta) (the **Act**) and acted contrary to the public interest in connection with securities sold between approximately December 2013 and October 2015 (the **Relevant Period**).

[2] The Respondents and Staff entered into a Statement of Admissions and Joint Submission on Sanction dated October 6, 2017 (the **Statement**). The Statement set out admissions by the Respondents, including admissions to multiple contraventions of the Act as alleged by Staff. In consequence of this misconduct and certain additional "Circumstances Relevant to Sanction" set out in the Statement, the Respondents and Staff jointly proposed that we make the orders set out in the Statement.

[3] At the hearing on October 10, 2017 (the **Hearing**), the Statement was entered into evidence and we heard from the parties – Staff represented by counsel, and Currey appearing on behalf of himself and the other Respondents – who made submissions and responded to panel questions. The parties agreed that we would proceed to consider and decide both the merits of the allegations and appropriate orders.

[4] Our decision and reasons follow. Stated briefly, we find that the Respondents contravened the Act as they admitted in the Statement. In the public interest we therefore order sanctions against the Respondents corresponding to those jointly proposed in the Statement: an array of market-access bans, plus an administrative penalty of $200,000 and a $120,200 disgorgement order against Currey. We also make a $25,000 cost-recovery order against Currey, as jointly proposed.

II. FACTUAL BACKGROUND

[5] Pertinent background facts were set out in the Statement. We accept them as accurate and summarize them here.

[6] Currey is a resident of Calgary. At the date of the Statement, he was 35 years old, married, and the father of two children with a third on the way. He was the founder, guiding mind, and sole director, shareholder and employee of each of the three corporate Respondents, and admitted to having "authorized, permitted or acquiesced in the acts, practices and conduct" of those Respondents. He advised us at the Hearing that he had been registered with the ASC as an exempt market dealer "for about six months" in 2011, but let the registration lapse.

[7] According to the Statement, Currey "held himself out to be an investment dealer and adviser". HRG was incorporated in Alberta in January 2008 and carried on business in Calgary. That business "ostensibly [involved] insurance sales and was Currey's primary marketing vehicle, engaging in the business of trading and advising in securities". Neither Currey nor HRG was registered with the ASC to advise in securities during the Relevant Period.

[8] Sunset was incorporated in Alberta in November 2013, and also carried on business in Calgary. Currey operated it "as an investment vehicle". It distributed "debentures or other

securities in Sunset", the proceeds from which were purportedly intended to fund investments in resource development companies.

[9] 182 Alberta was incorporated in Alberta in June 2014, and carried on business in Calgary. Like Sunset, Currey operated 182 Alberta "as an investment vehicle". It distributed "debentures or other securities in 182 [Alberta]", the proceeds from which were purportedly intended to fund real estate purchases and other unspecified investments.

[10] On June 7, 2016, the ASC issued a 15-day interim cease trade order against the Respondents (**ICTO**), which directed that (i) all trading in securities of HRG, Sunset and 182 Alberta cease; (ii) the Respondents cease trading in all securities; and (iii) all exemptions contained in Alberta securities laws do not apply to the Respondents. On June 21, 2016, the ICTO was varied to include a prohibition against Currey advising in securities and extended until such time as any proceeding involving the Respondents is finally determined or otherwise concluded (**ICTO Extension**).

[11] During the Relevant Period, Currey and HRG used Sunset and 182 Alberta to raise approximately $3.2 million from the sales of securities – "including promissory notes and debentures" – to nine investors. None of the Respondents was registered with the ASC to deal in securities during that period.

[12] Investors in Sunset and 182 Alberta were told or "led . . . to believe" that "their funds would be directed to specific investments which were not high risk and would provide the investors with a return on their investment[s]". However, "[b]y June 2014", the Respondents had begun to use investment funds – in the amount of "at least $695,200" – for other purposes which had not been disclosed to the investors. This included paying other investors and directing funds to HRG or Currey for Currey's personal use. The latter was demonstrated by "transfers of investor funds from Sunset's or [182 Alberta's] bank account to HRG or Currey bank accounts immediately following receipt", and by the "lack of any corporate documentation, financial records or tax filings to explain" the transfers. Those funds were then used for Currey's "personal expenses" and "personal debt", including credit card bills and amounts owing to the Canada Revenue Agency.

[13] The investments of five specific investors – each identified by his or her initials – were described in the Statement.

[14] MH and VH invested $55,200 in Sunset "on the understanding that they were investing in a refinery company", and invested $40,000 in what Currey told them was a "'secured debenture' with 182 [Alberta]". They had not been told that Currey was the sole director and shareholder of 182 Alberta, nor that the debenture was not in fact secured. Currey instead used their funds for personal debt and expenses, and they have never received any interest or repayment of the principal of either investment.

[15] LW invested $150,000 in 182 Alberta and AS invested $25,000 in Sunset, both on the understanding that the funds "would be invested in a specific gravel company". Staff advised us during the Hearing – and Currey did not dispute – that the gravel company did not receive any of the funds. Those sums were instead taken for Currey's personal use and, in the case of LW's funds,

partly directed toward repayment of other investors. LW and AS have not received any interest or repayment of the principal of their investments.

[16] KD made two investments in 182 Alberta, one for $275,000 and a second for $150,000. She was not told that Currey was the sole director and shareholder of the company. Some or all of her funds were used to repay other investors and to pay Currey's personal expenses. She "has not received any significant interest or repayment of the principal" of her investments. Staff advised us during the Hearing – and Currey did not dispute – that while it was unclear how much interest KD has received, it was likely paid from the investment funds of others, since 182 Alberta had not generated any revenue.

[17] As of the date of the Statement, Currey was "essentially on the verge of insolvency with limited ability to repay the investors". Some investors had filed or were expected to file civil suits against him and the other Respondents to recover their lost funds. Currey had already agreed to a $595,000 consent judgment in the Court of Queen's Bench of Alberta in favour of KD, approximately $475,000 of which was "attributable to Currey's fraudulent conduct".

III. ALLEGATIONS AND ANALYSIS

[18] In its notice of hearing issued February 14, 2017 (**NOH**), Staff alleged that all of the Respondents had contravened the Act by dealing in securities of Sunset and 182 Alberta without registration (contrary to s. 75(1)(a) of the Act) and by perpetrating a fraud on investors (contrary to s. 93(b)). Staff also alleged that Currey and HRG had contravened the Act by advising in securities without registration (contrary to s. 75(1)(b)). The impugned conduct was further alleged to have constituted conduct contrary to the public interest.

[19] We now analyze each of these allegations in turn.

A. Illegal Dealing

[20] Section 75(1)(a) of the Act prohibits anyone from acting as a "dealer" in securities "[u]nless registered in accordance with Alberta securities laws". Section 1(m) defines "dealer" as "a person or company engaging in or holding itself out as engaging in the business of . . . trading in securities . . . as principal or agent". Pursuant to s. 1(jjj), a "trade" includes both "any sale or disposition of a security for valuable consideration" and "any act, advertisement, solicitation, conduct or negotiation made directly or indirectly in furtherance" of such a sale or disposition. Pursuant to s. 1(ggg), "security" is broadly defined to include, among other things, "any . . . debenture, note or other evidence of indebtedness".

[21] Turning first to the threshold question of whether the conduct at issue here involved "securities", we note that while there was mention in the Statement of "debentures or other securities" of Sunset and 182 Alberta, there was a more specific reference in a later paragraph to "promissory notes and debentures". Since both fall within the Act's definition, we are satisfied that they were securities – as admitted by the Respondents in the Statement.

[22] In addition, we are satisfied that the Respondents traded in those securities, as admitted in the Statement. As the issuers, Sunset and 182 Alberta offered their securities for sale through Currey and HRG, in exchange for cash – "valuable consideration".

[23] The Companion Policy to National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**31-103CP**) offers guidance with respect to whether the Respondents engaged "in the business" of trading in securities. A non-exhaustive list of indicia of "engaging in the business" is set out, including:

- "[e]ngaging in activities similar to a registrant";
- "[i]ntermediating trades or acting as a market maker";
- "[d]irectly or indirectly carrying on the activity with repetition, regularity or continuity";
- "[b]eing, or expecting to be, remunerated or compensated"; and
- "[d]irectly or indirectly soliciting".

[24] Generally corresponding to this list, each Respondent admitted to:

- "engaging in trades repeatedly and frequently during the [Relevant Period]";
- "being, or expecting to be, compensated for making trades in securities";
- "directly or indirectly soliciting clients for the business of dealing in securities, through a website, social media and client referrals";
- "obtaining all or virtually all of their respective incomes from the business of selling investment products and advising in securities"; and
- "otherwise engaging in activities similar to those of a registrant".

[25] Sunset and 182 Alberta also admitted that they had "not operat[ed] any business apart from distributing securities and purportedly investing the funds they raised in securities of other companies".

[26] It would have been helpful to have been given some additional information elucidating certain of the admissions – for example, the details of the compensation arrangements, and the nature of the "activities similar to those of a registrant" in which the Respondents engaged. Regardless, in light of the Respondents' admissions and the overall context provided by the Statement, we are satisfied that they engaged in the business of dealing in securities as alleged. As none of the Respondents was registered as a dealer during the Relevant Period and there was no evidence of any available registration exemption, it follows that each of the Respondents breached s. 75(1)(a) of the Act as admitted. We so find.

B. Fraud

[27] Section 93(b) of the Act prohibits anyone from engaging or participating "in any act, practice or course of conduct relating to a security" that he or she "knows or reasonably ought to know" may "perpetrate a fraud on any person or company".

[28] Because "fraud" is not defined in the Act, ASC hearing panels have adopted the Supreme Court of Canada's enunciation of the elements of fraud as set out in *R. v. Théroux*, [1993] 2 S.C.R. 5, and applied them in the context of securities regulation. Those elements are (at para. 27):

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

  and

- the *mens rea*, which is established by proof of:
    - "subjective knowledge of the prohibited act"; and
    - "subjective knowledge that the prohibited act could have as a consequence the deprivation of another".

[29] Thus, the *actus reus* of fraud is proved if a "prohibited" or dishonest act occurred, resulting in the "deprivation" of another. The prohibited or dishonest act can be an "act of deceit, a falsehood or some other fraudulent means". There has been deceit or a falsehood where a party has "represented that a situation was of a certain character, when, in reality, it was not" (*Théroux* at para. 18). The phrase "other fraudulent means" captures other dishonest acts which may not be deceit or falsehood, such as "the use of corporate funds for personal purposes, non-disclosure of important facts, . . . unauthorized diversion of funds, and unauthorized arrogation of funds or property" (*Théroux* at para. 18).

[30] The *mens rea* of fraud is proved if the person involved had "subjective awareness that one was undertaking a prohibited act (the deceit, falsehood or other dishonest act) which could cause deprivation in the sense of depriving another of property or putting that property at risk" (*Théroux* at para. 24). A panel's conclusions regarding subjective awareness may be "based on inferences reasonably drawn from the evidence" (*Re Arbour Energy Inc.*, 2012 ABASC 131 at para. 983). In the case of a corporation, "it need only be proved that the corporation's directing minds knew or reasonably ought to have known that the acts of the corporation perpetrated a fraud" (*Arbour* at para. 985).

[31] The fraud allegation in this case related to use of investor funds for purposes "other than those disclosed to the investors": specifically, payment of earlier investors (a practice indicative of a Ponzi scheme, a well-known species of fraud) and payment of Currey's personal debts and expenses. Misdirection of investor funds in this manner, instead of investing them to generate actual returns, caused not only the risk but also the reality of financial loss. This was described and admitted to in the Statement, and certain such payments were confirmed by Currey at the Hearing. Accordingly, the *actus reus* of fraud has been proved.

[32] The *mens rea* has also been proved. As the sole directing mind of the corporate Respondents, Currey – and thus, through him, all of the Respondents – knew both what investors had been told and the use to which their funds had actually been put. While we also inferred from the totality of the circumstances that the Respondents must have known or reasonably ought to

have known that risk of loss or actual loss would occur, they admitted such knowledge in the Statement.

[33] We are therefore satisfied that the Respondents breached s. 93(b) of the Act by engaging in a course of conduct relating to securities of Sunset and 182 Alberta which they knew or reasonably ought to have known perpetrated a fraud on their investors. The Respondents have admitted all of the necessary elements of fraud, and to breaching s. 93(b).

C. Illegal Advising

[34] As noted, illegal advising allegations were made only against Currey and HRG. Section 75(1)(b) of the Act is similar to s. 75(1)(a), but substitutes "adviser" for "dealer" and prohibits anyone from acting as an "adviser" in securities "[u]nless registered in accordance with Alberta securities laws". Similar to the definition of "dealer" in s. 1(m), s. 1(a) defines "adviser" as "a person or company engaging in or holding itself out as engaging in the business of advising in securities". The guidance in 31-103CP again applies, with the same non-exhaustive list of indicia of "engaging in the business" – in this context, "the business of advising in securities".

[35] Generally corresponding to that list, Currey and HRG each admitted to:

- "executing an engagement agreement with a client to act as her financial adviser";
- "being, or expecting to be, compensated for advising in securities";
- "directly or indirectly soliciting clients for the business of advising in securities, through a website, social media and client referrals";
- "obtaining all or virtually all of their respective incomes from the business of advising and dealing in securities"; and
- "otherwise engaging in activities similar to those of a registrant".

[36] They also admitted more generally that they had "purported to act as financial advisers to the investors from whom they raised capital".

[37] Again, we observe that some additional detail with respect to the facts underlying some of these admissions would have been helpful. Nonetheless, the facts admitted in the Statement are sufficient to enable us to conclude that Currey and HRG engaged in the business of advising in securities as alleged by Staff. Neither of these Respondents was registered as an adviser and there was no evidence of an available registration exemption. It follows that they breached s. 75(1)(b) of the Act as admitted, and we so find.

D. Conduct Contrary to the Public Interest

[38] Although Staff alleged in the NOH that the Respondents' conduct was contrary to the public interest, that allegation was not admitted or addressed in the Statement or at the Hearing.

[39] Having found (consistent with the admissions in the Statement) that the Respondents breached ss. 75(1)(a) and 93(b) of the Act and that Currey and HRG breached s. 75(1)(b), we do not consider it necessary to determine whether these contraventions also constituted conduct contrary to the public interest.

E. Merits of the Allegations, Generally

[40] To summarize, all of Staff's allegations of misconduct have been admitted by the Respondents, other than the allegation of conduct contrary to the public interest. We have found each admitted allegation to have been proved.

[41] Accordingly, we now turn to the issue of what, if any, orders should result.

IV. APPROPRIATE ORDERS

A. Sanction Orders

1. General Principles and Factors

[42] Sections 198 and 199 of the Act authorize an ASC hearing panel to impose a range of sanctions where a hearing has been conducted and we consider it to be in the public interest to do so. Among other things, s. 198 provides for a variety of orders prohibiting a respondent from participating in the Alberta capital markets and acting in certain capacities. We typically refer to such orders as "market-access bans". Section 199 contemplates the imposition of monetary administrative penalties of up to $1 million for each contravention of Alberta securities laws.

[43] In addition, s. 198(1)(i) provides for another type of monetary order, typically referred to as "disgorgement". Under that section, "if a person or company has not complied with Alberta securities laws, [the ASC may order] that the person or company pay to the [ASC] any amounts obtained or payments or losses avoided as a result of the non-compliance". As explained in *Re Planned Legacies Inc.*, 2011 ABASC 278 (at para. 71):

> . . . disgorgement . . . orders the removal of unlawfully-obtained money from a wrongdoer. The rationale for ordering disgorgement in a securities commission proceeding 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. . . .

[44] Disgorgement orders and administrative penalties serve different purposes. While disgorgement is intended to remove any profit incentive behind securities misconduct and addresses the calculable financial benefit a respondent may have gained, the addition of an administrative penalty is meant to ensure that the respondent does not view a sanction as merely a cost of doing business. The panel in *Re Holtby*, 2015 ABASC 891, while noting that both are "aimed at protecting through deterrence", described the difference as follows (at para. 65): ". . . a disgorgement order is directed at ensuring that a respondent does not retain any financial benefit from breaching Alberta securities laws, whereas an administrative penalty imposes a direct financial cost on a respondent for the respondent's breach of Alberta securities laws."

[45] The purpose of all sanction orders is to protect investors and the capital market and to prevent future harm; sanctions are not intended to be punitive or remedial (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at paras. 41-43, 45). Sanction orders are imposed with the objective of deterrence: specific deterrence from future misconduct by the respondent or respondents before us, and general deterrence from similar future misconduct which might be perpetrated by others (*Re Cartaway Resources Corp.*, 2004 SCC 26 at paras. 52-53, 55-56, 60-61). The two considerations must be balanced to ensure that the sanctions ordered are "proportionate and reasonable" in the circumstances; "general deterrence does not warrant imposing a crushing or

unfit sanction on any individual" (*Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 at paras. 154, 156).

[46] In ordering sanctions which are "proportionate and reasonable", we have reference to prior decisions and settlements arising from comparable facts and wrongdoing (*Re Homerun International Inc.*, 2016 ABASC 95 at para. 16). Because the facts of each case are different, the orders necessary to achieve the goal of deterrence and limit future risks to investors and the capital market in a given context will still vary. We therefore carefully consider the specific facts of the case before us and the characteristics of the Respondents.

[47] To focus our analysis, we refer to a non-exhaustive set of factors intended to assist us in determining sanctions that are appropriate and commensurate with the gravity of the misconduct found. In past decisions, the ASC has relied on the factors described in *Re Lamoureux*, [2002] A.S.C.D. No. 125 (at para. 11) (aff'd. on other grounds 2002 ABCA 253). Staff cited those factors in their submissions at the Hearing. However, as a better reflection of the fundamental principles just discussed, we prefer to rely on the reformulated list of factors set out in *Homerun* (at para. 20) and applied in more recent decisions such as *Re Spaetgens*, 2017 ABASC 38 (at para. 19) and *Re Kostelecky*, 2017 ABASC 105 (at para. 28):

- the seriousness of the respondent's misconduct;
- the respondent's pertinent characteristics and history;
- any benefit sought or obtained by the respondent; and
- any mitigating or aggravating considerations.

[48] These factors were discussed at some length in *Homerun* (at paras. 22-46). We will not repeat all of that discussion here, but we adopt the reasoning set out therein.

[49] Finally, we are mindful of the Alberta Court of Appeal's caution that monetary sanctions in particular must be "proportionate to the offence, and fit and proper for the individual offender" (*Walton* at para. 156), but we also take heed of that Court's earlier caution in *Maitland Capital Ltd. v. Alberta (Securities Commission)*, 2009 ABCA 186, that "[i]f sanctions under this legislation are so low as to communicate too mild a rebuke to the misconduct, or perhaps a licensing fee for its occurrence, the opposite to deterrence may result" (at para. 21).

2. Joint Submission on Sanction

[50] As mentioned at the outset of this decision, the parties have submitted a joint proposal on sanction. The proposed orders would direct that:

- Currey pay an administrative penalty of $200,000 and disgorge $120,200;
- Currey immediately resign from any positions he holds as a director or officer of any issuer, registrant or investment fund manager, as well as any recognized exchange, self-regulatory organization, clearing agency, trade repository or quotation and trade reporting system; and
- for a period of 20 years or until the administrative penalty is paid in full, whichever is the later:

- all of the Respondents are prohibited from trading in or purchasing any securities or derivatives (subject to a limited exception applicable to Currey);
- all exemptions available under Alberta securities laws do not apply to the Respondents;
- both Currey and HRG are prohibited from advising in securities or derivatives; and
- Currey is prohibited from:
  - becoming or acting as a director or officer (or both) of any issuer or other person or company that is authorized to issue securities, any registrant or investment fund manager, as well as any recognized exchange, self-regulatory organization, clearing agency, trade repository or quotation and trade reporting system (subject to a limited exception);
  - becoming or acting as a registrant, investment fund manager or promoter; and
  - acting in a management or consultative capacity in connection with activities in the securities market.

[51] At the Hearing, Staff argued that the proposed sanctions would address the risk posed to the Alberta capital market if the Respondents' conduct were "left unchecked and undeterred". Currey acknowledged that the proposed sanctions were "fair".

[52] Although such a proposal by the parties to an enforcement proceeding will "generally carry considerable weight", it is not binding on this panel (*Re Bradbury*, 2016 ABASC 272 at para. 58; see also *Re TransCap Corporation*, 2013 ABASC 326 at para. 16). We must make our own determination as to what orders, if any, are in the public interest.

[53] That said, we agree with the view expressed in *Re Allan*, 2015 ABASC 919 (at para. 21):

> A hearing panel is not obliged to order jointly-recommended sanctions but will do so if satisfied they fall within a range of sanctions that are reasonable in all the circumstances and in keeping with the ASC's public-interest mandate.

3. Sanctioning Principles and Factors Applied

[54] We now turn to the application of the *Homerun* factors to determine the appropriate sanctions in the public interest. We discuss each factor in turn, then consider the outcomes of other proceedings involving comparable circumstances.

(a) Seriousness of Misconduct

[55] In *Homerun* (at para. 22), the hearing panel suggested that there are three aspects to the seriousness of misconduct: its nature; the intention behind it (i.e., whether it was deliberate, reckless or inadvertent); and the harm it caused or could have caused to the affected investors and the capital market in general. We agree with that panel's observation that "[a]bsent other considerations, the more serious the misconduct, the greater the future risk implied and thus the greater the deterrence required" (at para. 26).

[56] We have no hesitation concluding that the Respondents' misconduct was very serious. We agree with Staff's submission that it "falls at the most serious end of the spectrum", as it involved fraud and "a substantial degree of deceit and dishonesty" – deliberate misconduct – over a sustained period with respect to a "significant amount of money". Staff calculated that Currey benefited from personal use of approximately $400,000 of investor funds. The affected investors suffered substantial financial harm and are unlikely to recover the amounts they have lost.

[57] In addition, the Respondents deprived investors of some of the fundamental legal protections to which the latter were entitled: the involvement of a qualified dealer and adviser registered with the ASC. As noted in *Bradbury* (at para. 21):

> The registration requirement is a fundamental element of our regime of securities regulation. It is designed to protect an investor through the involvement of an intermediary knowledgeable about securities and the capital market, the particular investment offered, and the circumstances, investment objectives and risk tolerances of the investor. A breach of the registration requirement obviously exposes investors to unanticipated risks and potential financial harm, in turn undermining the fairness and efficiency of the capital market and jeopardizing confidence in that market.

[58] The Respondents' misconduct has no doubt adversely affected the investors' confidence in the Alberta capital market and their willingness to invest in that market in the future. Moreover, such loss of confidence can extend beyond those directly affected, to the detriment of issuers seeking to raise capital lawfully.

[59] The seriousness of the Respondents' misconduct calls for significant protective orders which will have both a specific and a general deterrent effect.

(b) Respondents' Characteristics and History

[60] Consideration of an individual respondent's personal characteristics and history may be indicative of the future risk posed by that individual, and thus "the extent of deterrence required" (*Homerun* at para. 27). Such considerations may also assist with an assessment of the proportionality of a contemplated package of sanctions (*Homerun* at para. 27). As noted in *Homerun*, "[r]elevant individual characteristics may include education, work experience, registration or other participation in the capital market, any disciplinary history and (with particular reference to proportionality) claimed impecuniosity" (at para. 28).

[61] In some cases, "it may be appropriate to attribute to a corporate respondent pertinent characteristics of its guiding individuals" (*Homerun* at para. 33). This is one of those cases, given Currey's position as the sole director, officer, shareholder and employee of the corporate Respondents. All of their activities were carried out at his behest and with his knowledge.

[62] Though not addressed in the Statement, Staff advised us during the Hearing that Currey has no prior sanction history with the ASC. In certain circumstances this might have a moderating effect; however, Currey was a registrant for a time not long before the Relevant Period. Even though his tenure as a registrant was apparently short-lived, he must have known that certain activities in a regulated capital market require registration before they may be lawfully undertaken. Despite this background, Currey – and, through him, the corporate Respondents – chose to engage in the business of dealing and advising in securities while unregistered. Further, it is obvious that no specialized knowledge or training is required to understand that fraud and deceit are wrong.

[63] All of this suggests an enhanced risk of future misconduct, and thus a need for significant deterrent sanctions.

[64] Reduced financial circumstances may suggest that reduced financial penalties are appropriate in certain cases (*Holtby* at para. 55). The Statement indicated that Currey is "on the verge of insolvency", and that the Respondents had been or expected to be sued by some of their investors. This included KD, with whom Currey agreed to the aforementioned $595,000 consent judgment. We were not provided with any further details of Currey's financial situation, but Staff acknowledged at the Hearing that he had provided them with evidence of his impending insolvency. We were not given any information as to the status of the corporate Respondents, but can infer that their situation is similar to that of Currey.

[65] We would expect that Currey's impecuniosity would hinder his ability to pay monetary orders against him in the near term. However, he is relatively young and "financial circumstances can change" (*Re Calmusky*, 2016 ABASC 9 at para. 49). Indeed, the Statement outlined his plans to earn a living working for his family's business. In addition, Currey's agreement to the sanctions jointly recommended in the Statement alleviates concerns that the financial penalties contemplated would be unreasonable, disproportionate or "crushing".

(c) Benefit to the Respondents

[66] The panel in *Homerun* noted that "[t]he extent to which a respondent sought to benefit, or did in fact benefit, from misconduct can be a compelling indicator of risk" (at para. 35). Generally, the larger the benefit sought or obtained, the greater the risk of future misconduct by a respondent and others who may be inclined to emulate that respondent's misconduct. As noted previously, the greater the risk, the greater the need for deterrence (*Homerun* at para. 38).

[67] Like the respondent in *Bradbury*, Currey's "current impecuniosity perhaps indicates that he enjoyed no enduring benefit from his misconduct" (at para. 68). It may be that he has long since spent the significant amount of investor funds he converted to his own use. Nonetheless, he had the benefit of those funds at one time and intended to benefit from them.

[68] In our view, this misappropriation of funds also suggests a need for significant deterrent sanctions. It is appropriate that such sanctions "include direct monetary consequences" (*Bradbury* at para. 69).

(d) Mitigating or Aggravating Considerations

[69] We also consider any other circumstances which might affect our assessment of the risk posed and the extent of deterrence required. As the panel noted in *Homerun* (at paras. 40-41):

> Mitigating considerations can take a variety of forms. The most obvious would be efforts by a respondent to undo the harm done to victims – payment of financial restitution, for example. For sanctioning purposes, that sort of mitigation might diminish the risk of future harm, not least by reducing any element of financial incentive for future misconduct. That in turn might diminish the need for specific deterrence, and perhaps also for general deterrence.
>
> Persuasive indications that a respondent appreciates the wrong done, and its seriousness, may indicate a diminished likelihood of the respondent again engaging in misconduct, and therefore

> moderate the need for specific deterrence. However, the absence of such persuasive indications is by itself merely a neutral consideration. . . .

[70] While "[a]n absence of mitigation is not the same as an aggravating consideration" (*Homerun* at para. 45), neither is an absence of aggravation the same as a mitigating consideration.

[71] At the Hearing, Staff acknowledged some of the mitigating circumstances in this case: that Currey agreed to a consent judgment in the Court of Queen's Bench in favour of investor KD; the Respondents' comprehensive admissions of liability in the Statement; and the Respondents' agreement to significant proposed sanctions (including long-term market-access bans and disgorgement) – all of which saved court and hearing time and spared the investors the stress and inconvenience of having to testify. Although Staff also pointed out that the Statement was not entered into until shortly before the Hearing (after virtually all of the preparation had been done), we consider that timing more relevant to the costs order discussed below.

[72] The Statement also addressed mitigating factors. It indicated that "Currey's stated desire is to make payment arrangements with KD, and other investors, as his financial circumstances permit", and that "[s]ome token repayments" have already been made to some investors, "but they have been limited". We accept that Currey has demonstrated an intention to make restitution to his victims, though we are somewhat skeptical of his ability to make a sustained and concerted effort to remediate the harm he has caused.

[73] In addition to the Respondents' specific admissions of responsibility for the breaches of Alberta securities laws alleged by Staff in the NOH, the Statement contained a general recognition of responsibility. It stated that "Currey acknowledges full responsibility for his actions and states that he intends to spend the rest of his life rectifying his misconduct. He acknowledges and apologizes without reservation for the financial, physical and emotional devastation his actions have caused investors and their families." Currey repeated that expression of remorse and responsibility at the Hearing, and reiterated his desire to make amends.

[74] Apart from what we have already said about the seriousness of Currey's misconduct – in particular, the fraud – we have not discerned any additional aggravating considerations. We did take note that despite his avowal of responsibility and remorse at the Hearing, Currey alluded to some reservations about not having opposed Staff's allegations. He said he had "a difference of opinions [sic] on certain things" and that he had "actually want[ed] to go through the process" (which we understood to be a reference to a contested hearing) but could not afford a lawyer. In addition, certain of his family circumstances led him to conclude that he should "own [his] mistakes" rather than "drag[. . .] everyone through this process so [he] could have [his] 2 cents".

[75] Notwithstanding these somewhat equivocal statements, overall we are satisfied that Currey is genuinely remorseful (which we also impute to the corporate Respondents), and recognizes the seriousness of his misconduct and the impact it has had on the investors. He also recognizes that the Respondents' actions have consequences and has accepted those consequences, thus saving resources and sparing the investors further inconvenience. While not excusing the misconduct, these mitigating facts suggest a diminished risk of recidivism and thus moderate the need for specific deterrence.

(e) Outcomes in Other Cases

[76] Finally, we have taken into account a number of ASC decisions involving comparable circumstances and misconduct for guidance as to the type and extent of sanction orders that are appropriate – "proportionate and reasonable" – in this case. As observed in *Holtby* (at para. 54): "A consideration of previous decisions and settlement outcomes, particularly those involving the same or similar factual background and allegations, is essential in determining what sanctions are proportionate to the circumstances of a respondent's misconduct and to the personal circumstances of the respondent."

[77] In argument at the Hearing, Staff cited five decisions. We summarize these as follows:

- *Re Reeves*, 2011 ABASC 107 – The misconduct included illegal distribution of securities, misrepresentation and fraud including conversion of approximately $500,000 raised from investors to the respondent's own use. The respondent had no history of prior sanction and had never been registered with the ASC, but had many years of fundraising experience. A hearing on the merits of the allegations was commenced, but admissions were made by the respondent on the third day (see *Re Reeves*, 2010 ABASC 572). Sanctions included permanent market-access bans with a limited trading exception and a $650,000 administrative penalty.

- *Re Schmidt*, 2013 ABASC 320 – The misconduct included illegal distribution of securities, misrepresentation and fraud including conversion of $700,000 of the approximately $5 million raised from investors to the individual respondent's own use. That respondent had a prior sanction history in that he had previously entered into two agreements with the ASC settling past allegations of misconduct. He and the corporate respondent (which he controlled) made admissions at a short hearing. Sanctions levied against the individual respondent included permanent market-access bans, a $700,000 disgorgement order, and a $200,000 administrative penalty.

- *Re Magee*, 2015 ABASC 846 – The misconduct by the principal individual respondent included illegal distribution of securities, dealing in securities without registration, misrepresentation and fraud, including conversion of "at least $893,837" (see para. 187) of the approximately $2 million raised from investors to the respondents' own use. Sanctions imposed against that respondent included permanent market-access bans and a $200,000 administrative penalty. In addition, all three individual respondents were made jointly and severally responsible for an $893,837 disgorgement order.

- *Calmusky* – As in this case, the respondent entered into an agreed statement of facts and joint submission on sanction. He admitted fraud involving approximately $1.1 million raised from investors and conversion of at least that amount to his personal line of credit and to members of his family. He had no prior sanction history, and entered into a consent order pursuant to which he was to pay nearly $1 million to a receiver. Like Currey, he claimed impecuniosity at the time of the hearing. Sanctions included permanent market-access bans and a $100,000 administrative penalty.

- *Bradbury* – The respondent entered into an agreed statement of facts and joint submission on sanction wherein he admitted misconduct including dealing in securities without registration, illegal distribution of securities, making a misrepresentation to Staff and fraud. He raised over $1.5 million from investors, approximately $370,000 of which he converted to his own use, and approximately $370,000 of which he used to pay other investors. He had been registered as an investment broker in the past, and had a past sanction history. He claimed impecuniosity at the time of the hearing, but had agreed to sanctions including permanent market-access bans with a limited trading exception, a $150,000 administrative penalty, and a $370,000 disgorgement order.

[78] We have also considered the decision in *Re Narayan*, 2016 ABASC 228. In that case the respondents admitted to misconduct including illegal distribution of securities, dealing in securities without registration, misrepresentation and fraud. Over $5.8 million had been raised from investors, and the individual respondent admitted both that he had converted "at least $800,000" to his personal use (see para. 30), and that he had used some investor funds to repay other investors. In the past, the individual respondent had been registered briefly as a mutual fund salesman and was at one time sanctioned for misconduct within the life insurance industry. Sanctions ordered against him included permanent market-access bans with a limited trading exception, a $300,000 administrative penalty, and a disgorgement order in the amount of $880,951 – the precise sum the panel had found was actually converted to the individual respondent's own use.

[79] While the facts and misconduct underlying these decisions are obviously not identical to those here, they are sufficiently comparable to provide guidance on the nature and extent of the sanction orders considered appropriate in the public interest. Cases involving fraud and misuse of investor funds attract very significant sanctions. In the cited decisions, those sanctions included lengthy market-access bans (similar to those recommended in the Statement) and administrative penalties ranging from $100,000 to $650,000 (within which range the administrative penalty recommended in the Statement falls). Four of the six also included disgorgement orders directing respondents who had converted investor funds to their own use to pay equivalent sums to the ASC – again, consistent with the recommendation in the Statement.

[80] *Calmusky* is an example of a case where disgorgement was not ordered, despite the finding that the respondent wrongfully converted over $1 million to his and his family's use. Instead, the panel made note of the approximately $1 million consent order the respondent had entered into with the receiver, and considered that to have served a similar purpose as a disgorgement order (at para. 41):

> . . . the mentioned consent order for payment to the receiver could ameliorate [i]nvestor losses, perhaps significantly (depending, of course, on the extent of Calmusky's compliance with the order). We observe that the circumstances here might justify a "disgorgement" order of similar magnitude, but the court-ordered payment would more likely assist the [i]nvestors.

[81] We are therefore satisfied that in cases of fraud and wrongful conversion of investor money, disgorgement or other remedies which would see the wrongdoer deprived of the benefit of illegally-obtained funds are both proportionate and reasonable.

(f) Conclusion on Sanctions

[82] The Respondents admitted – and we have found – serious and deliberate misconduct which harmed the affected investors and the integrity of the Alberta capital market. This harm is in contrast with the personal monetary benefit sought and taken by Currey, once a registrant, and the individual solely responsible for the corporate Respondents. These factors suggest that the Respondents pose an ongoing risk to the investing public, and argue in favour of significant protective sanctions which will have both a specific and a general deterrent effect. Those who might be tempted to emulate the Respondents must be shown that such conduct – especially fraud – will be met with severe repercussions.

[83] As mentioned, there are also factors here which suggest a diminished risk of future misconduct and thus moderate the need for specific deterrence. These include the Respondents' cooperation with Staff, their acceptance of responsibility as demonstrated by their comprehensive admissions of liability, their willingness to agree to sanctions against them, Currey's agreement to a consent judgment in favour of KD, and his general show of remorse and expressed desire to make amends with his victims. We also take into account Currey's current financial circumstances, and the fact that he has represented in the Statement that he "has no desire to deal or advise in securities or derivatives, or to raise funds from the public" but will instead "work for his father's tree growing, reforestation, and reclamation business".

[84] Applying the sanctioning principles discussed to the facts and circumstances of this case and having regard to the outcomes from the cited ASC decisions, we agree that the sanctions jointly proposed by Staff and the Respondents in the Statement are appropriate and in the public interest.

[85] The Respondents abused the privilege of access to the Alberta capital market, and should be removed from it for a substantial period. In addition, since Currey has demonstrated that he is not currently fit to undertake certain roles or act in certain capacities, he should be barred from doing so. We agree with Staff's argument at the Hearing that "the scope of the [market-access] bans [recommended in the Statement] is rationally connected to the misconduct and the respective roles undertaken by Currey during the course of it". While the Statement recommended some limited exceptions or "carve-outs" from the bans applicable to Currey, we also agree with Staff that these do not "undermine the protective purpose of the bans". They do not provide him with access to the investing public, or the opportunity for repeated misconduct of the kind being sanctioned.

[86] Further, we are satisfied that bans alone are not sufficient to provide the necessary deterrent and protective effects. Significant monetary orders are also required, and it is appropriate that those orders be made against Currey alone given his position as sole directing mind and shareholder of the corporate Respondents.

[87] A $200,000 administrative penalty is reasonable and proportionate in light of the seriousness of the breaches of Alberta securities laws at issue, the amount of money raised from the investors, the results in comparable cases, Currey's personal circumstances, and his agreement as evidenced in the Statement.

[88] It is also appropriate that Currey be ordered to disgorge the funds he misappropriated. Staff advised during the Hearing that the calculation of the disgorgement amount in the Statement was

intended to recognize the consent judgment Currey agreed to with investor KD. This approach is consistent with that taken in *Calmusky*, and we accept the amount jointly recommended as appropriate in this case.

B. Cost-Recovery Orders

1. General Principles

[89] Section 202 of the Act authorizes an ASC hearing panel to impose orders directing respondents who have been found to have acted contrary to Alberta securities laws or the public interest to pay the costs associated with Staff's investigation and any hearing into that misconduct. Such orders are not sanctions, as they serve a different purpose. That purpose was explained in *Re Marcotte*, 2011 ABASC 287 (at para. 20):

> A costs order is . . . a means of recovering, from a respondent found to have engaged in capital-market misconduct, certain investigation and hearing costs that would otherwise be borne indirectly by law-abiding market participants whose fees fund the [ASC's] operations. It is generally appropriate that a respondent pay at least some portion of the relevant costs. Determination of the appropriate portion may involve assessing parties' contributions to the efficient conduct and ultimate resolution of the proceeding.

[90] In some cases the assessment of an appropriate cost-recovery order will involve an apportionment among two or more respondents, depending on the time and resources required to prove different allegations or varying levels of involvement.

2. Appropriate Cost Recovery

[91] At the Hearing, Staff indicated that as of October 9, 2017, their investigation and litigation costs (including disbursements) totalled $46,710.40. While Staff did not seek full indemnity of this amount in light of the costs, effort and time saved as a result of the Respondents' admissions in the Statement, it was submitted that just over half that total – $25,000 – was "fair and reasonable" because the admissions were not made until the eve of the scheduled Hearing when most of the Hearing preparation had already been completed.

[92] Staff did not specifically address the reason why the parties agreed to recommend that Currey be made solely responsible for the entirety of the proposed costs order instead of sharing the burden in some proportion among some or all of the other Respondents. We presume that each of those Respondents was accountable for some of the investigation and Hearing costs given their admissions to certain of the misconduct alleged. However, in these circumstances – where Currey was the sole directing mind and shareholder of all of the corporate Respondents – we are satisfied that it is reasonable to ascribe full responsibility for any ordered costs to him.

[93] In addition, we agree with Staff that Currey should be given significant credit for his contribution to the efficient resolution of the proceeding. Accordingly, we are satisfied that the $25,000 cost amount jointly recommended by the parties is appropriate in the circumstances.

V. CONCLUSION

[94] For the reasons given, we make the following orders:

Market-Access Bans

- under s. 198(1)(d) of the Act, Currey must immediately resign all positions he holds as a director or officer of any issuer, registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository or recognized quotation and trade reporting system;

- for a period of 20 years from the date of this decision or until the administrative penalty set out below is paid in full, whichever is the later:

    - under s. 198(1)(b), the Respondents must cease trading in or purchasing any securities or derivatives, except that this order does not preclude Currey from trading in or purchasing securities through a registrant (who has first been given a copy of this decision) in registered accounts or tax-free savings accounts maintained with that registrant for the benefit of one or more of himself, his spouse or his dependent children;

    - under s. 198(1)(c), all of the exemptions contained in Alberta securities laws do not apply to the Respondents;

    - under s. 198(1)(e), Currey is prohibited from becoming or acting as a director or officer (or both) of any issuer (or other person or company that is authorized to issue securities), registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository or recognized quotation and trade reporting system, except that this order does not preclude Currey from becoming or acting as a director or officer (or both) of an issuer that is wholly owned by himself, his spouse, his parents, his siblings or his children, and which does not issue or propose to issue securities to the public;

    - under s. 198(1)(e.1), Currey and HRG are prohibited from advising in securities or derivatives;

    - under s. 198(1)(e.2), Currey is prohibited from becoming or acting as a registrant, investment fund manager or promoter; and

    - under s. 198(1)(e.3), Currey is prohibited from acting in a management or consultative capacity in connection with activities in the securities market;

Disgorgement

- under s. 198(1)(i), Currey must pay to the ASC $120,200 obtained as a result of his non-compliance with Alberta securities laws;

Administrative Penalty

- under s. 199, Currey must pay an administrative penalty of $200,000; and

Cost Recovery

- under s. 202, Currey must pay $25,000 of the costs of the investigation and hearing.

[95] According to its terms, the ICTO Extension expires with the issuance of this decision.

[96] This proceeding is concluded.

February 27, 2018

For the Commission:

"original signed by"
Tom Cotter

"original signed by"
Trudy Curran

"original signed by"
Maryse Saint-Laurent