ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Aitkens, 2018 ABASC 27 **Date: 20180215**

Ronald James Aitkens, Roy Juergen Beyer,
Foundation Group Capital Trust, 0865701 B.C. Ltd.,
Harvest Capital Management Inc., Foundation Capital Corporation,
Foundation Securities Corporation, Stoney View Crossing Inc. and
Harbour View Landing Inc.

Panel:	Tom Cotter Terry Allen, CFA Webster Macdonald, QC
Representation:	Tom McCartney Peter Verschoote for Commission Staff Norman Anderson for Ronald James Aitkens, 0865701 B.C. Ltd. and Foundation Capital Corporation Christian Popowich for Roy Juergen Beyer
Submissions Completed:	April 27, 2017
Decision:	February 15, 2018

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I. INTRODUCTION

[1] Staff (**Staff**) of the Alberta Securities Commission (the **ASC**) made allegations against Ronald James Aitkens (**Aitkens**), Roy Juergen Beyer (**Beyer**), Foundation Group Capital Trust (the **Trust**), 0865701 B.C. Ltd. (**0865701**), Harvest Capital Management Inc. (**HCMI**), Foundation Capital Corporation (**Foundation Capital**), Foundation Securities Corporation (**Foundation Securities**), Stoney View Crossing Inc. (**SV Crossing**) and Harbour View Landing Inc. (**HV Landing**) (collectively, the **Respondents**). After the evidentiary portion of the hearing was complete and submissions on the merits of the allegations had been made to the panel, Staff withdrew allegations against Stoney View Capital Inc. (**SV Capital**) and Harbour View Capital Inc. (**HV Capital**), each of which had originally been named as a respondent (see *Re Aitkens*, 2017 ABASC 64).

[2] Transactions in connection with three projects were at issue:

- securities of the Trust (the **Trust Securities**) issued in connection with an oil and gas exploration and development project (the **Trust Project**). Staff referred to this project (or, at times, the Trust itself) as "**FROG**", an acronym for Foundation Resources Oil & Gas. We consider "the Trust Project" to be a more accurate term for the underlying factual background here, although we use the term FROG when appropriate;

- securities of SV Capital (bonds) and SV Crossing (shares) issued in connection with a land development project in Calgary, Alberta (the **SV Project**); and

- securities of HV Capital (bonds) and HV Landing (shares) issued in connection with a land development project on Vancouver Island, British Columbia (the **HV Project**).

[3] Staff's allegations were set out in a March 20, 2015 notice of hearing (the **NOH**). The NOH alleged that certain of the Respondents had committed various breaches of Alberta securities laws in connection with those three projects and had thereby acted contrary to the public interest. Allegations relating to the Trust Project included making what we later term "misrepresentations" in offering memoranda (**OMs**), signing false OM certificates, providing misleading OMs to the ASC, and engaging in illegal distributions. Allegations relating to the SV Project and HV Project included engaging in fraud. We set out details of all the allegations later in this decision.

[4] During a lengthy hearing into the merits of Staff's allegations, we received documentary evidence and heard testimony from several witnesses (including Aitkens and Beyer). We also received a November 14, 2016 Statement of Admissions (the **Admissions**) on behalf of Aitkens, the Trust and 0865701. Aitkens, 0865701 ("as Trustee of Foundation Group Capital Trust") and Foundation Capital (together, the **Aitkens Respondents**) were at times represented by counsel; at other times Aitkens represented himself, while 0865701 and Foundation Capital were at such times apparently unrepresented. Beyer was represented throughout by counsel (although that counsel did not always attend the hearing as not all of the evidence was pertinent to the allegations against Beyer). None of the other Respondents were represented. We received written and oral submissions from Staff, the Aitkens Respondents and Beyer.

[5] As set out below, we found that: Aitkens, Beyer, the Trust, 0865701 and HCMI breached s. 92(4.1) of the *Securities Act* (Alberta) (the **Act**); Aitkens authorized, permitted or acquiesced in those breaches by the Trust, 0865701 and HCMI; Beyer authorized, permitted or acquiesced in those breaches by the Trust and 0865701; Aitkens, SV Crossing and HV Landing breached s. 93(b) of the Act; and Aitkens authorized, permitted or acquiesced in those breaches by SV Crossing and HV Landing. We now set out the reasons for those findings.

II. BACKGROUND

[6] Many different entities were involved in one or more of the three projects. Many of the entities' names were similar. Some testimony was given without care as to which specific entity was being referenced. Such confusion was also reflected in some of the documentary evidence. In some instances, it was important that we determine ownership of certain entities, their connections to one another, and the involvement of Aitkens and Beyer with various of them. To minimize confusion, we first set out the background of the Trust Project, the SV Project and the HV Project, including the connections among various entities. We also outline Aitkens' and Beyer's respective involvement and roles in those entities, then turn to some preliminary matters and to our analysis of the allegations.

A. The Trust Project

[7] The Admissions referred to the Trust as a "'trust on trust' structure, with subsidiaries", "established to raise funds to engage in oil and gas exploration and development". Aitkens testified that FROG (in context, the Trust) was a mutual fund trust with oil and gas assets. A June 1, 2011 letter from Terressa Moore (**Moore**), identifying herself as the "Harvest Group Corporate Administrator" and written on "Harvest Group" and "Foundation Resources" letterhead, clarified the difference between the Trust and FROG: "The Trust was established to issue Series A Units to raise Net Proceeds to purchase, indirectly, limited partnership units" of Foundation Resources Limited Partnership (**Foundation Resources LP**), with Foundation Resources LP being "an affiliate of the Trust" and "FROG" being "the marketing name for the complete trust structure". Documents in evidence described Scott Rohrer (**Rohrer**) as chief investment officer of FROG and Roger Baker (**Baker**) as its "Technical Team Leader" (Baker's more significant role in the matters before us was as the president and chief executive officer of Neo Exploration Inc. (**Neo**)).

[8] A draft organizational plan in evidence (the **Step Memo**), prepared by the accounting firm of PricewaterhouseCoopers LLP (**PwC**) and circulated to others, including the law firm of Gowling Lafleur Henderson LLP (**Gowlings**), set out the steps needed to structure the Trust.

[9] The Trust Project was essentially a way for the Trust to raise money from investors and to acquire indirectly an interest in Neo and other oil and gas interests. Those goals were met through several steps:

- The Trust held units of "Foundation Group Development Trust" (the **Business Trust**).

- The Business Trust held units of Foundation Resources LP (the **Foundation Resources LP Units**) and was to acquire "other Investments" for the Trust.

- Foundation Resources LP purchased shares in Neo (**Neo Shares**) from Exen Resources Inc. (**Exen**) and Harvest Group Limited Partnership (**Harvest Group LP**). We note that the NOH and the Admissions both stated that Foundation Resources LP purchased Neo Shares from Harvest Group GP Corporation (**Harvest Group GP**), but the majority of the evidence indicated that Harvest Group LP was the seller. There was also at times a lack of distinction between shares and units of Neo. For simplicity, we refer to all transactions of Neo securities as involving Neo Shares. Further, the parties often referred to the Neo Shares transactions as purchases by the Trust. We concluded that such terminology was shorthand for the Trust's indirect acquisition of the Neo Shares through Foundation Resources LP. We did not find such references misleading or confusing and, in fact, use that shorthand ourselves in this decision. We are satisfied that none of these discrepancies caused confusion to the Respondents.

- Between approximately January 2010 and November 2011, the Trust issued Trust Securities to investors using four OMs (the **Trust OMs**).

[10] Aitkens agreed that he was "the lead person . . . the decision-maker, the ultimate decision-maker" for "all the decision-making entities involved with the [T]rust".

[11] The entities and individuals involved in these transactions were connected in various ways:

- The Trust was the central entity in the Trust Project.
  - The Trust was established on November 20, 2009, with 0865701 as its trustee.
  - The four Trust OMs were, respectively:
    - **Trust OM1**, dated December 10, 2009;
    - **Trust OM2**, dated April 30, 2010;
    - **Trust OM3**, dated August 18, 2010; and
    - **Trust OM4**, dated May 12, 2011.
  - For the reasons stated below, we conclude that Aitkens was the guiding mind of and controlled the Trust.

- 0865701 was the trustee of the Trust.
  - 0865701 was incorporated in British Columbia on November 6, 2009.
  - Aitkens and Beyer were directors of 0865701.
  - Aitkens was president and secretary of 0865701 and Beyer was vice-president.
  - Mark McCarthy (**McCarthy**) was listed in the Trust OMs as a director and the treasurer of 0865701 (this was inconsistent with some other evidence, but nothing turned on McCarthy's involvement).
  - We conclude from all the evidence that Aitkens was the guiding mind of and controlled 0865701.

- HCMI was the "Administrator" of the Trust and the "Manager" of the Business Trust.
  - HCMI was incorporated in Alberta on October 1, 2002 and placed in receivership on September 30, 2013.
  - Aitkens was the sole director and voting shareholder of HCMI at incorporation and throughout the relevant period. Aitkens was also its president.
  - We conclude from all the evidence that Aitkens was the guiding mind of and controlled HCMI. Because Aitkens controlled the trustee of the Trust (0865701) and the "Administrator" of the Trust (HCMI), we conclude that Aitkens was the guiding mind of and controlled the Trust.

- The Business Trust was managed by its trustee, Foundation Capital Investment Corporation (**Foundation Capital Investment**), and by its manager, HCMI.
  - Aitkens, Beyer and McCarthy were directors of Foundation Capital Investment.
  - Aitkens was president and secretary of Foundation Capital Investment, Beyer was vice-president, and McCarthy was treasurer.
  - Aitkens was the sole voting shareholder of Foundation Capital Investment.
  - We conclude from all the evidence that Aitkens was the guiding mind of and controlled Foundation Capital Investment. Because Aitkens was the guiding mind of and controlled the trustee of the Business Trust (Foundation Capital Investment) and the manager of the Business Trust (HCMI), we conclude that Aitkens was the guiding mind of and controlled the Business Trust.

- Foundation Resources GP Corporation (**Foundation Resources GP**) was the general partner of Foundation Resources LP (the purchaser of the Neo Shares).
  - Aitkens and Beyer were directors of Foundation Resources GP (some of the Trust OMs listed Moore as a director, and corporate records showed McCarthy as a director during the relevant period).
  - Although some evidence was inconsistent as to other roles, we are satisfied that, at a minimum, Aitkens was the president and Beyer was the vice-president.
  - The Business Trust was the sole shareholder of Foundation Resources GP.
    - As mentioned, Aitkens was the guiding mind of and controlled the Business Trust.
  - We conclude from all the evidence that Aitkens was the guiding mind of and controlled Foundation Resources GP, including through his control of its sole shareholder, the Business Trust. Because Aitkens was the guiding mind of and controlled the general partner of Foundation Resources LP, we also conclude that Aitkens was the guiding mind of and controlled Foundation Resources LP.

- Exen sold Neo Shares to Foundation Resources LP.
  - As set out later in this decision, we are unable to conclude from the evidence that Aitkens was the guiding mind of or controlled Exen.

- Harvest Group LP sold Neo Shares to Foundation Resources LP.
  - As set out later in this decision, we conclude that Aitkens was the guiding mind of and controlled Harvest Group LP.

- Foundation Capital promoted and sold securities for the Trust.
  - Foundation Capital was incorporated in Alberta on June 15, 2005 and struck on December 2, 2014.
  - Beyer testified that he was hired as "marketing director" of Foundation Capital in about November 2006. He also referred to himself in a June 9, 2011 letter as "the Sr. Marketing Director of Foundation Capital Corporation and of the Harvest Group of Companies". We are satisfied that Beyer was marketing director for Foundation Capital from approximately November 2006 to July 2011.
  - Although the evidence was inconsistent as to Aitkens' positions with Foundation Capital, we are satisfied that Aitkens was the sole director of Foundation Capital, was an officer of Foundation Capital (possibly the only officer, but that was unclear), and owned at least 75% of its voting shares (possibly 100%, but that was unclear).
  - We conclude from all the evidence that Aitkens was the guiding mind of and controlled Foundation Capital.

- Foundation Securities sold securities for the Trust.
  - Foundation Securities was incorporated federally in August 2010, registered in Alberta on August 26, 2010, and struck on February 2, 2014.
  - According to Beyer, Foundation Securities was incorporated as a response to regulatory changes requiring exempt market dealer registration and was licensed as an exempt market dealer in March 2011.
  - Corporate registry documents stated that Beyer, Moore, Rohrer and Wayne Tinker (**Tinker**) were directors of Foundation Securities (a fifth person was also a director).
  - All of Foundation Securities' voting shares were owned by Harvest Group of Companies Inc. (this is distinct from the term "Harvest group of companies" used throughout the hearing by various people, apparently as an informal umbrella term for some or all of the entities under Aitkens' control).
    - According to corporate registry documents, Aitkens was the sole director and sole voting shareholder of Harvest Group of Companies Inc.
  - Beyer and Tinker testified that Beyer was Foundation Securities' ultimate designated person and Tinker was its chief compliance officer. Beyer also acknowledged being its president; Tinker stated that Beyer was also chief executive officer.

- We are unable to conclude from the evidence that Aitkens was the guiding mind of or controlled Foundation Securities.

B. The SV Project

[12] The two main SV Project companies were SV Capital and SV Crossing, with SV Capital raising the majority of the money and lending it to SV Crossing (the **SV Loan**). The SV Project contemplated that SV Crossing would use the money raised to purchase certain land in Calgary targeted for development (the **SV Land**). Most of the money was raised pursuant to the offering memorandum exemption (the **OM Exemption**) using four OMs (the **SV OMs**), although some money was raised using the accredited investor exemption (the **AI Exemption**). We discuss those exemptions later in this decision. Two SV OMs were dated November 3, 2008: the **SV Crossing 2008 OM** and the **SV Capital 2008 OM**. The other two SV OMs were dated January 28, 2010: the **SV Crossing 2010 OM** and the **SV Capital 2010 OM**.

[13] The dual-company structure was described in the SV Crossing 2008 OM as "allow[ing] subscribers to participate indirectly in an investment in the financing and development of the [SV Land] through" the holding of securities in SV Crossing and SV Capital (together, the **SV Entities**). The bonds sold by SV Capital were to mature November 30, 2013, with the principal and accrued and unpaid interest payable on that date.

[14] The SV Land was to be purchased from 1379599 Alberta Ltd. (**1379599**) for $23.7 million, with a closing date of November 20, 2008. Aitkens was a director, officer and shareholder of 1379599. The Admissions stated that the SV Land was transferred into SV Crossing's name on October 9, 2009.

[15] We conclude from the evidence that the SV Entities raised $31,616,388, the majority of which was raised by SV Capital. This amount was referred to in testimony and documents relied on by Neil Narfason (**Narfason**) of the firm Ernst & Young Inc., which acted as the court-appointed monitor (the **Monitor**) in restructuring and insolvency proceedings involving some entities relevant to this hearing. This amount was higher than the amount set out in the reports of exempt distribution (**Exempt Distribution Reports**) filed by the SV Entities with the ASC. According to Staff's summary of those, SV Capital raised $26,385,200 and SV Crossing raised $14,669. We considered Narfason's amount to be more accurate, given that the Monitor's task was to go through the SV Entities' records with particular care. Moreover, as noted elsewhere in this decision, records for the SV Project were scattered and incomplete. We do not doubt that the SV Entities' Exempt Distribution Reports reflected that disarray and carelessness, which clearly would have affected their accuracy. Further, Aitkens indirectly accepted Narfason's amount by contending that the sum raised from SV Project accredited investors was $4,797,000, amounting to "over 15% of the funds raised" (15% of Narfason's total would be $4,742,458).

[16] Staff impugned payments made from the SV Entities to 1379599 and to 1252064 Alberta Ltd. (**1252064**).

[17] Aitkens was connected to various relevant companies:

- SV Capital
  - SV Capital was incorporated in Alberta on July 24, 2008.

- Aitkens admitted being its "sole director and president" and to owning 40% of its voting shares at the relevant times. The 60% shareholder was Eyelogic Systems Inc. (**Eyelogic**). We are satisfied that Eyelogic's involvement was to allow investors to use registered funds (e.g., RRSP funds) to purchase SV Capital bonds.
- We conclude from all the evidence that, despite Eyelogic's 60% shareholding in SV Capital, Aitkens was the guiding mind of and controlled SV Capital.

- SV Crossing
  - SV Crossing was incorporated in Alberta on July 24, 2008 and struck on January 2, 2015.
  - Aitkens was its sole director and voting shareholder.
  - The SV Crossing 2008 OM and the SV Crossing 2010 OM disclosed that Aitkens was the president (and apparently the only officer) of SV Crossing.
  - We conclude from all the evidence that Aitkens was the guiding mind of and controlled SV Crossing.

- 1379599
  - Aitkens was one of two or possibly three directors of 1379599. As at April 18, 2013, Aitkens was its sole director and owned 50% of its shares, while Wayne Chiu (**Chiu**) owned the other 50%. Chiu was apparently a director from April 10, 2008 to December 12, 2012 and a 50% shareholder throughout the relevant time. Both Aitkens and Chiu testified that Chiu was not involved in making decisions for 1379599 or running the company. There was also other evidence confirming that Aitkens ran 1379599 and made decisions for that company, including selling land owned by 1379599 to SV Crossing and directing that payments be made from 1379599's bank account to other entities.
  - We conclude from all the evidence that, despite Chiu's directorship of and 50% shareholding in 1379599, Aitkens was the guiding mind of and controlled 1379599.

- 1252064
  - Aitkens admitted that he was the sole director and shareholder of 1252064. This was consistent with corporate records in evidence.
  - We conclude from all the evidence that Aitkens was the guiding mind of and controlled 1252064.

C. The HV Project

[18] The two main HV Project companies were HV Capital and HV Landing, with HV Capital raising the majority of the money and lending it to HV Landing (the **HV Loan**). The HV Project contemplated that HV Landing would use the money raised to purchase certain land in British Columbia targeted for development (the **HV Land**). Most of the money was raised pursuant to the OM Exemption using four OMs (the **HV OMs**), with some money raised using the

AI Exemption. As mentioned, we discuss those exemptions later in this decision. Two HV OMs were dated January 30, 2009: the **HV Landing 2009 OM** and the **HV Capital 2009 OM**. The other two HV OMs were dated August 27, 2010: the **HV Landing 2010 OM** and the **HV Capital 2010 OM**.

[19] The dual-company structure was described in the HV Landing 2009 OM as "allow[ing] subscribers to participate in an investment in the financing and development of the [HV Land] through" the holding of securities in HV Landing and HV Capital (together, the **HV Entities**). The bonds sold by HV Capital were to mature April 30, 2014, at which time the principal and accrued and unpaid interest would become payable.

[20] The HV Land was to be purchased from 0747618 BC Ltd. (**0747618**) for $9.75 million, with a closing date of May 15, 2009. Aitkens was a director and officer of 0747618. Aitkens also controlled all of the shares of 0747618, through 1252064, which apparently owned all the shares of 0747618.

[21] We conclude from the evidence that the HV Entities raised $16,136,902, the majority of which was raised by HV Capital. This amount was used by Narfason in his testimony and in the documents on which he relied, although it was higher than the amount set out in the HV Entities' Exempt Distribution Reports filed with the ASC. According to Staff's summary of those, HV Capital raised $12,087,800 and HV Landing raised $20,521.80. For the same reasons as in the case of the SV Entities, we considered Narfason's amount to be more accurate. Aitkens indirectly accepted Narfason's amount by contending that the sum raised from HV Project accredited investors was $4,936,800, which he submitted was "over 30% of the funds raised" (30% of Narfason's total would be $4,841,071 – although not "over 30%" of Narfason's amount, it was closer to that percentage than it was to 30% of the HV Entities' Exempt Distribution Reports total (which would be $3,632,497)).

[22] Staff impugned payments made from the HV Entities to Foundation Mortgage Corporation (**Foundation Mortgage**), 1357686 Alberta Ltd. (**1357686**), HCMI and 1252064.

[23] Aitkens was connected to various relevant companies:

- HV Capital
  - HV Capital was incorporated in Alberta on January 13, 2009.
  - Aitkens admitted being its sole director and president. Aitkens also owned 40% of its voting shares at the relevant times. The 60% shareholder was Target Capital Inc. (**Target**). We are satisfied that Target's involvement was to allow investors to use registered funds (e.g., RRSP funds) to purchase HV Capital bonds.
  - We conclude from all the evidence that, despite Target's 60% shareholding in HV Capital, Aitkens was the guiding mind of and controlled HV Capital.

- HV Landing
  - HV Landing was incorporated in Alberta on January 13, 2009 and struck on July 2, 2014.

- Aitkens was its sole director and voting shareholder.
- The HV Landing 2009 OM and the HV Landing 2010 OM disclosed that Aitkens was the president (and apparently the only officer) of HV Landing.
- We conclude from all the evidence that Aitkens was the guiding mind of and controlled HV Landing.

- Foundation Mortgage
  - During the relevant period, Aitkens was apparently its sole director and a 40% shareholder. Eyelogic held the other 60%.
  - We are unable to conclude from the evidence that Aitkens was the guiding mind of or controlled Foundation Mortgage.

- 1357686
  - Aitkens was apparently its sole director from February 29, 2008, and its sole shareholder (from that date or possibly from its incorporation on October 22, 2007).
  - We conclude from all the evidence that Aitkens was the guiding mind of and controlled 1357686.

- HCMI
  - We concluded earlier that Aitkens was the guiding mind of and controlled HCMI.

- 1252064
  - We concluded earlier that Aitkens was the guiding mind of and controlled 1252064.

D. Aitkens

[24] Aitkens testified that he began working "in the life insurance business" in 1994. For a few years leading up to 2000, Aitkens worked with a large "real estate syndication company". In about 2001, he received his designation as a "certified financial planner". Aitkens also "partnered up with" a Toronto-based company in 2001 and began engaging in commercial real estate syndication. In 2005, Aitkens "started doing land-banking syndications", adopting a "bond-share" structure for these syndications until approximately 2009 and eventually changing to a "mutual fund trust structure".

[25] Aitkens described the bond-share structure as involving two OMs, with the same investors in each: investors would purchase bonds in a bond company and common shares in a connected share company. The share company would receive a loan from the bond company, then the share company would buy a particular asset from a nominee company. According to Aitkens, one problem was that "when the economy was faltering or going down, the maturity date on the bond-share structure posed a real issue". This was complicated by the fact that the documentation did not allow investors to vote on renewing the bonds – apparently meaning that the bond interest and repayment would come due even if funds were not available because of

economic or other difficulties. There were also looming tax changes. These issues led to the decision to move to the mutual fund trust structure.

[26] We have concluded, as mentioned, that Aitkens was the guiding mind of and controlled the following entities (this includes all of the non-individual Respondents except Foundation Securities):

- the Trust (a Respondent);
- 0865701 (a Respondent);
- HCMI (a Respondent);
- Foundation Capital Investment;
- the Business Trust;
- Foundation Resources GP;
- Foundation Resources LP;
- Harvest Group LP;
- Foundation Capital (a Respondent);
- SV Capital;
- SV Crossing (a Respondent);
- 1379599;
- 1252064;
- HV Capital;
- HV Landing (a Respondent); and
- 1357686.

E. Beyer

[27] Beyer testified that his post-secondary education was "a pastoral certification", received in approximately 1981. He worked with various churches over several years, including as a member of the board of directors for a religious alliance. In approximately 1995, he "was the founding president of [a not-for-profit interfaith] public policy organization". In about 2003, he "transitioned into the business realm" and started doing consulting work for political groups. Beyer testified that because of publicity stemming from these allegations and commentary related to the "Harvest group of companies", it has been "almost impossible for [him] to have meaningful employment over the last five years". At the time of the hearing he was working for a person in a company that helps people manage their money and generate income.

[28] Beyer's testimony regarding his involvement with the matters at issue was confusing at times, given his imprecise use and occasional misuse of various business names. This may have been due to his own way of looking at the business structure. More likely, however, we consider that this reflected a general carelessness or imprecision among the various entities. Such references strengthened our conclusion that the entities were essentially considered by those involved to be part of a conglomerate generally owned and controlled by Aitkens.

[29] When asked about "the business of the Harvest group of companies", Beyer stated that "some people would define us as a development company that raised investment capital; others would say we were an investment company that used real estate. I think both of those two sides were true about us."

[30] Beyer testified that he was initially hired "as marketing director of Foundation Capital Corporation in about November of 2006 . . . to develop a strategy for raising investment capital for Foundation Capital". He also described this role as "senior director with Harvest Group of companies starting about late 2006", and as being "asked to become a marketing director relative to a new division called Foundation Capital Corporation". Beyer testified that he and Moore "basically ran [the] Calgary office for the Harvest Group, which at the time was called Foundation Capital Corporation". Although Beyer at times seemed to confuse the names of the various entities, he testified that "Foundation Capital Corporation" later "merged" with "Harvest Capital Management", and "we start[ed] referring to [the merged entity] as 'the Harvest group of companies'". Beyer testified that "Harvest Group" added oil and gas products in about the early fall of 2009, then "evolved" into FROG.

[31] We conclude that Beyer was primarily involved in marketing aspects of several entities referred to at various times as being within the "Harvest group of companies" or as "FROG". We are not satisfied on the evidence that Beyer was a guiding mind of or had control over any of the entities with which he was involved. He was, however, a director and officer of 0865701 – the trustee of the Trust – and thus had a responsibility to ensure Trust property was dealt with appropriately. As mentioned above, his roles with the various entities were:

- a director and the vice-president of 0865701 (a Respondent);
- a director and the vice-president of Foundation Capital Investment;
- a director and the vice-president of Foundation Resources GP, the general partner of Foundation Resources LP;
- marketing director of Foundation Capital (a Respondent) from approximately November 2006 to July 2011; and
- a director, the president and the ultimate designated person of Foundation Securities (a Respondent).

III. ALLEGATIONS AND PARTIES' POSITIONS

A. Trust Project

[32] Staff alleged that Aitkens, Beyer, the Trust, 0865701 and HCMI (together the **Trust Respondents**) breached:

- s. 92(4.1) of the Act by omitting to make certain statements in the Trust OMs;
- s. 221.1 of the Act by providing misleading Trust OMs to the ASC; and
- s. 2.9(13) of National Instrument 45-106 *Prospectus Exemptions* (**NI 45-106**, then titled *Prospectus and Registration Exemptions*) by falsely stating that each of the Trust OMs did not contain a misrepresentation.

[33] Staff also alleged that the Trust Respondents, Foundation Capital and Foundation Securities breached s. 110(1) of the Act by illegally distributing Trust Securities.

[34] Beyer argued that the two alleged omissions had been disclosed, with no evidence that "omission of further details of either was material". In the alternative, Beyer submitted that he had "a defence of due diligence", given the involvement of accounting and law firms. Beyer

noted that if the alleged misrepresentations were not found (presumably including if we were to find that any misrepresentations were excused by a defence), then Beyer could not be found to have provided misleading OMs to the ASC, signed false certificates, or engaged in illegal distributions.

[35] The Aitkens Respondents adopted and relied on Beyer's submissions "in respect of those allegations concerning misrepresentation and breach of s. 92(4.1) of the [Act]". The Aitkens Respondents made clear in oral submissions that they also adopted Beyer's contentions regarding the three connected allegations and adopted the claimed due diligence defence. Accordingly, when nothing specific was said to the contrary, we assumed the Aitkens Respondents adopted Beyer's arguments.

[36] The Trust, HCMI and Foundation Securities were not represented and took no position on the above allegations.

B. SV Project and HV Project

[37] Staff alleged that Aitkens, SV Crossing and HV Landing breached s. 93(b) of the Act by engaging "in a course of conduct that they knew or ought to have known perpetrated a fraud on Stoney View and Harbour View investors" (as mentioned, allegations against SV Capital and HV Capital were withdrawn after the hearing). Staff argued that Aitkens had raised money through the SV OMs and HV OMs, then – contrary to disclosure in those OMs – "diverted most of the balance of the funds raised from investors to other private companies he owned or controlled", such that the elements of fraud were met.

[38] Aitkens argued that Staff failed to provide "clear, convincing and cogent" evidence proving the fraud allegations against him. His arguments seemed to include:

- suggested frailties in the type and quality of Staff's evidence;
- that sufficient money was raised for both the SV Project and HV Project from accredited investors, which "cannot rely on the terms set out in an [OM], thereby lessening the arguments of fraudulently misleading any such investors";
- that money raised under the SV OMs and HV OMs was not inappropriately transferred; and
- that Aitkens did not intend to commit fraud.

[39] SV Crossing and HV Landing were not represented and took no position on the above allegations.

C. Authorizing, Permitting or Acquiescing

[40] Corporate entities and trusts can act only through individuals – either directly or through other corporate entities (such as through a corporate trustee acting for a trust). Further, "[a]uthority over the acts of a corporation generally rests, ultimately, with its directors and officers" (*Re Aurora*, 2011 ABASC 501 at para. 199). Therefore, directors and officers of corporations may be held responsible for – or to have authorized, permitted and acquiesced in – the conduct of corporate respondents (see also *Re Maitland Capital Ltd.*, 2007 ABASC 357 at para. 138).

[41] For the same reason, the knowledge and behaviour of certain individual respondents may be attributed to corporate respondents (*Re Mandyland Inc.*, 2012 ABASC 436 at para. 197; *Re Arbour Energy Inc.*, 2012 ABASC 131 at para. 872). When a trustee is a corporation, the knowledge and behaviour of those controlling that corporate trustee may be attributed to it and to the trust (for example, see *Re Shire International Real Estate Investments Ltd.*, 2011 ABASC 608 at paras. 156-60).

[42] Staff alleged that "Aitkens was the guiding mind of all" of the non-individual Respondents, and that he "authorized, permitted or acquiesced in" the misconduct alleged against each of them.

[43] Staff alleged that "Beyer was the directing mind of the marketing efforts for the Trust", and that he "authorized, permitted or acquiesced in the misrepresentations, illegal distributions and misleading certificate allegations". They also alleged that Beyer authorized, permitted or acquiesced in the Trust, 0865701 and HCMI providing misleading OMs to the ASC.

[44] Staff did not address all of the authorizing, permitting and acquiescing allegations in their written argument. However, they clarified in oral argument that they were maintaining all of the allegations in the NOH that Aitkens and Beyer, respectively, authorized, permitted or acquiesced in the specified alleged misconduct. When Staff discontinued their allegations against SV Capital and HV Capital, the panel also took that as an abandonment of the allegations that Aitkens authorized, permitted or acquiesced in the previously-alleged misconduct by SV Capital, HV Capital or both.

[45] The respective written submissions for the Aitkens Respondents and for Beyer did not address these allegations. The issue was only briefly mentioned on Aitkens' behalf in oral argument.

D. Conduct Contrary to the Public Interest

[46] Staff alleged that the Respondents' misconduct, as alleged, was also contrary to the public interest. They repeated that allegation in their written submissions, without additional detail.

[47] Beyer and the Aitkens Respondents did not make submissions regarding Staff's allegation of conduct contrary to the public interest, presumably considering that such allegation would not be sustainable if the other allegations were dismissed.

IV. PRELIMINARY MATTERS

A. Standard of Proof

[48] The applicable standard of proof in ASC enforcement hearings is proof on a balance of probabilities. We must "be satisfied that there is sufficiently clear, convincing and cogent evidence that the existence or occurrence of any alleged fact required to be proved is more likely than its non-existence or non-occurrence" (*Arbour* at para. 38; see also *F.H. v. McDougall*, 2008 SCC 53 at paras. 46 and 49).

[49] We are also "entitled to draw inferences from the evidence as a whole" (*Arbour* at para. 39), including circumstantial evidence. We are mindful of the comments of the Alberta

Court of Appeal in *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 (at paras. 26-28) to ensure that inferences are supported by evidence and are not based on speculation.

B. Relevance and Use of Hearsay Evidence

[50] Pursuant to ss. 29(e) and (f) of the Act, while an ASC hearing panel is to "receive that evidence that is relevant to the matter being heard", "the laws of evidence applicable to judicial proceedings do not apply". Therefore, all relevant evidence – including hearsay evidence – is admissible, subject to the rules of natural justice and procedural fairness (*Arbour* at para. 45; see also *Maitland Capital Ltd. v. Alberta (Securities Commission)*, 2009 ABCA 186). However, we retain a discretion as to the relevant evidence we will admit (*Lavallee v. Alberta (Securities Commission)*, 2010 ABCA 48 at paras. 14-18).

[51] We must also determine the weight to be given to the evidence we receive. In doing so, we consider indicators of its reliability, such as corroboration by other evidence (*Arbour* at paras. 46 and 53). In the case of transcripts of witness interviews compelled by Staff, indicators might include whether or not the witness was sworn or accompanied by counsel (*Arbour* at para. 54; see also *Re TransCap Corp.*, 2013 ABASC 201 at para. 65; and *Alberta (Securities Commission) v. Brost*, 2008 ABCA 326 (affirming *Re Capital Alternatives Inc.*, 2007 ABASC 79) at para. 34).

C. Conflicting Evidence and Credibility

[52] ASC hearing panels are often required to draw conclusions on the credibility of certain witnesses, and to assess conflicting evidence. In doing so, we consider the source of the evidence and whether or not the evidence is consistent with other reliable evidence, such as documents or the testimony of neutral parties with no motivation not to tell the truth. We also consider whether the evidence makes logical sense in the circumstances. A useful statement of the law is from *Faryna v. Chorny*, [1951] B.C.J. No. 152 (BCCA) (at para. 11, also cited in *R. v. Boyle*, 2001 ABPC 152 at para. 107):

> The credibility of interested witness[es,] particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[53] Again, we are mindful of the Alberta Court of Appeal's statements in *Walton* with respect to assessing credibility and the implications of that assessment. This includes the proposition that unless there is positive evidence to the contrary, disbelief of a witness does not necessarily mean that the opposite of what he or she said is true (at para. 36).

[54] Our conclusions on certain specific points of credibility and conflicting evidence are set out later in this decision. Generally, we found credible the evidence of the witnesses from whom we heard, especially when it was consistent with documentary evidence, the testimony of other witnesses, or the overall circumstances.

[55] That said, we had a number of concerns with respect to Aitkens' testimony. While we generally accepted his evidence as to non-controversial matters (and refer to some of that evidence in this decision), we found him to be evasive at times. That evasiveness took the form of lengthy yet non-responsive answers to the questions asked or, at times, took the form of professed memory lapses.

[56] In addition, in some instances Aitkens' evidence directly conflicted with that of other witnesses – most notably, Narfason. Narfason is a chartered accountant, business valuator, insolvency restructuring professional and licensed trustee in bankruptcy. He is a partner with Ernst & Young LLP, and oversees its corporate insolvency and restructuring group through its wholly-owned subsidiary, Ernst & Young Inc. As discussed elsewhere in this decision, Ernst & Young Inc. was appointed the Monitor of certain of the "Harvest group" entities by the Alberta Court of Queen's Bench in proceedings commenced under the *Companies' Creditors Arrangement Act* (**CCAA**).

[57] We found Narfason to be a credible independent witness. Moreover, his evidence was typically consistent with or corroborated by other evidence, in accordance with (as quoted above from *Faryna*) "the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable" in the circumstances. Therefore, where Aitkens' evidence conflicted with Narfason's, we preferred Narfason's. For example, Aitkens claimed that Narfason effectively ignored Aitkens after a certain point in the CCAA proceedings and did not ask Aitkens questions about certain corporate transactions and documents. According to Narfason, he asked Aitkens such questions but did not get helpful or satisfactory replies. We disbelieved Aitkens' evidence on this and believed Narfason's.

[58] Aitkens' evidence also conflicted with Chiu's evidence in some respects. Their testimony was consistent on some matters, such as the facts that they had several business deals and were both involved as shareholders of 1379599 to buy land. However, there was one very significant difference. Chiu testified that he did not receive back his portion of the deposit with which 1379599 purchased what we have called the SV Land, nor any profit from the sale of that land to SV Crossing. In fact, Chiu testified that he was not even aware of the sale of that land to SV Crossing at the time. Aitkens made several different statements regarding Chiu receiving the deposit money back or receiving any profit. The most significant of these statements was Aitkens' testimony that Chiu told Aitkens that Aitkens did not need to give Chiu any of the profit from the sale of that land: "Don't worry about -- don't worry about splitting any profit with me". Although Chiu was not asked directly about that, Chiu stated that he did not even know the SV Land had been sold, so obviously he would have been unaware of any profit. Moreover, we considered that Aitkens' testimony on this point was ludicrous.

[59] We found Chiu to be a credible although somewhat vague witness. He was, however, very clear that he had no decision-making role in 1379599. We believed Chiu's evidence that he received no money back from the sale of the SV Land from 1379599 to SV Crossing, and that he did not even know of that sale at the time. Where his evidence conflicted with Aitkens, we had no hesitation believing Chiu's evidence and disbelieving Aitkens.

D. Lack of Expert Evidence

[60] Also with respect to Narfason, Aitkens complained in closing argument that Narfason was "not an expert in securities law" yet gave "his opinion" with respect to the SV OMs, the HV OMs, and the use of the money raised under them. Aitkens contended that "Narfason was not qualified as an expert in the proceedings" and that "only experts are allowed to offer opinion evidence, and of course only in their area of expertise".

[61] It is true that Narfason is not (and did not purport to be) an expert in securities law, and that he was not qualified as an expert in these proceedings in that area or any other. Narfason was called as a fact witness by Staff, to give evidence with respect to the work of the Monitor and the findings of the Monitor as to the SV Entities' and HV Entities' sources and uses of funds. We accepted his evidence on those factual matters. Insofar as he expressed any opinions, we did not consider them relevant and did not rely on them in arriving at any of our conclusions. We are aware that we must make the final determination on the matters in issue, and we have done so.

E. Adverse Inference and Failure to Call Witnesses

[62] Aitkens criticized Staff for not calling certain people to testify at the hearing: the chief restructuring officer; the chief executive officer of "Harvest Group"; Moore; Rohrer (originally on Staff's witness list, but not called); McCarthy; and an internal bookkeeper. Aitkens stated that evidence from these people would have been some of "the best evidence" and should therefore have been called by Staff. Aitkens also criticized Staff for not calling anyone from Gowlings.

[63] In *The Law of Evidence in Canada*, 4th ed. (Markham: LexisNexis Canada, 2014) at para. 6.450, the authors explain:

> . . . an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. Such failure amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it. [Footnote omitted.]

[64] In *Arbour* (at para. 73), the panel noted that the same applies in proceedings under the Act: "[w]e are entitled to draw an adverse inference against a party when, in the absence of an explanation, that party fails to call a witness who would have knowledge of the facts and presumably would be willing to assist that party." In deciding whether to exercise its discretion to draw an adverse inference, the trier of fact should consider all of the relevant circumstances, such as whether the witness "is within the 'exclusive control'" of one of the parties or is "'equally available'" to all parties (*Howard v. Sandau*, 2008 ABQB 34 at paras. 43-44, citing A. Mewett and P. Sankoff, *Witnesses* (Toronto: Thompson Carswell, 2007) at 2-23).

[65] It is clear that Staff have discretion as to how they will present their case, and against whom. This includes discretion as to which witnesses they will call. We note the statement of the Alberta Court of Appeal in *Brost* that it is up to Staff to "decide what case they [will] present" (at para. 32; see also *Re Proprietary Industries Inc.*, 2005 ABASC 745 at paras. 105, 113 and 147). The Court in *Brost* went on to cite the reasons of L'Heureux-Dubé J. in *R. v. Cook*, [1997] 1 S.C.R. 1113 at para. 39, who stated that she "fail[ed] to see why the defence should not have to call witnesses which are beneficial to its own case". ASC panels have observed that "[t]here is no property in a witness", and that "[i]f a respondent believes that a

certain individual has relevant evidence and that person is not called as a witness by Staff in a hearing, then the respondent can itself call that person to give evidence" (*Proprietary Industries* at para. 109; see also *Cook* at paras. 36-37).

[66] We note that any of the Respondents could have called any of the people referred to by Aitkens. We do not draw any adverse inference from Staff's decision not to call those people. Obviously, if Staff do not exercise their discretion in a way that adduces sufficient evidence to prove their case on a balance of probabilities – whether through witnesses, documents or other records – the case will fail (*Cook* at paras. 30-31).

F. Fairness Arguments

[67] Beyer submitted that two matters characterized as issues of "fundamental fairness" should preclude any findings against him on the allegations.

[68] First, Beyer referred to a review of Trust OM3 conducted by the ASC. He assumed that Trust OMs 1 and 2 would have also been reviewed at the same time. As Trust OM4 was later issued "without comment", he contended that "[i]t can only be taken that there was full compliance with the legislation" regarding the first three Trust OMs. He therefore argued that it was unfair for Staff to later make allegations involving all four Trust OMs, and suggested that "the necessary inference is that some irrelevant consideration was relied upon".

[69] Second, Beyer noted that only two of the Trust OMs' four signatories were the subject of Staff's allegations. Again, he argued that this distinction, without explanation, raised the concern "that considerations other than the purpose of the Act were relied on", leading to "selective" enforcement.

[70] We disagree with Beyer that either of those two matters raised the spectre of irrelevant considerations, selective enforcement, or – as seemingly implied – improper allegations or some sort of persecution against Beyer. Review of one or more aspects of an OM does not mean that the ASC has approved that OM or any previous OMs from the same issuer. Moreover, Staff are not required to make allegations against all individuals or entities involved in impugned activities. Staff have the discretion to make those decisions, and we will not ascribe improper motives simply because a respondent disagrees with Staff's exercise of that discretion: *Re Workum and Hennig*, 2008 ABASC 363 at paras. 95-96; and *Re Workum and Hennig*, 2008 ABASC 719 at paras. 120, 122-23 and 126; see also *Ironside v. Alberta (Securities Commission)*, 2009 ABCA 134 at para. 112.

G. "Due Diligence" Defence

1. Availability of "Due Diligence" Defence

[71] Beyer argued that he "met the standard to establish the defence of due diligence in respect of the [OMs] he signed". He contended that the "[r]egulatory offences" here are "strict liability" offences, thus making available a due diligence defence. The Aitkens Respondents relied on the same arguments relating to the Trust OMs. Aitkens also appeared to raise a due diligence defence in response to the fraud allegations.

[72] For the reasons set out below, we disagree with the contention that misrepresentation and fraud allegations may give rise to a due diligence defence. In our view, misrepresentation and

fraud allegations require Staff to prove a *mens rea* element. There is, therefore, no "due diligence" defence available for such allegations. However, evidence with respect to due-diligence-type steps taken by a respondent would be relevant to that *mens rea* element. In addition, due-diligence-type submissions would typically be considered relevant at any sanction phase of a proceeding. In the circumstances, it was not necessary for us to consider a due diligence defence in connection with the other allegations.

(a) Position of Beyer and the Aitkens Respondents

[73] As set out in Beyer's written submissions, the British Columbia Securities Commission (**BCSC**) recently considered the availability of a due diligence defence in securities regulatory proceedings – see *Re SunCentro*, 2017 BCSECCOM 58. There, the BCSC found that s. 61 of the *Securities Act* (British Columbia) (**BCSA**) (distribution without a prospectus or an applicable exemption) would be contravened unless a due diligence defence were available to respondents and made out in the circumstances (at para. 51).

[74] *SunCentro* referred (at para. 66) to *Whistler Mountain Ski Corp. v. British Columbia (General Manager Liquor Control and Licensing Branch)*, 2002 BCCA 426 at para. 29: "A public welfare offence should be interpreted as a strict liability offence for which the defence of due diligence is available, unless there is clear legislative language that indicates an offence is one of absolute liability . . .". *SunCentro* built on that view in commenting (at para. 67): "The enforcement regime under the [BCSA] is analogous to that considered by the [British Columbia] Court of Appeal in *Whistler Mountain* in that our administrative/regulatory proceedings may lead to significant financial sanctions being imposed on respondents." Accordingly, the BCSC held that the provision at issue created a strict liability offence, with a defence of due diligence available. It concluded that the due diligence defence had been proved by certain respondents in connection with distributions to certain investors (at paras. 68-105).

[75] Beyer argued that the similarities between the BCSA and the Act meant that the same reasoning should apply here, thus making a due diligence defence available for the misrepresentation allegations. As mentioned, he further submitted that he met the required standard of due diligence, having taken "all reasonable care to avoid misleading statements or omissions by informing himself of the . . . disclosure requirements and actual disclosure made" through reviewing the Trust OMs and satisfying himself that the Trust OM process had appropriate oversight "both within the Harvest Group and by professional advisors, namely [the accountants and lawyers]". As noted, Aitkens appeared to advance the same rationale in connection with the allegations of fraud against him.

(b) Position of Staff

[76] Staff accepted that evidence proffered during the hearing by Beyer and the Aitkens Respondents apparently related to "a legal advice or due diligence defence". However, Staff contended that no such defence was available. Staff submitted that reliance on legal advice may be relevant "to the determination of sanctions", but that "it is not clear . . . if reliance on legal or accounting advice is a complete defence to alleged contraventions of the Alberta securities laws". Further, according to Staff, even if such a defence were available in general, it was not established here.

[77] Specifically regarding *SunCentro*, Staff pointed to "strict liability" and "due diligence" as concepts arising from criminal law, not administrative law, and noted that ASC panels are not bound by decisions of the BCSC. Staff also stated that *SunCentro* "is not necessarily an inaccurate statement of law" but they did not think that it "directly accords with the case law from [the ASC]".

[78] Staff referred to *Re CTC Crown Technologies Corp.*, 1998 LNABASC 567 at 23 for their claimed proposition that a legal advice defence is not available "regardless of the content of any advice that may have been given by [a lawyer or accountant] and the reasonableness of the Respondents' reliance on it". The passage cited by Staff was part of a finding that a director was responsible for a misrepresentation in an OM. The panel stated that, even if the lawyers were responsible for an error:

> . . . the ultimate responsibility for the contents of the Offering Memorandum still rests with the [company] directors who signed the certificate, and particularly with [the respondent] Tansowny, who was most directly involved. . . . If the lawyers did err, that is scarcely a mitigating factor because, if Tansowny had acted responsibly, he would surely have detected the error before the Offering Memorandum was finalized.

[79] The panel in *CTC Crown* also stated that a due diligence defence was not available in those proceedings because they were regulatory, not criminal or quasi-criminal (at 14-15).

[80] As noted, Staff further argued that "even if reliance on legal and/or accounting advice" could constitute a full defence in some circumstances, the Respondents had not met the test set out in *Arbour*. After stating (at para. 895) that directors and officers "are responsible for ensuring that their issuer complies with securities laws, including disclosure obligations", the panel in *Arbour* (at para. 897) referred to *Re Mega-C Power Corp.* (2010), 33 OSCB 8290 at para. 261 and *Re Jennix*, 2009 ABASC 368 at paras. 99-102 in setting out four criteria to be met before reliance on legal advice could be a complete defence:

- the lawyer had sufficient knowledge of the facts on which to base the advice;
- the lawyer was qualified to give the advice;
- considering all the circumstances the advice was credible; and
- the respondent made sufficient inquiries, properly applied the advice and reasonably relied on the advice.

[81] Staff acknowledged the qualifications of the lawyers and accountants involved in the Trust Project, but argued that those professionals had insufficient knowledge of the facts, there was scant evidence regarding what advice was actually given to the Trust Respondents, and it appeared that the Trust Respondents did not make sufficient inquiries. Regarding the fraud allegations, Staff stated that it was unclear from Aitkens' testimony from whom and when he had received legal advice, and what such advice was.

[82] Although thus addressing the professional advice evidence and interpretation, Staff did not make specific submissions on the other due diligence arguments made by Beyer – that "Beyer took all reasonable care to avoid misleading statements or omissions" in the

circumstances, through his review of the OMs and his consideration of the internal oversight process (in addition to the external oversight by professional advisors, which assertion Staff did counter).

(c) Analysis

[83] As alluded to by Staff, there is an unfortunate lack of clarity in the law around the concept of due diligence (of which reliance on professional advice may be considered a subset) as a defence to allegations of securities regulatory misconduct. The panel in *SunCentro* observed that "previous [BCSC] decisions and decisions of securities regulatory authorities across the country do not provide clear guidance on this issue" (at para. 64).

[84] Some decisions have held that a due diligence defence is only available where breaches of securities laws are prosecuted quasi-criminally in provincial court (*CTC Crown*, following *Gordon Capital Corp. v. Ontario (Securities Commission)* (1991), 50 O.A.C. 258 (Gen. Div.)). Some have accepted due diligence as a full defence and either declined to find liability where the panel was satisfied that reasonable steps in the circumstances had been taken to avoid a breach (*Re Cartaway Resources Corp.*, 2000 LNABASC 375; *Re YBM Magnex International Inc.*, 2003 LNONOSC 337; and *SunCentro*), or found liability because the panel was not satisfied that the steps purportedly taken were sufficient or sufficiently proved (*Re Euston Capital Corp.*, 2007 ABASC 75; *SunCentro*; and *Re Sino-Forest Corp.*, 2017 LNONOSC 382). Still others have held that due diligence in administrative proceedings is only relevant at the sanctioning stage, where it may be taken into account, if proved, as a mitigating factor in assessing whether orders in the public interest are warranted (*CTC Crown; Re Agagnier*, 2002 LNABASC 527; *Jennix*; *Re Aviawest Resorts Inc.*, 2013 BCSECCOM 319; and *Re Biovail Corp.*, 2010 LNONOSC 729).

[85] The decisions also vary in their respective levels of analysis of the issue, with some seeming to assume the availability of due diligence as a defence – or not – with little (if any) consideration of precedent or underlying legal principles.

[86] This case provides us with an opportunity to re-examine our approach to what the parties referred to as "due diligence" and clarify its applicability when considering allegations of misrepresentation and fraud.

[87] As a starting point, we note that the parties' submissions and some of the case law are coloured by an unfortunate imprecision of terminology. This is demonstrated by the lack of consensus around whether "due diligence" and "reliance on legal (or other professional) advice" are distinct concepts or whether the latter is simply a subset of the former. In addition, the term "due diligence" is complex, given the many aspects of "diligence" that arise in securities and corporate law. The panel in *CTC Crown* alluded to this latter difficulty, noting that the term "is often used loosely" (at 15). However, the panel then explained that in this context, what is meant is "due diligence as that term was used in the *Sault Ste. Marie* decision".

[88] We agree that the matter of terminology and the applicability of what is commonly referred to as the "due diligence" defence is clarified by referring directly to the wording of *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299. The Supreme Court of Canada (**SCC**) described due diligence (at 1325-26) as the taking of "all reasonable care" in the circumstances

of strict liability offences. The court there set out three categories of "offences", the second category of which it called "strict liability" and for which it allowed a due diligence defence:

> I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:
>
> 1. Offences in which *mens rea*, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.
>
> 2. Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. . . .
>
> 3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault.
>
> Offences which are criminal in the true sense fall in the first category. Public welfare offences would *prima facie* be in the second category. They are not subject to the presumption of full *mens rea*. An offence of this type would fall in the first category only if such words as "wilfully," "with intent," "knowingly," or "intentionally" are contained in the statutory provision creating the offence. . . .

[89] Some decision-makers seem to have defaulted to the view that the SCC's categorization above applies only to "offences" in a narrow sense of the word: matters prosecuted in court, either criminally or quasi-criminally (e.g., *Gordon* and *CTC Crown*). As noted, others have declined to follow such a narrow interpretation and have been prepared to include "[p]ublic welfare" matters prosecuted administratively in the *Sault Ste. Marie* "strict liability" category, unless it is clear they should be considered offences of absolute liability (*Whistler Mountain* at para. 29; see also decisions following *Whistler Mountain*, e.g., *504174 N.B. Ltd. (c.o.b. Choo Choo's) v. New Brunswick (Minister of Public Safety)*, 2005 NBCA 18 and *SunCentro*).

[90] We are satisfied that the word "offences" should be construed broadly enough to apply to securities administrative enforcement proceedings. Accordingly, we are of the view that it is appropriate to use the *Sault Ste. Marie* taxonomy in considering the availability of a due diligence defence in securities law administrative proceedings.

[91] However, we do not consider allegations of misrepresentation or fraud to fall within the strict liability category described in *Sault Ste. Marie*. Instead, we consider that the requisite knowledge element for a misrepresentation contravention under s. 92(4.1) or a fraud contravention under s. 93(b) of the Act falls under the first category from *Sault Ste. Marie*: breaches requiring proof of "some positive state of mind such as intent, knowledge, or recklessness". As the SCC explained, these are signalled by the use of "such words as 'wilfully,' 'with intent,' 'knowingly,' or 'intentionally'" in the statutory provision at issue. This aspect was not considered in *SunCentro* because s. 61 of the BCSA did not have a knowledge element. It stated only that "a person must not distribute a security unless . . . a preliminary prospectus and a prospectus respecting the security have been filed with the executive director" and receipts have

been issued. As the provision did not require proof of any particular "state of mind", the panel there considered its choice to be between strict liability with a due diligence defence or absolute liability with no defence at all. It followed the reasoning in *Whistler Mountain* and characterized the section as creating a strict liability offence (regardless of the forum in which it was prosecuted), not an absolute liability offence, and thus found that the defence of due diligence was available (*Sun Centro* at paras. 60-68).

[92] As discussed later in this decision, a misrepresentation finding under s. 92(4.1) of the Act requires us to conclude that the particular respondent "knows or reasonably ought to know" certain things. As also discussed later, a fraud finding under s. 93(b) requires us to conclude that a particular respondent "knows or reasonably ought to know" that certain conduct would perpetrate a fraud. Given these knowledge components, we conclude that the misconduct described in s. 92(4.1) and s. 93(b) would fall within the first category set out in *Sault Ste. Marie*.

[93] Accordingly, to the extent that the concepts of strict liability and the related due diligence defence apply in the securities law context, they are not relevant here. There can be no complaint that any of the Respondents are being unfairly deprived of advancing a defence, because the knowledge element is part of the misconduct alleged under s. 92(4.1) or s. 93(b), and therefore must be proved by Staff. We also note that assessing the knowledge element may involve an examination of some of the same considerations as for a due diligence defence to a strict liability offence, including consideration of the criteria for reasonable reliance set out in *Arbour* and cited above. Therefore, a reasonable belief or reasonable steps taken may be indicators that a respondent did not know or ought not reasonably to have known of any misrepresentations or fraudulent conduct.

[94] Assessing the knowledge element may also involve a consideration of reliance on professional advice, as such advice may be the foundation of a reasonable belief or constitute reasonable steps taken. We do not accept that *CTC Crown* supports Staff's contention that a "legal advice defence is not available" regardless of the advice or how reasonable any reliance on such advice may have been. In *CTC Crown*, the respondent, Tansowny, tried to rely on the lawyer's failure to disclose in an OM certain compensation paid to directors. That panel concluded that Tansowny knew the compensation should not have been paid and would have noticed the omission had he read the OM at issue before certifying it. This, therefore, was not a conclusion that legal advice cannot be relied on, but that Tansowny could not properly claim such reliance in those circumstances.

[95] Our approach here is consistent with that taken in a number of past decisions of Canadian securities regulatory authorities wherein hearing panels considered the presence or absence of a knowledge element in the provision alleged to have been breached.

[96] In *Cartaway*, for example, the ASC panel did not find an outside director liable for a breach of disclosure obligations or for a misrepresentation in a news release because he had "exercised appropriate prudence and due diligence under the circumstances" and "could not reasonably be expected to have known" of the material change at issue (at 12-13) or the misrepresentation (at 34). In *Re Dobler*, 2004 ABASC 927, an ASC panel held that state of mind was not relevant to the determination of whether the respondents had breached a cease trade order because such an order "bars a type of activity, not a state of mind" (at paras. 113-14).

2. Conclusion on "Due Diligence" Defence

[97] Based on the above, we consider such aspects as reasonable belief, reasonable steps and reliance on professional advice as part of our analysis of the elements of the misrepresentation allegations made by Staff in relation to the Trust Project and the fraud allegations in relation to the SV Project and the HV Project. Although we did not find a due diligence defence available in these circumstances for the foregoing reasons, we considered the arguments made on behalf of Beyer (adopted by the Aitkens Respondents) regarding steps taken to review material and claimed reliance on legal or accounting advice (or both) when assessing the requisite level of knowledge for the misrepresentation allegations. We also considered the arguments made on behalf of Aitkens regarding claimed reliance on legal advice for the fraud allegations. Such arguments may also be considered at any sanction hearing.

V. ANALYSIS – TRUST PROJECT

A. Background

[98] The first set of allegations related to the Trust and the Trust OMs. Two alleged misrepresentations in the Trust OMs were at issue: (1) the omission of information regarding the profit made by Harvest Group LP and Exen on their sales of Neo Shares to the Trust (the **Neo Shares Profit**); and (2) the omission of information regarding a consulting agreement dated December 23, 2009 between Neo and Foundation Resources LP (the **Neo Consulting Agreement**) and Neo's consequent working interest (the **Neo Working Interest**) in certain Foundation Resources LP properties. The other Trust Project allegations were connected to these alleged misrepresentations. Details of the Neo Shares acquisitions by Harvest Group LP and Exen and their subsequent sales to the Trust are set out below, as are details of the Neo Consulting Agreement and the Neo Working Interest.

B. Aitkens' Involvement with Trust OMs

[99] According to Aitkens, he "very rarely" spoke with anyone at Gowlings regarding the Trust OMs "once we had the initial framework set up". Aitkens testified that Rohrer "was the point man [doing] 95 percent of the interaction with Gowlings on all of these [Trust OMs]". Aitkens denied having a role in preparing the Trust OMs or providing information for use in them.

[100] Aitkens testified that he reviewed Trust OM1 and acknowledged that he would have seen two or three drafts before it was finalized. He also confirmed that he reviewed the content of and signed Trust OM1 and had not raised any concerns with Gowlings about the content. Aitkens said that he spoke with Rohrer about Trust OM1, and that Rohrer would have highlighted differences from the last draft, "then if there was anything that needed to be discussed or talked about, we would talk about it".

[101] Aitkens testified to the effect that his involvement was similar for Trust OM2 and Trust OM3. Although he was not asked about his involvement in Trust OM4, we assume it was similar (and, in any event, nothing turned on this point).

C. Beyer's Involvement with Trust OMs

[102] Beyer testified that he signed the four Trust OMs as "promoter" but did not "have a direct role" in preparing them:

> . . . My role was as a trustee to be satisfied with the process by which the offering memorandum would be produced, and then, of course, in the final stages, once the offering memorandum is created, to review and be satisfied with the accuracy of the offering memorandum and sign off on it.

[103] According to Beyer, Rohrer was hired in 2009 to be the "person in charge of producing offering memorandums":

> [Rohrer] did not have any other primary responsibility; his responsibility was to work with [PwC] and with Gowlings to provide all the information that they requested, all the information relative to producing an accurate offering memorandum, and so he was charged with the responsibility of working with PwC and Gowlings in producing an accurate -- accurate offering memorandum.

[104] Beyer said that his role with the trust structure was merely being briefed on the structure and its advantages. He also testified that no professional adviser told him that further disclosure was required in the Trust OMs regarding the purchase of Neo Shares from Harvest Group LP or Exen, or regarding the Neo Consulting Agreement.

D. Neo

[105] Neo's business was finding and developing oil and natural gas properties.

[106] The Trust and connected entities became involved with Neo after Aitkens met with Martin Bunting (**Bunting**) of Redtail Capital Partners (**Redtail**), which helped companies with financing. Baker had approached Redtail about financing, and Bunting already knew Aitkens. Bunting told Aitkens about the Neo opportunity. Baker, Bunting and Aitkens met in May 2009, and Baker presented the Neo opportunity to Aitkens. More discussions followed. In a May 21, 2009 email to Aitkens, Bunting stated that the Neo project "fits [Aitkens'] real estate model for his investors. He can buy in at $1.75, sell through to Foundation investors at an easily justifiable $2.50 to $3.00 with plenty of upside for them." Bunting's evidence was clear that the increase in the Neo Shares' value and the consequent "substantial upside" to investors would depend on gas prices and on "how much drilling and how much workup [was] done on the property" before such an increased value would materialize.

[107] The discussions between Baker and Aitkens led to a private placement to Foundation Resources Inc. (**FRI**) of 500,000 Neo Shares at $1.75 per Neo Share in July 2009 (Aitkens was the sole director and voting shareholder of FRI). Further discussions led to the signing of a December 14, 2009 warrant giving Harvest Group LP the right to purchase up to $15 million worth of Neo Shares at $1.75 per Neo Share (the **Harvest Group Warrant**). We are satisfied from the evidence that the fundamental terms of the Harvest Group Warrant – including the number of securities to be issued and the exercise price – had been agreed to by early December at the latest and definitely before Trust OM1's December 10, 2009 date. Baker testified that the anticipated proceeds from the Harvest Group Warrant "would finance the majority of [Neo's] natural gas development".

[108] Aitkens testified that Baker told him about Neo, including "their history, what they were looking for, and . . . maybe what some potential opportunities to work together were". Aitkens said that Neo was looking for "someone who could, essentially, buy their shares at a wholesale level and then -- and then do -- well, either hold them or -- or do whatever they wanted with them". He also stated that either Bunting or Baker or both said there was "good value at 350", which we interpret to have meant a price of $3.50 per Neo Share. As set out later in this decision, we conclude that a value of approximately $3.50 per Neo Share was discussed, but was conditional on a number of factors.

E. Wording in Trust OMs

1. Offering Specifics

[109] The Trust OMs' terms differed slightly:

- Trust OM1 (dated December 10, 2009) offered Trust Securities for $10 per Trust Security, with a minimum subscription amount of $4,000. The minimum to maximum offering range was $1 million to $35 million.

- Trust OM2 (dated April 30, 2010) offered Trust Securities for $11.25 per Trust Security, with a minimum subscription amount of $4,500. The minimum to maximum offering range was $1.125 million to $39.375 million.

- Trust OM3 (dated August 18, 2010) offered Trust Securities for $12 per Trust Security, with a minimum subscription amount of $4,800. The minimum to maximum offering range was $480,000 to $24 million.

- Trust OM4 (dated May 12, 2011) offered Trust Securities for $12 per Trust Security, with a minimum subscription amount of $4,800. The minimum to maximum offering range was $240,000 to $19.8 million.

2. Use of Proceeds and Purchases of Neo Shares

[110] The "Use of Net Proceeds" section in each Trust OM stated that proceeds would be used to acquire Foundation Resources LP Units through the Business Trust.

[111] More specific information was found elsewhere in the Trust OMs, including under "Short Term Objectives". Both Trust OM1 and Trust OM2 stated that proceeds would be used to acquire Neo Shares through Foundation Resources LP. For Trust OM1, about one half of the maximum net proceeds was allocated for Neo Shares; for Trust OM2, about one quarter of the maximum net proceeds was allocated for Neo Shares. The remaining net proceeds were to be used to "[a]cquire and/or invest in various exploration and production and enhanced oil recovery companies and improve undervalued property of [Foundation Resources LP]". Trust OMs 3 and 4 did not refer to purchases of Neo Shares, but only to the acquisition of or investment in various oil and gas assets.

[112] Trust OM3 stated: "As of the date of this Offering Memorandum, the Trust has acquired, through Foundation Resources LP, 4,515,000 Neo Shares from Harvest Group LP for a value of $14,673,750."

[113] Trust OM4 stated:

> As of the date of this Offering Memorandum, the Trust has acquired, through Foundation Resources LP, 4,015,000 Neo Shares from Harvest Group Limited Partnership, a related party of the Trust, for a value of $13,048,751 and 1,933,810 Neo Shares from Exen Resources Inc., a related party of the Trust through common management, for a value of $4,267,500.

[114] We were directed to no explanation for why purchases of Neo Shares from Exen were not mentioned in Trust OM3. As for the 500,000 difference between Trust OMs 3 and 4 as to the number of Neo Shares acquired from Harvest Group LP, Baker testified that the larger amount likely included the 500,000 Neo Shares sold by FRI to the Trust (discussed above). We did not consider those inconsistencies relevant to our decision.

3. Roles of Aitkens and Beyer

[115] Aitkens' and Beyer's roles were set out in the "Summary" in Trust OM1:

> The Trust will be managed by the Trustee [0865701] and the Administrator [HCMI]. The directors of the Trustee are Ronald J. Aitkens, Roy J. Beyer and Mark McCarthy and the director of the Administrator is Ronald J. Aitkens. The Business Trust will be managed by the Trustee of the Business Trust [Foundation Capital Investment] and the Manager [HCMI]. The directors of the Trustee of the Business Trust are Ronald J. Aitkens, Roy J. Beyer and Mark McCarthy and the director of the Manager is Ronald J. Aitkens. Foundation Resources LP will be managed by its General Partner, [Foundation Resources GP], whose directors are Ronald J. Aitkens, Roy J. Beyer and Terressa Moore. The General Partner will be responsible for implementing the investment strategy of Foundation Resources LP including the identification and selection of investment opportunities, related due diligence, negotiation, approvals and ongoing services related to exploration and production and enhanced oil recovery projects.

[116] Aitkens' and Beyer's roles outlined in the summaries in Trust OMs 2, 3 and 4 were identical to those set out in Trust OM1.

[117] The Trust OMs listed Aitkens as:

- Director, President and Secretary of 0865701 since November 6, 2009;
- Director, President and Secretary of Foundation Capital Investment since November 3, 2009;
- Director and President of HCMI since October 1, 2002; and
- Director, President and Secretary of Foundation Resources GP since December 1, 2009 (Trust OM4 added the title Chief Executive Officer).

[118] The Trust OMs also gave Aitkens' "Principal Occupation and Related Experience":

> Mr. Aitkens is the founding President of the Harvest Group of Companies and has served as the President to the Harvest Group of Companies since May 1994. Mr. Aitkens is a Certified Financial Planner with specific focus on real estate investments and has over 15 years of experience in managing investment syndications.

[119] The Trust OMs listed Beyer as:

- Director and Vice President of 0865701 since November 6, 2009;
- Director and Vice President of Foundation Capital Investment since November 3, 2009; and
- Director and Vice President of Foundation Resources GP since December 1, 2009 (Trust OM4 added the title Chief Operating Officer).

[120] The Trust OMs also gave Beyer's "Principal Occupation and Related Experience":

> Mr. Beyer has been the Senior Marketing Director of Foundation Capital Corporation, a private Alberta corporation focusing on real estate development projects, since November 2006. Prior thereto Mr. Beyer served as President of Beyer Consulting Ltd., a private Alberta corporation specializing in providing marketing services on a consultancy basis.

4. Powers of 0865701 as Trustee

[121] According to each of the Trust OMs, the powers of 0865701 as trustee (subject to the deed of trust creating the Trust) were extensive:

> . . . [0865701] has, without further or other action or consent, and free from any power or control on the part of the [holders of Trust Securities], full and absolute power, control and authority over the Trust Assets and over the affairs of the Trust to the same extent as if [0865701] was the sole and absolute beneficial owner of the Trust Assets in its own right with full power and authority to do all acts and things as it in its sole judgment and discretion deems necessary or incidental to, or desirable for, carrying out the purposes of the Trust . . . .

[122] This included the power to issue Trust Securities "for such consideration as [0865701] may deem appropriate".

5. Disclosure in Financial Statements Included with Trust OMs

[123] Financial statements for the Trust were included with each Trust OM. There was no relevant disclosure regarding the Neo Shares purchases in the financial statements in Trust OM1 or Trust OM2.

[124] Trust OM3 contained some information about Neo Share purchases in the notes to the financial statements:

> [Note 4] During the three months ended March 31, 2010 the Trust invested in [Neo], a private oil and gas company with assets in Manitoba, Saskatchewan and Alberta. The Trust purchased 1,835,000 common shares from a related party (note 10) for $3.25 per share through private placement for a total investment of $5,963,750.
>
> . . .
>
> [Note 10] During the three months ended March 31, 2010, the Trust acquired common shares of a third party from [Harvest Group LP] at $3.25 per share. These shares were purchased from the third party by [Harvest Group LP] through an option arrangement with the third party at $1.75 per share. The Trust is related to [Harvest Group LP] through common management.

[125] The financial statements included with Trust OM4 stated that the Trust "is related to HCMI, [Harvest Group LP] and Exen through common management".

[126] A note in the financial statements for each of the Trust OMs stated in part that: "The Trust was established for the purposes of investing, through Foundation Resources LP . . . , in a certain Alberta based oil and gas company acquired from a related entity, [Harvest Group LP]."

6. Certification of OMs

[127] Aitkens, Beyer, Moore and McCarthy each certified that each of the Trust OMs contained no misrepresentations: Aitkens and McCarthy on behalf of 0865701; Aitkens and Moore on behalf of HCMI; and Aitkens, Beyer and Moore as "Promoters".

F. Purchase of Neo Shares by the Trust

[128] The evidence referred to by Staff showed the transactions in which Harvest Group LP and Exen acquired Neo Shares from Neo at a value of $1.75 and sold them to the Trust (via Foundation Resources LP) for prices ranging from $1.75 to $3.25 (with the majority sold to the Trust by Harvest Group LP at $3.25).

[129] Harvest Group LP's purchases of Neo Shares occurred through the exercise of the Harvest Group Warrant between February 5, 2010 and June 29, 2010. Its sales of Neo Shares to the Trust occurred between February 16, 2010 and July 27, 2010. Exen acquired Neo Shares on September 16, 2009 and sold Neo Shares to the Trust on April 26, 2010 for $2.25 per Neo Share and on April 27, 2010 for $3.25 per Neo Share (because the October 27, 2010 sale by Exen to the Trust was at the same $1.75 value at which Exen acquired the Neo Shares, there was no Neo Shares Profit for that sale). FRI also acquired Neo Shares and sold them to the Trust. The details of these acquisitions and sales are as follows:

FRI acquisition and sale

- July 6 to July 10, 2009 – FRI purchased 500,000 Neo Shares for $1.75 per Neo Share; and

- mid-2010 – FRI sold 500,000 Neo Shares to the Trust for $3.25 per Neo Share. (Baker testified that he initially objected to this transaction because FRI would receive the money, not Neo. In Baker's view, "it was wholly inappropriate that Foundation stop funding us [Neo] when their entire organization was based around the success of Neo through its equity".)

Harvest Group LP acquisitions and sales

- December 14, 2009 – Harvest Group LP acquired the Harvest Group Warrant from Neo for $1.00; this allowed Harvest Group LP to purchase up to 8,571,428 Neo Shares by June 30, 2010 for $1.75 per Neo Share;

- February 5 and 12, 2010 – Harvest Group LP purchased a total of 230,000 Neo Shares through the Harvest Group Warrant for $1.75 per Neo Share;

- February 16, 2010 – Harvest Group LP sold 230,000 Neo Shares to the Trust for $3.25 per Neo Share;

- March 5, 2010 – Harvest Group LP purchased 280,000 Neo Shares through the Harvest Group Warrant for $1.75 per Neo Share;

- March 9, 2010 – Harvest Group LP sold 280,000 Neo Shares to the Trust for $3.25 per Neo Share;

- March 19, 2010 – Harvest Group LP purchased 925,000 Neo Shares through the Harvest Group Warrant for $1.75 per Neo Share;

- March 26, 2010 – Harvest Group LP sold 925,000 Neo Shares to the Trust for $3.25 per Neo Share;

- March 31, 2010 – Harvest Group LP purchased 400,000 Neo Shares through the Harvest Group Warrant for $1.75 per Neo Share;

- March 31, 2010 – Harvest Group LP sold 400,000 Neo Shares to the Trust for $3.25 per Neo Share;

- May 10, 2010 – Harvest Group LP purchased 800,000 Neo Shares through the Harvest Group Warrant for $1.75 per Neo Share;

- May 20, 2010 – Harvest Group LP sold 800,000 Neo Shares to the Trust for $3.25 per Neo Share;

- May 28, 2010 – Harvest Group LP purchased 800,000 Neo Shares through the Harvest Group Warrant for $1.75 per Neo Share;

- June 3, 2010 – Harvest Group LP sold 800,000 Neo Shares to the Trust for $3.25 per Neo Share;

- June 29, 2010 – Harvest Group LP purchased 580,000 Neo Shares through the Harvest Group Warrant for $1.75 per Neo Share; and

- July 27, 2010 – Harvest Group LP sold 580,000 Neo Shares to the Trust for $3.25 per Neo Share.

Exen acquisition and sales

- September 16, 2009 – Exen acquired 2,975,432 Neo Shares in exchange for assets, with the acquisition valued at $1.75 per Neo Share;

- April 26, 2010 – Exen sold 266,667 Neo Shares to the Trust for $2.25 per Neo Share;

- April 27, 2010 – Exen sold 500,000 Neo Shares to the Trust for $3.25 per Neo Share; and

- October 27, 2010 – Exen sold 750,000 Neo Shares to the Trust for $1.75 per Neo Share.

G. Neo Consulting Agreement

[130] Neo and Foundation Resources LP entered into the Neo Consulting Agreement, which was dated as of December 23, 2009. The Neo Consulting Agreement gave Neo a 5% working interest in certain Foundation Resources LP properties managed by Neo. Neo also had an option to acquire an additional 20% interest in those properties. Together, the 5% certain working interest and the 20% conditional working interest are what we refer to as the Neo Working Interest. The exercise price for the option was 20% of Foundation Resources LP's original acquisition cost of the subject property, plus 20% of the capital costs expended by Foundation Resources LP between the acquisition date and the exercise date, less 20% of the net production revenues.

[131] Aitkens acknowledged "sign[ing] off on" the Neo Consulting Agreement. He denied having anything else to do with it, stating that Rohrer was "the point person on that". Aitkens' understanding was that Neo suggested the 5% working interest and the "incentive" (presumably referring to the 20% option). Beyer testified that Gowlings "primarily drafted" the Neo Consulting Agreement, which was "finalized in consultation by the legal counsel with Neo".

[132] Baker testified that he was surprised the Neo Consulting Agreement and its terms were not set out in the Trust OMs, but that when he asked Rohrer about it, Rohrer responded that disclosure as a material contract was not necessary. Aitkens testified that "the Gowlings folks said that it was just a regular course of business agreement, that didn't have to be disclosed".

H. The Law

1. Misrepresentations

[133] During the relevant period, s. 92(4.1) of the Act provided that:

> (4.1) No person or company shall make a statement that the person or company knows or reasonably ought to know
>
> (a) in any material respect and at the time and in the light of the circumstances in which it is made,
>
> (i) is misleading or untrue, or
>
> (ii) does not state a fact that is required to be stated or that is necessary to make the statement not misleading,
>
> and
>
> (b) would reasonably be expected to have a significant effect on the market price or value of a security or an exchange contract.

[134] As stated in *Arbour* (at para. 753), to establish a misrepresentation under s. 92(4.1), Staff must prove that:

> (a) a statement was made by a respondent;
>
> (b) the respondent knew or reasonably ought to have known that the statement was, in a material respect, untrue or omitted a fact required to be stated or necessary to make the statement not misleading; [and]
>
> (c) the respondent knew or reasonably ought to have known that the statement would reasonably be expected to have a significant effect on the market price or value of a security.

[135] As to the last factor, the context or "circumstances in which [a statement or omission was] made" must be considered; a significant fact for one issuer at a given point in time may not be significant for another (*Re Stan*, 2013 ABASC 148 at para. 225).

[136] Context may be particularly important when assessing the materiality of information concerning contingent events – those which may or may not actually occur. In this regard, we adopt the reasoning of the OSC panel in *Re Sheridan*, 1993 LNONOSC 21. The issue in *Sheridan* was whether a pending court application for an injunction was a material change for the issuer that should have been disclosed. The OSC panel reviewed US case law and commentary, then suggested (at paras. 36-39) that two factors needed to be considered: (1) the impact the mere fact of the contingent event (in that case, the fact an application had been filed at all) might have on an issuer's securities; and (2) the probability that the contingent event would occur (in that case, the probability that the injunction would be granted) and the effect it would have on the issuer if it did occur. The OSC panel concluded that a contingent event is material "'when there are high probabilities the event will occur and high magnitudes of the event's impact on the [issuer]'" (at para. 38, citing J.W. Bagby and J.C. Ruhnka, "The Predictability of Materiality in Merger Negotiations Following *Basic*[, *Inc. v. Levinson*, 485 U.S. 224 (1988)]", (1988), 16 Sec. Reg. L.J. 24.5).

[137] Also with respect to the element of materiality, a prior decision of an ASC panel noted that "[c]ommon-sense inferences . . . may suffice in certain cases" (*Arbour* at para. 764, citing *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23 at paras. 58 and 61). While investors' evidence with respect to the impact the information may have had on their investment decisions may be considered (see, for example, *Aurora* at para. 146), neither that evidence nor expert evidence on market price or value is required to meet the legal test (*Arbour* at paras. 763-66; see also *R. v. Zelitt*, 2003 ABPC 2 at paras. 32-34, distinguishing, *inter alia*, *R. v. Coglon*, [1998] B.C.J. No. 2573 (British Columbia Supreme Court)). That is because an ASC panel is itself an expert tribunal with the specialized knowledge and experience necessary to "draw inferences as to the objective view of a reasonable investor" (*Arbour* at para. 765).

[138] A hearing panel will find that a statement or omission would reasonably be expected to have a significant effect on the market price or value of a security if it can reasonably be concluded that the misrepresentation would influence an investor's decision to purchase the security and the price that investor would be prepared to pay for it. Stated another way, the determination is "whether there is a substantial likelihood that such facts would have been

important or useful to a reasonable prospective investor in deciding whether to invest in the securities on offer at the price asked" (*Arbour* at para. 765, citing *Sharbern* at para. 61).

[139] A panel can find a breach of s. 92(4.1) even in the absence of proof that any particular investor relied on any particular misrepresentation or omission (*Arbour* at para. 768; see also *Re Cloutier*, 2014 ABASC 2 at para. 360):

> Securities regulation does not focus on what the market or investors do with mandated information provided to them. Rather, the objective of securities regulation is to oblige those who seek money from public investors and the capital market to provide current, truthful and accurate information in prescribed formats, which can then be used by those in the capital market as a basis for making reasonably informed investment decisions. That a particular investor or investors may not read or rely on such information in making investment decisions does not relieve an issuer of its obligations to provide accurate and reliable information and to comply with Alberta securities laws when soliciting money from the public. . . .

[140] Finally, we note that accurate disclosure of an issuer's intended use of investment funds is among the most important information an investor can and should be given. That is why such disclosure is mandated by law in securities offering documents (see, for example, the requirements of s. 2.9(5) of NI 45-106 and the prescribed form, discussed further below). As stated by the ASC panel in *Arbour* (at para. 776):

> . . . The use to which an issuer proposes to put money raised is obviously one of the most important factors considered by reasonable investors in deciding whether to invest in the issuer's securities. Such decisions would ultimately reasonably be expected to have a significant effect on the market price or value attributed to the securities. As this Commission noted in *Re Dobler*, 2004 ABASC 927 (at para. 220):
>
> > . . . Disclosure of the use of proceeds of an offering of securities has long been a key element of prospectuses and other offering documents, an element taken seriously by securities regulators and market participants. . . . The assumption underlying the requirement, and the seriousness with which it is taken, is that investors being asked to put money in a company, and market participants observing the process, care about how the money will be spent. Different proposed uses of proceeds may well affect investors' willingness to invest, and the prices they are willing to pay. . . .

2. False Certificates

[141] Sections 2.9(8)-(12) of NI 45-106 require an OM to include a certificate signed by certain responsible parties acting on behalf of the issuer and stating that "[t]his [OM] does not contain a misrepresentation". That certificate is required to have been true both at the date it was signed, and at the date the OM was delivered to each purchaser (s. 2.9(13)).

3. Providing Misleading OMs to the ASC

[142] Section 221.1(2) of the Act provides:

> No person or company shall make a statement, whether oral or written, in any document, material, information or evidence provided to the [ASC], that, in a material respect and at the time and in light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading.

[143] To prove a breach of this section, Staff must prove that: (a) a statement was made to the ASC; (b) at the time and in light of the circumstances under which it was made, the statement was misleading or untrue; and (c) the statement was misleading or untrue in a material respect (*Re Hagerty*, 2014 ABASC 237 at para. 130).

[144] As observed in *TransCap* (at para. 89), there is a close parallel between ss. 92(4.1) and 221.1 of the Act: both prohibit a "misrepresentation" as defined in s. 1(ii) of the Act. "[M]aterial fact" is defined in s. 1(gg) as one that "would reasonably be expected to have a significant effect on the market price or value of the securities" being considered.

[145] Under NI 45-106, OMs are documents required to be filed with the ASC.

4. Illegal Distributions

[146] Section 110(1) of the Act provides in part that no person or company is permitted to trade in a security if the trade would be a distribution of the security unless a preliminary prospectus and prospectus have been filed with and receipted by the Executive Director of the ASC (**Prospectus Requirement**). The Prospectus Requirement is intended to ensure that investors are given appropriate and comprehensive disclosure describing the details of an investment offered.

[147] In some instances, where certain investment risks are decreased (usually due to the nature of the security, the sophistication of the investor, or the relationship between the investor and the issuer), an exemption from the Prospectus Requirement may be available.

[148] To find that s. 110 of the Act was breached, we must conclude that: (i) the conduct involved a "security", a "trade" and a "distribution" (all as defined in the Act); (ii) prospectuses for the distribution were not filed with or receipted by the ASC; and (iii) no exemptions from the Prospectus Requirement were available.

[149] NI 45-106 provided for a number of exemptions from the Prospectus Requirement at the relevant time. This included the AI Exemption, available for investors meeting certain financial eligibility criteria (s. 2.3 of NI 45-106), and the OM Exemption, available for investors who met certain financial criteria and who were given certain mandated disclosure by way of an OM (s. 2.9).

[150] Some of the specific requirements of the OM Exemption in s. 2.9 of NI 45-106 were of particular relevance to this matter.

[151] First, an OM must "be in the required form" (s. 2.9(5) of NI 45-106). The applicable "required form" here was Form 45-106F2 *Offering Memorandum for Non-Qualifying Issuers* (**Form 45-106F2**), which set out the information to be included in the OM, such as "the key terms of all material agreements" (item 2.7 of Form 45-106F2). This included "purchase price and payment terms", and "for any transaction involving the purchase of assets by or sale of assets to the issuer from a related party . . . the cost of the assets to the related party, and the cost of the assets to the issuer". As discussed later in this decision, "related party" was a defined term.

[152] Second, as noted, an OM was to include a certificate stating that the OM contained no misrepresentations.

[153] Failures to adhere to these requirements of the OM Exemption (among others) may range in seriousness from "the minor to the grave" (*Capital Alternatives* at para. 277). Serious failures to adhere to the requirements of the OM Exemption could render the OM Exemption unavailable, as there would be no valid OM on which to base it (*Capital Alternatives* at paras. 279-82; see also *Arbour* at para. 861). The absence of another applicable exemption could in turn render the distribution illegal, contrary to s. 110 of the Act.

I. Undisclosed Neo Shares Profit

1. Allegations

[154] As mentioned, Staff alleged that the Trust Respondents contravened: s. 92(4.1) of the Act by omitting certain statements in the Trust OMs; s. 221.1 of the Act by providing misleading Trust OMs to the ASC; s. 2.9(13) of NI 45-106 by furnishing false certificates in the Trust OMs; and s. 110(1) of the Act by illegally distributing Trust Securities (which latter contravention was also alleged against Foundation Capital and Foundation Securities). Staff also alleged that Aitkens and Beyer authorized, permitted or acquiesced in such misconduct by the Trust, 0865701, HCMI, Foundation Capital and Foundation Securities. Finally, Staff alleged that all such misconduct was contrary to the public interest.

[155] We discuss here those allegations in the context of the omission from the Trust OMs of information regarding the Neo Shares Profit.

2. Analysis

(a) Omission

[156] There was no dispute that Trust OMs 1 and 2 did not include information about the Neo Shares Profit nor the prices at which Harvest Group LP and Exen acquired Neo Shares. Beyer and the Aitkens Respondents noted that information about Harvest Group LP's Neo Shares Profit was disclosed in the financial statements attached to Trust OM3, and that some information regarding the transactions was provided in Trust OM4 and its attached financial statements.

[157] There was also no dispute that each of the Trust Respondents (through the individual signatories) certified that the Trust OMs did not contain any misrepresentations – including misrepresentations by omission.

(b) Misrepresentation

(i) Parties' Positions

(A) Staff

[158] Staff argued that the omission of information about the Neo Shares Profit meant that the Trust OMs were misleading, viewed in one or both of two ways:

- First, Staff pointed to item 2.7 of Form 45-106F2, which required certain disclosure of material agreements with a related party in the "material agreements" section of an OM. Such required disclosure included the cost of assets acquired by the issuer from a related party. Here, Staff argued that the profit made by each of Harvest Group LP and Exen (allegedly related parties to

the Trust) from selling Neo Shares to Foundation Resources LP should have been disclosed. Staff seemingly would have been satisfied that there was no material omission had the Trust OMs clearly disclosed either the Neo Shares Profit or the price at which each of Harvest Group LP and Exen acquired Neo Shares.

- Second, Staff maintained that the Trust OMs were also materially misleading because they failed to disclose elsewhere in the Trust OMs (i.e., other than in the material agreements section of the Trust OMs) the Neo Shares Profit made by each of Harvest Group LP and Exen. Again, Staff seemingly would have been satisfied that there was no material omission had the Trust OMs disclosed either the Neo Shares Profit or the price at which each of Harvest Group LP and Exen acquired Neo Shares. This argument was independent of the requirement in item 2.7 of Form 45-106F2, but was based on the same facts. We have treated it as an alternative to the Form 45-106F2-based argument.

[159] Staff's position was that the omitted facts "would reasonably be expected to have a significant effect on the market price or value placed on securities [here, the Trust Securities] by reasonable investors", with a proxy for this being whether knowledge of those facts "would have been important or useful to a reasonable prospective investor in deciding whether to invest in" such securities at the price asked (citing *Arbour* at para. 765). Staff argued there was "a substantial likelihood" that disclosure of the Neo Shares Profit "would have been important or useful to a reasonable prospective investor in deciding whether to" purchase Trust Securities.

[160] Specifically, Staff argued that investors in Trust Securities "would likely have concluded that the Trust was getting a bad deal" by acquiring the Neo Shares at the price paid. Staff submitted that there was insufficient time between Harvest Group LP's and Exen's respective acquisitions and sales of Neo Shares "to justify an enhancement in the value of" those Neo Shares. Staff also argued that investors would likely have concluded that the payments to Harvest Group LP and Exen for the Neo Shares were inflated because "Aitkens' significant involvement in each of" the Trust, Harvest Group LP and Exen created a conflict of interest among those three entities. Staff further contended that investors in the Trust "would likely have considered investing directly in Neo instead of indirectly in Neo via the Trust, especially if they had known that Neo was selling its shares to other private investors for $1.75 during the relevant time".

[161] Although recognizing that the materiality test is objective, Staff submitted that ASC panels may consider subjective views of investors when appropriate – see *Aurora* at para. 146.

[162] Staff submitted that each of Aitkens and Beyer knew or ought to have known that the Trust OMs were materially misleading by omission because each knew the facts underlying the acquisitions by Harvest Group LP and Exen of the Neo Shares and their subsequent sales to the Trust, and therefore each knew the facts underlying the Neo Shares Profit and the non-disclosure of that information. According to Staff, Aitkens knew or ought to have known these points because of his positions and involvement with the Trust, Harvest Group GP (as general partner of Harvest Group LP) and Exen, while Beyer knew or ought to have known these points because of his positions and involvement with 0865701 (as trustee of the Trust) and with Harvest Group GP (as general partner of Harvest Group LP). Staff argued that the Trust, 0865701 and HCMI

"knew or ought to have known that the [Trust OMs] were materially misleading because Aitkens' and/or Beyer's knowledge of the undisclosed [Neo Shares] Profit can be attributed to them".

[163] Staff further submitted that the Trust Respondents knew or ought to have known that the omissions would reasonably be expected to have a significant effect on the Trust Securities' value for three reasons:

- "it is arguably self-evident that substantial profits made by related entities from the sale of significant assets to the issuer, with no time in between the purchase and sale of those assets to justify an increase in their value, is something at least some investors would have viewed as having a significant effect on the value of the issuer's securities had they known about it";

- the Trust Respondents knew or ought to have known that the absence of a statement required by item 2.7 of Form 45-106F2 "would be viewed as material"; and

- "Aitkens and Beyer knew that significant related party profits were disclosed in the OMs of other issuers that they signed and/or reviewed shortly before or during the relevant period, and therefore knew or ought to have known that the [Neo Shares Profit] would likely be viewed as material and required to be disclosed in the [Trust OMs]".

[164] Presumably, Staff considered that Aitkens' and Beyer's knowledge on this aspect should also be imputed to the Trust, 0865701 and HCMI.

(B) The Trust Respondents

[165] As noted, the Aitkens Respondents adopted the arguments made by Beyer. Also as noted, the Trust and HCMI made no submissions.

[166] Beyer and the Aitkens Respondents denied that either Harvest Group LP or Exen was a related party within the meaning of Form 45-106F2, so that there was no requirement to disclose the price those parties paid for the Neo Shares. They said that there was sufficient disclosure in each Trust OM of the relevant terms of the sales of Neo Shares by Harvest Group LP and Exen, such that the requirements of item 2.7 of Form 45-106F2 were satisfied.

[167] Beyer and the Aitkens Respondents also referred to certain conflict of interest disclosure found in the Trust OMs, from which we inferred an argument that prospective investors were adequately warned of the prospect of self-dealing.

[168] Beyer and the Aitkens Respondents dismissed Staff's materiality arguments concerning a "bad deal", possible investor concerns about a benefit to Aitkens personally, and that investors "would likely have considered investing directly in Neo". They characterized those claims as "speculation", "double speculation" and "pure speculation", also referring to the rejection in *Sharbern* of the standard that investors "might" have considered information to be material. They said that Staff adduced no evidence of "a substantial likelihood that a reasonable investor would view the omitted fact as significantly altering the total mix of information that was

available", and that the evidence was actually to the contrary (one investor witness testified that he knew before investing that Harvest Group LP was selling the Neo Shares to Foundation Resources LP for an increased price). They also contended that only a seller cares about the loss or profit to the seller. Beyer and the Aitkens Respondents further asserted that the omission did not affect the Trust's profitability, capital structure, credit arrangements or actual business. Moreover, they claimed the price at which the Neo Shares were sold to Foundation Resources LP was "a fair market price, or even a bargain", based on what they said were independent evaluations arriving at a value of $3.57 per Neo Share – thus rendering the price paid by Harvest Group LP and Exen "irrelevant to the value of the [Trust Securities]".

(ii) Related Party – Form 45-106F2

[169] We earlier concluded that Aitkens controlled the Trust. All parties represented by counsel before us agreed that the relevant test to determine Harvest Group LP's and Exen's "related party" status in relation to the Trust turned on whether Aitkens "controlled" Harvest Group LP and Exen, respectively. Section A6 of the *Instructions for Completing Form 45-106F2 Offering Memorandum for Non-Qualifying Issuers* provided:

> 6. When the term "related party" is used in this form, it refers to:
>
> (a) a director, officer, promoter or control person of the issuer,
> (b) in regard to a person referred to in (a), a child, parent, grandparent or sibling, or other relative living in the same residence,
> (c) in regard to a person referred to in (a) or (b), his or her spouse or a person with whom he or she is living in a marriage-like relationship,
> (d) an insider of the issuer,
> (e) a company controlled by one or more individuals referred to in (a) to (d), and
> (f) in the case of an insider, promoter or control person that is not an individual, any person that controls that insider, promoter or control person.
>
> (If the issuer is not a reporting issuer, the reference to "insider" includes persons or companies who would be insiders of the issuer if that issuer were a reporting issuer.)

[170] The parties represented by counsel before us also agreed that the applicable definition of "control" is to be found in s. 3 of the Act:

> 3 A person or company is considered to control another person or company if the person or company, directly or indirectly, has the power to direct the management and policies of the other person or company by virtue of
>
> (a) the ownership or direction of voting securities of the other person or company,
> (b) a written agreement or trust instrument,
> (c) being the general partner or controlling the general partner of the other person or company, or
> (d) being the trustee of the other person or company.

[171] We consider Aitkens' relationship to each of Harvest Group LP and Exen in turn.

(A) Harvest Group LP

[172] Staff relied on corporate searches indicating that, at the relevant time, Aitkens was a director of Harvest Group GP (the general partner of Harvest Group LP) and "therefore had the

power to direct the management and policies of Harvest Group LP by virtue of exercising control over its general partner". The corporate searches also indicated that Harvest Group Development Trust owned all of the voting shares of Harvest Group GP (although no searches in evidence indicated the ownership of Harvest Group Development Trust). Staff relied on correspondence from the Trust to the ASC dated September 16, 2011 wherein each of Harvest Group GP and Exen was referred to as a "Related Party". Staff also relied on disclosure in Trust OM3, which described Harvest Group LP as related to the Trust through "common management" and as a "related party", and Trust OM4, which referred to each of Harvest Group LP and Exen as "a related party of the Trust".

[173] Beyer and the Aitkens Respondents countered that Aitkens was not a "control person" of Harvest Group LP within the meaning of s. 3 of the Act, as he was only one of several directors (in fact three, the other two being Beyer and McCarthy) of Harvest Group GP, and "that position did not give him the power to direct the management and policies of Harvest Group GP". Those parties also claimed that Aitkens "did not have ownership or direction of the voting securities of Harvest". Aitkens testified to having no recollection of his role with Harvest Group Development Trust (the owner of all Harvest Group GP's voting shares). We did not believe that Aitkens' memory was actually faulty on this point. However, we required more than disbelief of Aitkens' evidence to reach a conclusion regarding control of Harvest Group Development Trust, Harvest Group GP and Harvest Group LP.

[174] Had this been all the evidence, we would have agreed that it was insufficient to prove that Aitkens controlled Harvest Group LP. Aitkens being one of three directors of its general partner was not enough to establish control. Nor can we conclude that the correspondence to the ASC and the selected text from Trust OMs 3 and 4, when read in context, were determinative or intended to acknowledge that Harvest Group LP was a related party to the Trust within the meaning of Form 45-106F2.

[175] However, there was more – considerably more – evidence indicating that Aitkens indirectly held all or substantially all of the voting securities of Harvest Group LP such that he had the power to direct the management and policies of that partnership.

[176] The documents tendered into evidence by Beyer – specifically those prepared by Gowlings or PwC, including the Step Memo – gave us insight into the organizational structure of the group of entities which included Harvest Group LP. It was part of the "trust on trust" structure that was organized in substantially the same manner as were the entities within the Trust Project. The Step Memo and attachments made clear that Aitkens was to hold 90% of the units in the parent trust, Harvest Group Capital Trust, with the remaining 10% of the units held by employees of FRI. Another document included in the same exhibit as the Step Memo indicated that Aitkens actually held the only units in Harvest Group Capital Trust as at December 8, 2009. That same document showed Harvest Group Capital Trust as being the sole unitholder of Harvest Group Development Trust which, together with Harvest Group GP, held all of the units of Harvest Group LP.

[177] Therefore, the documentary evidence showed that Aitkens held 90% or 100% of the units of Harvest Group Capital Trust, which was the sole unitholder of Harvest Group Development Trust, which (alone or together with Harvest Group GP) held all the units of Harvest Group LP.

This was consistent with Beyer's testimony that Aitkens was the "owner . . . of [Harvest Group LP] or the person that controlled that entity".

[178] In every material respect, the series of transactions contemplated by the Step Memo and accompanying documents was consistent with other documentary evidence concerning the organization of and transactions among the Trust Project and the group of entities under Harvest Group Capital Trust. The other documentary evidence included the Trust OMs, corporate searches, correspondence from Gowlings, and several emails among personnel from the Trust Project, Gowlings, PwC and Neo. Taken as a whole, this evidence clearly depicted Aitkens as firmly in control of Harvest Group LP, and this was unquestionably the understanding of those involved in the planning and implementation of both trust structures. A few examples illustrate the point:

- The Step Memo made it apparent that there were two fundamental aspects to creating the two trust structures. First, the oil and gas holdings of FRI were to be reorganized "to potentially allow for the realization of gains inherent in the value of these assets by way of a sale to an arm's-length investor group". FRI's successor entity was Harvest Group Capital Trust. Aitkens held 100% of FRI's shares and, as mentioned, he was to hold 90% or 100% of the units in Harvest Group Capital Trust, which would hold FRI's assets in its indirect subsidiary, Harvest Group LP. In other words, Aitkens would not be relinquishing control over the successor entity, which was consistent with the objective of the overall plan. Second, the second trust structure (which we have defined as the Trust Project) was to be created as the vehicle through which investors would acquire the assets in a manner that was tax-efficient for the vendor (ultimately Aitkens).

- The foregoing plan was also contemplated in an eight-page letter from Gowlings dated August 20, 2009 describing the principal attributes of a mutual fund trust, the organizational documents required to create a trust, and its governance. Again, two trust groups were envisaged, one being the "Aiken's Trust [sic]" which would own the business assets to be transferred to another trust as a sale to "Foundation Capital investors". The apparent reason for the suggested structure was set out in that letter: "We discussed the fact that the Aiken's Trust [sic] does not pay corporate tax and that a 'lift' could be taken by the Aiken's Trust [sic] upon the transfer of the Assets to the Trust." The Gowlings letter described Aitkens as the "principle [sic]" behind the "Aiken's Trust [sic]".

- Subsequent email correspondence among personnel from the Trust Project, Gowlings, PwC and Neo concerned the implementation of certain aspects of the plan, including the identification of Harvest Group LP as the entity to be the counterparty to the Harvest Group Warrant and the trustees of the Trust (to "be the same as for Ron Aitkens' MFT that Gowlings just set up"). This correspondence variously referred to "Ron's MFT", "Ron A's MFT" and "Ron Aitkens' MFT". In another example, a November 13, 2009 email from Rohrer to someone at PwC queried whether Harvest Group LP would be an accredited investor, stating that "I suppose it would if it was holding the other Neo [Shares] that Ron A. had previously purchased." The contents of those emails made it

> obvious that Harvest Group LP was part of the same shorthand eponymous "MFT" or mutual fund trust group – in other words, Harvest Group LP was part of Aitkens' group of entities.

[179] We are therefore persuaded on a balance of probabilities that Aitkens controlled Harvest Group LP. As a corollary, we conclude that Harvest Group LP was related to the Trust within the meaning of Form 45-106F2. We also find that Aitkens was the guiding mind of Harvest Group LP.

(B) Exen

[180] Staff argued that Aitkens "had the power to direct the management and policies of Exen". For this, Staff relied on three aspects of the evidence: (1) Aitkens' ownership of Exen's shares (either 42.5% or 100%); (2) Aitkens being "a significant creditor of Exen" due to a $4 million loan made by Aitkens to Exen; and (3) Aitkens having "enough influence at [Exen] to send a representative of the Harvest Group to work with it" (a reference to Rohrer). Staff also relied on the disclosure in Trust OM4, as well as the Trust's aforementioned letter to the ASC dated September 16, 2011 wherein Exen was described as a "Related Party".

[181] Beyer and the Aitkens Respondents denied Staff's assertions regarding Aitkens' purported control of Exen, in particular vehemently criticizing some of the share ownership evidence on which Staff sought to rely.

[182] Dealing first with Staff's assertion that Aitkens' position as "a significant creditor" of Exen contributed to his ability to direct Exen's management and policies, Staff provided no evidence as to Exen's aggregate liabilities. Therefore we can only speculate as to what influence, if any, Aitkens had as a lender of $4 million. We cannot find on this basis that Aitkens controlled Exen.

[183] Regarding Staff's assertion that Aitkens demonstrated control by sending Rohrer to work with Exen, Aitkens said in cross-examination that Rohrer was "more of a liaison", on behalf of "Harvest", who worked with Exen management. We were not pointed to other evidence on this issue, and Rohrer did not testify. In any event, we are not convinced that this would have been a strong indicator of control. We cannot find on this basis that Aitkens controlled Exen.

[184] Finally turning to the issue of share ownership, the evidence in this regard was murky. In written argument, Staff asserted that Aitkens owned 42.5% of Exen's shares (which Aitkens admitted to in cross-examination). However, in oral argument, Staff referred to a corporate search dated as at May 4, 2010 showing FRI (100% owned by Aitkens) as the sole shareholder of Exen and a corporate search dated June 4, 2013 showing FRI as the sole shareholder of Exen while Aitkens was Exen's sole director at that time. On this basis, Staff argued that Aitkens had control of Exen through FRI, at least at the time of Trust OMs 3 and 4. Earlier corporate searches for Exen as at July and September 2009 contained no shareholder information, and Aitkens did not appear as a director on either of those searches.

[185] Beyer contended that Staff were limited by their written assertion that Aitkens' ownership of Exen was 42.5%, so could not now argue that Aitkens held 100%. Beyer and the Aitkens

Respondents submitted that the 42.5% was insufficient to amount to control within the meaning of s. 3 of the Act.

[186] The Step Memo was the only other document in evidence that spoke to Exen's ownership – it indicated that FRI held 100% of Exen's shares. However, all of the witness testimony we heard consistently maintained that Aitkens held a minority interest in Exen. Aitkens was not challenged on his evidence that he held 42.5%, with another 42.5% held by an entity named "Parafax" or "Parafex", and the remaining 15% held by Redtail. Bunting gave similar evidence, and Beyer testified that he understood Aitkens to be a minority shareholder of Exen, albeit a large shareholder.

[187] Although certain documents indicated that Aitkens' ownership exceeded 42.5% at certain points, none of them spoke definitively to Exen's ownership when its Neo Shares were sold to Foundation Resources LP or when the Trust OMs were issued. On the evidence before us we cannot find that Aitkens owned more than 42.5% of Exen at the relevant times, nor can we find that he controlled Exen by virtue of this ownership position. Although a 42.5% interest may give a shareholder control in some circumstances, here the evidence was consistent that there were only two other shareholders which collectively had sufficient voting power to overcome Aitkens' votes. We were provided with no evidence suggesting that Aitkens had a voting agreement with one of the other shareholders, formal or informal.

[188] On balance, we find there was insufficient evidence to establish that Aitkens controlled Exen such that it was a related party to the Trust within the meaning of Form 45-106F2. Similarly, we cannot find that Aitkens was the guiding mind of Exen.

(iii) Materiality

(A) General

[189] Our finding that Harvest Group LP was a related party within the meaning of Form 45-106F2 – and conversely, that Exen was not a related party – is not, however, dispositive of the allegations of misrepresentation by omission concerning the undisclosed Neo Shares Profit. The necessary element of s. 92(4.1) in these circumstances would be that the Trust OMs did "not state a fact that [was] required to be stated or that [was] necessary to make the statement not misleading". Even though a mandatory form disclosure item is a "fact that is required to be stated" in the material contracts portion of an OM, such omitted fact does not become a misrepresentation unless the materiality and knowledge elements of s. 92(4.1) of the Act are satisfied. We disagree with Staff's statement in their written submissions that the Trust OMs "contravened part 2.7 of [Form] 45-106F2, and were therefore materially misleading". There is no such automatic causal connection between a form requirement failure and a conclusion that such failure was materially misleading – see also *Re Platinum Equities Inc.*, 2014 ABASC 71 at para. 37: "compliance or non-compliance with the content requirement [for an OM] is in itself not determinative of the issue of misrepresentation".

[190] This gets back to the heart of the issue here. Beyer and the Aitkens Respondents acknowledged that the information about the price at which Harvest Group LP and Exen acquired Neo Shares and the subsequent Neo Shares Profit, was either not set out (in Trust OMs 1 and 2) or was set out somewhat obliquely (in Trust OMs 3 and 4). The real issue is not whether such disclosure was required by Form 45-106F2 (there was no allegation of a breach of

the Form 45-106F2 requirements) but rather whether the lack of such disclosure in the circumstances of each Trust OM was a misrepresentation under s. 92(4.1) of the Act.

[191] Essentially, therefore, our task is to determine "whether there is a substantial likelihood that such facts would have been important or useful to a reasonable prospective investor in deciding whether to invest in the securities on offer at the price asked" (*Arbour* at para. 765). The relevant facts here are either or both the $1.75 price at which Harvest Group LP and Exen acquired Neo Shares and the amount of the Neo Shares Profit received by Harvest Group LP and Exen. Such facts would be important to a reasonable investor if the $1.75 more accurately reflected the value of the Neo Shares at the times the Trust purchased them than did the price paid by the Trust.

(B) Parties' Positions

[192] Staff contended that prospective investors may not have been willing to pay the asking price for Trust Securities under the Trust OMs had those Trust OMs set out the Neo Shares Profit – in other words, that the existence of the Neo Shares Profit was material and should have been disclosed. Staff relied in part on the short time between Harvest Group LP's and Exen's acquisitions of Neo Shares and their sales of those shares to the Trust. In Staff's view, there was insufficient time for the Neo Shares to have gained so much value. In a similar vein, Staff pointed to evidence that "Neo was selling its shares to other private investors for $1.75 during the relevant time". Staff thus implied that the Neo Shares, when sold to the Trust, were worth $1.75 or close to it rather than the typical $3.25 at which the Trust purchased the Neo Shares.

[193] As noted, Beyer and the Aitkens Respondents argued that the Trust paid fair value for the Neo Shares from Harvest Group LP and Exen, and that disclosure of the price paid by or profit earned by Harvest Group LP and Exen would therefore not have affected the value of the Trust Securities. Further, they argued the general principle that it is irrelevant for a buyer to know what a seller paid for something – in this case, for the Neo Shares. They also cited *Sharbern* at para. 49 for the principle that disclosure is not required solely because a certain fact "might" be considered important to investors.

(C) Acquisition of Neo Shares

[194] In the case of Trust OMs 1 and 2, a significant portion of the offering proceeds was to be allocated to the purchase of Neo Shares at a price of $3.25 per Neo Share. It was thus incumbent on the signatories to those Trust OMs to ensure that the documents contained clear disclosure of all material facts pertinent to the value of the Neo Shares at the time of those Trust OMs because that value would affect the value of the Trust Securities.

[195] In contrast, the stated use of proceeds in Trust OMs 3 and 4 did not include the acquisition of any Neo Shares. Trust OM3 did contain certain disclosure about Harvest Group LP having acquired Neo Shares at $1.75 per share and then selling those shares to the Trust for $3.25 per share. Trust OM4 disclosed the fact that the Trust, through Foundation Resources LP, had acquired Neo Shares from both Harvest Group LP and Exen, although there was no disclosure concerning the price paid by either of the sellers for those Neo Shares. While the disclosure in Trust OMs 3 and 4 concerning these transactions was incomplete and shoddy in several respects, we are of the view there was enough disclosure to at least warn prospective investors that the Trust had engaged in prior non-arm's length transactions. Moreover, the

importance of the Neo Share acquisitions had arguably diminished by the time of Trust OMs 3 and 4, since the Trust had acquired other oil and gas properties. Further, as noted, the sale of Neo Shares to the Trust by Exen after the issuance of Trust OMs 1 and 2 occurred at $1.75, meaning there was no new Neo Shares Profit by Exen to disclose in Trust OMs 3 and 4. On balance, we are not persuaded that there was sufficient evidence to make a finding that Trust OMs 3 and 4 were deficient within the meaning of s. 92(4.1) of the Act. Accordingly, we discuss only Trust OMs 1 and 2 for the remainder of this analysis.

(D) Timing

[196] Therefore addressing Staff's timing argument only for Trust OMs 1 and 2, we consider the Trust's purchases from Harvest Group LP from February 16 to July 27, 2010. We are not persuaded by Beyer's contention that the Neo Shares Profit did not need to be disclosed in Trust OM1 because the Trust had not, at the December 10, 2009 date of Trust OM1, bought any Neo Shares from Harvest Group LP or Exen, thus no Neo Shares Profit had been earned by that date. To the contrary, the evidence was clear that the plan for Harvest Group LP and Exen to sell Neo Shares acquired at $1.75 per Neo Share to the Trust for a higher price (typically $3.25 per Neo Share) had been determined before the date Trust OM1 was issued.

[197] Although the evidence indicated that Harvest Group LP had itself purchased Neo Shares only a short time before each of its separate sales to the Trust, that timing was not relevant. Harvest Group LP purchased the Neo Shares by exercising its warrants under the Harvest Group Warrant at the price of $1.75 determined sometime in the period between July 2009 (the FRI private placement) and December 10, 2009 (the date of Trust OM1). Therefore, we must consider whether the Neo Shares increased in value from the time the exercise price was set for the Harvest Group Warrant, not from the individual dates at which those warrants were exercised.

[198] As for the sales to the Trust by Exen, Exen acquired its shares from Neo on September 16, 2009 and sold them to the Trust in three tranches. The last sale (October 27, 2010) was irrelevant to the allegations here because Exen's sale price to the Trust was the same as Exen's acquisition price of $1.75 – no Neo Shares Profit was earned on that transaction (and, in any event, that transaction was after the operative date of Trust OMs 1 and 2). The two Exen sales at issue were the sales April 26, 2010 at $2.25 per Neo Share and the following day at $3.25 per Neo Share. Apart from whether either of those prices was an accurate reflection of the Neo Shares' value at the time, we note that there was no evidence before us to justify a sale price $1.00 higher one day later.

(E) Fair Value: Trust OMs 1 and 2

[199] Trust OMs 1 and 2 contained certain information about Neo, its business and its oil and gas assets (including a summary of an independent reserves evaluation as at March 31, 2009). Trust OM1 also contained certain of Neo's financial statements. Trust OMs 1 and 2 did not disclose information about the private placements of Neo Shares (although some general share capital disclosure was in the Neo financial statements appended to Trust OM1).

[200] Staff contended that investors may have considered buying Neo Shares directly from Neo had they "known that Neo was selling its shares to other private investors for $1.75 during the

relevant time". That relevant time would have been the February 16 to July 27, 2010 period during which Harvest Group LP and Exen were selling Neo Shares to the Trust.

[201] We are not persuaded that all of the other Neo Shares private placements during or close to that time assisted our determination of the alleged misrepresentations in Trust OMs 1 and 2. Some of the private placements were relatively small: 2,635 Neo Shares at $3.00 each on January 22, 2010; 48,000 Neo Shares at $3.25 each on October 20, 2010; and 1,500 Neo Shares at $2.25 each on October 20, 2010 (through the exercise of warrants issued in June 2009). Overall, information about these private placements was not helpful.

[202] However, we find very significant the fact that Trust OMs 1 and 2 were silent on the existence and terms of the Harvest Group Warrant entitling Harvest Group LP to purchase 8,571,428 Neo Shares for $1.75 per Neo Share (although Trust OM1 was dated four days before the Harvest Group Warrant was issued, we are satisfied, as mentioned, that its fundamental terms had been agreed to prior to Trust OM1). According to a summary of Neo's Exempt Distribution Reports filed with the ASC, the Harvest Group Warrant – if exercised – would represent by far the largest single investment in Neo since its inception. Moreover, Trust OMs 1 and 2 were silent about the asset sale in September 2009 by which Exen received 2,975,432 Neo Shares valued at $1.75 each and about the private placement of 500,000 Neo Shares to FRI earlier in 2009 at the same price. (The financial statements of Neo included with Trust OM1 noted a share-for-asset exchange for that amount of Neo Shares, but Exen was not identified as the recipient.)

[203] We also note the 525,148 Neo Shares issued at $1.75 each between December 2009 and April 2010, and there was no indication that these were anything other than arm's length transactions. We mention these issuances, not as a criticism of the Trust Respondents for not disclosing them in the Trust OMs, but as confirmation that the principal arm's length purchases of Neo Shares had established that $1.75 was the fair market value at which Neo was able to sell the majority of its shares at the relevant time. Although Baker would have preferred to sell the Neo Shares at $3.00 per Neo Share, thus raising more capital, the arm's length transactions indicated that was not feasible in the market at those times.

[204] In our view, reasonable people would conclude that significant arm's length transactions give a more reliable indication of fair market value than non-arm's length transactions, particularly if such reasonable people had been aware that certain of the non-arm's length transactions eventually resulted in substantial gains to the seller. Indeed, Aitkens (signing for 0865701 on behalf of the Trust) made this very point in a letter to the ASC on September 16, 2011. In his response to Staff's question as to what steps were taken to assess whether there had been an impairment of the Trust's investment in Neo as at December 31, 2010 (given that the Trust's purchase of 750,000 Neo Shares from Exen at $1.75 per share on October 27, 2010 compared unfavourably to the Trust's earlier purchases at an average price of $3.19 per share), Aitkens said:

> The Trust does not consider its purchase of 750,000 common shares of Neo for a price of $1.75 per common share to be indicative of impairment in the value of the Trust's investment as the seller is a related party to the Trust that was liquidating its assets to wind-up its business. The Trust entered into this transaction on October 27, 2010 and considered the purchase price to be a discount purchase that was available to the Trust only though the related party relationship. At the

> transaction date, Neo was offering its common shares for purchase at $3.25 per share under an offering memorandum.
>
> The Trust considers the selling price of Neo's common shares in Neo's offering memoranda as a more accurate representation of current value as those trades will conceivably be between two unrelated arm's length parties. On December 16, 2010 Neo released a revised offering memorandum with a lower price of $2.50 per common share. The Trust recognized the decrease in the selling price as a possible indicator of impairment and, consequently, performed an impairment test for the reporting period ended December 31, 2010. . . .

[205] The negotiation and execution of the Harvest Group Warrant was a significant arm's length transaction which was virtually contemporaneous with Trust OM1. The Exen transaction and the FRI transaction were similarly significant and arm's length, although occurring earlier. Information about these transactions in Trust OMs 1 and 2 – particularly about the Harvest Group Warrant – would have provided highly relevant data to a prospective reasonable investor in assessing the value of the Neo Shares and, consequently, in determining whether to buy Trust Securities at the price offered. This is particularly the case when, as discussed below, nothing had occurred within Neo to justify the increased value from the $1.75 set for the FRI purchase, the Exen asset exchange and the Harvest Group Warrant to the typical $3.25 price at which Harvest Group LP and Exen sold Neo Shares to the Trust.

[206] In arguing that the prices at which Harvest Group LP and Exen sold Neo Shares to the Trust "represented a fair market price", Beyer and the Aitkens Respondents referred to valuations furnished by Neo at the relevant time. However, these "valuations" were not the price at which Neo Shares could be sold for at the time. Rather, they represented what Neo Shares could be worth in the future, based either on internal projections of future values or on the discounted present value of estimated future values. Either way, such estimates were apparently contingent on three critical assumptions: (1) sufficient capital to execute a planned drilling program; (2) the successful completion of that drilling program; and (3) natural gas prices escalating from $4.85 per thousand cubic feet (**mcf**) in 2009 to $8.30 per mcf in 2013. Baker confirmed in his testimony that an earlier Neo projection (by a third party) indicating a share value of $3.67 in 2009, evidently prepared at a time when Neo was attempting to sell Neo Shares at $3.00 each, was a projection subject to several assumptions, including capital. He stated that such numbers were "projections", valid if "we have this capital" and "this base of assumptions" – making the $3.67, in his view, "an output" or a "theoretical what-if scenario". We do accept that Baker was convinced that approximately $3.67 could represent a fair valuation, were all the assumptions to materialize.

[207] We address each of these assumptions, not for the purpose of testing their accuracy with the benefit of hindsight, but merely to illustrate their highly contingent nature and, thus, the unreliability of the resulting forecast. The third assumption seemed tenuous, given an email from Baker in June 2009 discussing gas prices (the forecast assumed a present price of $4.85 per mcf). Baker acknowledged that the price was already lower at the time and decreased further. Baker also acknowledged that he would be less confident about the project as natural gas prices declined. The first and second assumptions did not materialize. For example, Bunting testified to his understanding – which we accepted – that the purpose of the private placement of Neo Shares at $1.75 was to provide capital to improve Neo's properties, which would then allow Aitkens to sell the shares to his investors at a higher price. Bunting did not recall any

discussions about the intention to pay down Neo's debt. However, Baker testified that between the time of Trust OM1 and Trust OM2, Neo raised approximately $3.2 million and that "the majority [of that money] went to debt repayment". An additional approximately $4 million was used for some acquisitions and some drilling. He also stated that, by the middle of 2010, Neo had been unable to execute its drilling plan, due to a lack of capital. Baker testified that when no warrants were exercised under the Harvest Group Warrant after June 2010, Neo "had to shelve [its] winter drilling plans" and "needed to find an additional source of capital".

[208] We conclude that relatively little money was therefore put towards a drilling program and certainly there was no successful completion of such a program. Significant capital investment would have been critical in enabling Neo to reach a share value even approaching the estimated $3.50 or $3.57. Bunting further confirmed the importance of such capital investment when responding to a question from the panel. In the result, nothing in Neo's actions and prospects would have justified a higher Neo Share price between late 2009 and the times at which Harbour Group LP and Exen made the impugned sales of Neo Shares to the Trust.

[209] The contrast was stark between the then-value of Neo's oil and gas reserves reflected in the independent reserves evaluation contained in Trust OMs 1 and 2 and the value reflected in Neo's projections. For example, Neo's June 29, 2009 forecast value for its proved developed reserves in 2009 was $57 million (no discount rate was given), whereas the March 31, 2009 reserves evaluation in Trust OMs 1 and 2 estimated Neo's proved developed reserves at approximately $16.6 million (undiscounted, being the most generous estimate). A year later, Neo's independent reserves evaluator estimated proved developed reserves at approximately $22.7 million (undiscounted). It should have been obvious to even a casual observer that – at the time Trust OMs 1 and 2 were given to prospective investors – there was a profound difference between Neo's optimistic projections of its future reserves and Neo's actual circumstances.

[210] Such reserves valuations were important in determining an estimated Neo Share value. There was no independent valuation in evidence that supported a share price of $3.57 – or even $3.25 – at or about the times when Trust OMs 1 and 2 were certified (December 10, 2009 and April 30, 2010, respectively), contrary to the contention of Beyer and the Aitkens Respondents. Beyer testified that, at the time the Neo Shares were acquired by the Trust, "[w]e had what Neo provided to us [as a fair market value], as well as independent valuations in the area of about $3.57 for Neo [Shares], and we used that valuation as a basis for acquiring those Neo [Shares]."

[211] When asked about these figures, Baker testified that the "January 2009 McDaniels' price forecast" was "the price forecast that McDaniels Engineering would've ascribed to any of its reserve valuations done in that [month]" and that McDaniels "had ascribed the reserve categories that we had for our properties". We understood references to McDaniels and McDaniels Engineering to mean the Calgary-based reserves evaluation firm of McDaniel & Associates Consultants Ltd. There was no evidence to suggest that the McDaniel firm had evaluated Neo's reserves. We reject the submission made on behalf of Beyer that this projection was "McDaniel's low reserve value based on McDaniel's price model" or, in the alternative, that it did not matter because that was the forecast Neo was using – implying that Beyer was therefore entitled to rely on that projection. Baker's evidence was clear that this was an internal valuation prepared by Neo's chief financial officer. The only information used from the McDaniel firm was the price model.

[212] We do not consider an internal valuation conducted by Neo using generic industry commodity price projections to be "independent". We are also not convinced that the source of the valuation was irrelevant.

[213] Based on all the above evidence, we are satisfied that, at the time Trust OMs 1 and 2 were issued, the independently-assessed value of Neo's assets reflected in those Trust OMs was demonstrably less than Neo's internal valuation. Neo's internal valuation was, we conclude, properly reflected by the $1.75 price for Neo Shares at which the private placements at issue here had been made, including those to Harvest Group LP and Exen (although, as mentioned, Baker would have preferred to sell the Neo Shares at $3.00 per Neo Share, that was not the fair value at the time, as indicated by the arm's length sales). Despite this, prospective investors in Trust OMs 1 and 2 were not told of that $1.75 price or of the internal valuation which that $1.75 price represented. Had prospective investors been informed in Trust OMs 1 and 2 of that $1.75 cost (or of the Neo Share Profit), that fact would reasonably have been expected to have had a significant effect on the value ascribed by such prospective investors to the Neo Shares and thus to the Trust Securities sold under Trust OMs 1 and 2, because a significant portion of the offering proceeds was to be allocated to the purchase of Neo Shares.

(F) Potential Conflict

[214] As mentioned, Beyer and the Aitkens Respondents argued that a seller's purchase price is irrelevant to a buyer's calculus of whether to purchase at the price asked. Staff contended that, had investors known of the Neo Shares Profit, they may "have concluded that the Trust was purchasing Neo [Shares] at an inflated price because of a conflict of interest". This essentially is an argument that a reasonable investor would want to know whether any conflicts or potential conflicts existed, as this information would give a prospective investor pause as to whether the price asked corresponded to fair market value.

[215] The question of conflicts of interest, be they actual or potential, may have broader implications, among which is whether management can be trusted to act in the best interests of the issuer by avoiding or appropriately managing any such conflicts. Many disclosure requirements in securities laws are grounded in such trust, conflict or related party issues. In addition to the required disclosure in Form 45-106F2 for related party transactions, the same theme is seen in requirements such as those for prospectus offerings (item 24.1 of Form 41-101F1 *Information Required in a Prospectus*), continuous disclosure (item 13.1 of Form 51-102F2 *Annual Information Form*), and the protection of minority shareholders in certain transactions (Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions*). The rationale underlying these disclosure requirements is obvious – related party transactions are susceptible to abuse and can undermine the public's confidence that capital markets are operating efficiently, fairly and with integrity (see s. 1.1 of Companion Policy 61-101).

[216] Candour around self-dealing is important to investors in assessing the integrity of an issuer's management – determining whether those managing the business will act in the best interests of the issuer and its security holders, or will prefer their own interests. This consideration is fundamental to the sound corporate governance of any issuer, all the more when the issuer is a trust. Prospective investors are entitled to expect that a trustee will discharge its

fiduciary duty to act in the best interests of trust beneficiaries, and in particular will refrain from self-dealing without the beneficiaries' explicit and informed consent.

[217] Beyer and the Aitkens Respondents addressed this trust and conflict issue by pointing to certain "conflicts of interest" disclosure in the Trust OMs. We review that disclosure below, concluding that such reliance on it was misplaced because that disclosure fell well short of giving investors fair warning that the Trust's representatives would be self-dealing in Trust property.

[218] The disclosure in Trust OMs 1 and 2 read:

> ***Potential Conflicts of Interest***
>
> Under the Deed of Trust, the Unitholders acknowledge that the Trustee [0865701] and the Trust's respective subsidiaries, associates, affiliates and their respective directors and officers may be and are permitted to be, engaged in and continue in other businesses in which the Trust will not have an interest and which may be competitive with the activities of the Trust. The Trustee [0865701] and the Trust's subsidiaries, associates and affiliates, and their respective directors and officers, may be and are permitted to act as a partner, shareholder, director, officer, employee, consultant, joint venturer, advisor or in any other capacity or role whatsoever of, with or to other entities, which may be engaged in all or some of the aspects of the business of the Trust and may be in competition with the Trust.
>
> Further, under the Deed of Trust, the Unitholders agree that the activities and facts as referred to above will not constitute a conflict of interest or breach of fiduciary duty to the Unitholders or the Trust. The Unitholders consent to and relinquish any claim relating to such activities.

[219] This disclosure did not warn prospective investors that individuals connected to the Trust might transact with the Trust for their personal profit. It merely notified prospective investors that certain parties connected to the Trust and 0865701 might engage in other businesses in competition with the Trust. What was disclosed was very different from the apparent construction given to this disclosure by Beyer and the Aitkens Respondents.

[220] We conclude that it was important for prospective investors to know whether individuals in a position to make decisions for the Trust were engaged (or potentially engaged) in self-dealing and to what extent. That is certainly a factor that a reasonable prospective investor would find important when deciding whether to purchase Trust Securities at the price asked.

(G) Conclusion on Materiality of Omission

[221] For the foregoing reasons we find that Trust OMs 1 and 2 did not state a fact which was required to be stated and which would reasonably have been expected to have had a significant effect on the value of the Trust Securities sold pursuant to those Trust OMs.

(iv) Knowledge

[222] Staff submitted that both Aitkens and Beyer knew or ought to have known that the Trust OMs did not state a fact that was required to be stated or that was necessary to make a statement not misleading and would reasonably have been expected to have had a significant effect on the value of the Trust Securities. Here we address only Trust OMs 1 and 2, as those were the two documents for which we found material omissions. Beyer and the Aitkens Respondents did not

address the aspect of knowledge, other than to maintain that they had a defence of "due diligence" for having relied on professional advice and otherwise having taken reasonable care to avoid misleading statements or omissions. Beyer also submitted that it is not reasonable to expect direct involvement by all those in senior management.

[223] In that regard, Beyer and the Aitkens Respondents implicated Gowlings and PwC as to blame for any deficiencies that might be found in the Trust OMs. As mentioned, this contention was expressed in terms of a due diligence defence, which we have concluded does not apply to an alleged contravention of s. 92(4.1) of the Act. The relevance of professional advice, or the lack thereof, to this allegation is whether it informed the requisite level of knowledge of Aitkens and Beyer.

[224] Both Aitkens and Beyer acknowledged having read Trust OMs 1 and 2 before certifying them, and both conceded that those Trust OMs did not disclose the gains to be, or already, realized by Harvest Group LP and Exen from their sales of Neo Shares to the Trust. Aitkens' and Beyer's explanations for the omissions, though similar in some respects, differed on the reason they believed them unimportant.

[225] Aitkens professed complete ignorance of the requirements for disclosure in an OM and claimed he was agnostic on whether something ought to be said in the document about a "lift":

> Q Didn't you think it was important for the investors to know about your lift?
>
> A I never had an opinion on it one way or the other. Whatever information Gowlings and PwC knew about everything there was to know about. There was nothing withheld from them. It was not my decision on what -- I'm not a lawyer. I have no idea what's supposed to be in there. That's why we hired somebody like Gowlings. So we disclosed everything, the lift, every -- every time you showed that or Mr. Verschoote showed that in Harbour View and Stoney View, I don't have an issue with that. Was it supposed to be in here? There's no reason -- no reason that I would -- for me to doubt the lawyers, that's for sure. So they were the ones who made the final call not any of us, so . . .
>
> Q I appreciate that. But didn't you think you should disclose your lift to the investors?
>
> A I never gave it a second thought. . . .

[226] We understood Aitkens' evidence concerning the "Stoney View" and "Harbour View" lifts to be a reference to disclosure in the SV OMs and HV OMs of significant profits realized by companies controlled by Aitkens when they sold real estate to those investor-funded projects – approximately $8.5 million in the case of the SV Project and approximately $5.2 million in the case of the HV Project. The relevant SV OMs and HV OMs were dated November 3, 2008 and January 30, 2009, respectively – both well before the December 10, 2009 date of Trust OM1 and the April 30, 2010 date of Trust OM2. Staff argued that Aitkens and Beyer knew that those profits had been disclosed in those SV OMs and HV OMs, having certified them (Aitkens) or reviewed them (Beyer), and thus knew or ought to have known that the Neo Shares Profit "would likely be viewed as material" for purposes of the Trust OMs.

[227] Beyer referred to some email communications between Rohrer and Gowlings and between Rohrer and PwC (copied to Aitkens and Gowlings). An October 16, 2009 email from

Rohrer to a lawyer at Gowlings stated that the Neo Shares' market value "is calculated to be $3.25 per share, and that is the price per share the [Trust] will be paying to [Aitkens' trust] for the shares". A November 13, 2009 email from Rohrer to PwC referred to "the process for getting the Neo [Shares] into the Harvest Trust (or LP?) and ultimately into Foundation Resources LP", and to "sell[ing] at a lift into FR" (presumably Foundation Resources LP). Beyer also referred to a Redtail document dated "3rd Quarter 2010" describing Neo seeking financing at $3.25 per share, which reflected a "discount" from its "[c]orporate value of $141 million or $3.58 per share". Beyer testified that he and Rohrer "discussed oftentimes the Neo valuation to be satisfied that -- that the Neo valuation was moving in a positive direction". All of this evidence was intended to show both that Beyer believed $3.25 (or higher) was a reasonable value for the Neo Shares at the time the Trust purchased them and that the professional advisers knew that the Trust would be purchasing the Neo Shares at a "lift".

[228] In his evidence, Beyer sought to distinguish what he described as the "land deals" from the Trust Project, claiming it was an "apple-and-orange comparison". He asserted that the basis for the distinction lay in the fair market value of the Neo Shares, which he maintained was at least $3.25 per Neo Share. Beyer elaborated on that distinction when interviewed by ASC investigators (at which time he was sworn and represented by counsel). He alluded to several Harvest Group real estate projects in which investors provided capital and were given OMs. He said that in those cases the lifts were predicated on projected future increased land values, whereas he understood the Trust was paying present fair market value for the Neo Shares it bought from Harvest Group LP and Exen. In the case of the Trust, the lift could be explained by Aitkens having negotiated the terms of the Harvest Group Warrant when natural gas prices were roughly half of what they were when the Neo Shares were sold to the Trust ("around $2" compared to "when we [the Trust] started buying Neo [Shares], natural gas prices were in and around [$]4 to $5"). However, that explanation was inconsistent with other evidence.

[229] Even accepting for argument's sake that Aitkens had astutely timed the market in negotiating the terms of the Harvest Group Warrant at a bargain price, this did not, in our view, negate actual or constructive knowledge of the materiality of the Neo Shares Profit, either expected or realized, from the exercise of the Harvest Group Warrant. For the reasons already given, it should have been obvious that full disclosure of these transactions would have provided prospective Trust investors with important information in making their investment decisions. Moreover, we are satisfied that both Aitkens and Beyer knew that the subject of non-arm's length transactions would be of particular interest to investors or their representatives. In Beyer's investigative interview, he said:

> . . . There was an awful lot of information that was disclosed in the offering memorandum. I felt like it was there, and certainly a number of people would ask me about the lift after reviewing the offering memorandum. So the information was within the offering memorandum.
>
> And I am not speaking specific to Rocky View, but certainly later on with other OMs that became routine discussion with investment agents: What is the lift; how much, you know, did [Aitkens] buy it for; how much is he selling it for. That was not an uncommon discussion.

[230] The evidence was clear that non-arm's length asset sales to investor-funded issuers formed a consistent pattern in how Aitkens conducted business. Despite that well-established pattern for the "land deals" – apparently disclosed in their respective OMs – neither Aitkens nor Beyer sought professional advice on whether the same kind of transaction should be disclosed in Trust OMs 1 and 2. There was no evidence that Aitkens or Beyer (or both) raised this issue with either the legal or accounting professionals. Instead both Aitkens and Beyer took solace in the apparent silence of their professional advisors as tacit permission to certify Trust OMs 1 and 2 without that disclosure. However, directors and officers cannot delegate all aspects of their responsibilities to others; they have a duty to oversee fundamental aspects, which we consider includes the matter of dealing with trust property. At a minimum, therefore, we expect that persons in Aitkens' and Beyer's positions would ask their professional advisers the direct question of whether a significant non-arm's length profit from a transaction involving Trust property ought to be disclosed in the Trust OMs. At best, we would describe Aitkens' and Beyer's actions as carelessness in discharging their responsibilities as directors and officers of the trustee, 0865701, and, at worst, wilful blindness.

[231] In either case, we find that both Aitkens and Beyer knew or ought to have known that the omission of the Neo Shares Profit in Trust OMs 1 and 2 was misleading and material.

[232] In sum, we conclude that each of Aitkens and Beyer knew or ought to have known that information about the Neo Shares Profit had been omitted from Trust OMs 1 and 2 and knew or ought to have known that such information would reasonably have been expected to have had a significant effect on the value of the Trust Securities. We therefore conclude that Aitkens and Beyer each breached s. 92(4.1) of the Act.

[233] As noted, 0865701 had extensive powers over the Trust, including full authority over the Trust's assets, and the power to issue Trust Securities "for such consideration as [0865701] may deem appropriate". Given Aitkens' positions with the Trust, 0865701 and HCMI, we conclude that, through him, the Trust, 0865701 and HCMI knew or ought to have known that material information about the Neo Shares Profit had been omitted from Trust OMs 1 and 2 and knew or ought to have known that such information would reasonably have been expected to have had a significant effect on the value of the Trust Securities, such that the Trust, 0865701 and HCMI breached s. 92(4.1) of the Act. We also find that Aitkens authorized, permitted or acquiesced in the breaches by those three entities.

[234] Given Beyer's positions with the Trust and 0865701, we conclude that, through him, the Trust and 0865701 knew or ought to have known that material information about the Neo Shares Profit had been omitted from Trust OMs 1 and 2 and knew or ought to have known that such information would reasonably have been expected to have had a significant effect on the value of the Trust Securities, such that the Trust and 0865701 breached s. 92(4.1) of the Act. We also find that Beyer authorized, permitted or acquiesced in the breaches by those two entities.

(v) Conclusion on Misrepresentation

[235] We found materially misleading omissions in Trust OMs 1 and 2 relating to the Neo Shares Profit. We also found that the Trust Respondents made those materially misleading omissions, knew or ought to have known they were materially misleading, and knew or ought to

have known that such omissions would reasonably have been expected to have had a significant effect on the value of the Trust Securities. Accordingly, we find that:

- the Trust Respondents breached s. 92(4.1) of the Act;
- Aitkens authorized, permitted or acquiesced in the s. 92(4.1) breaches by the Trust, 0865701 and HCMI; and
- Beyer authorized, permitted or acquiesced in the s. 92(4.1) breaches by the Trust and 0865701.

(c) False Certificates and Misleading OMs

(i) Allegations

[236] Staff alleged that the Trust Respondents contravened s. 2.9(13) of NI 45-106 by falsely certifying that the relevant Trust OMs contained no misrepresentations, which certificates were untrue at the time they were signed and at the time they were delivered to purchasers of the Trust Securities under the Trust OMs. Staff also alleged that the Trust Respondents contravened s. 221.1 of the Act by providing materially misleading Trust OMs to the ASC.

[237] As we have addressed only the Neo Shares Profit allegation to this point and have found misrepresentations relating only to Trust OMs 1 and 2, we deal only with the Neo Shares Profit aspect and those two Trust OMs in this analysis.

(ii) Parties' Positions

(A) Staff

[238] Both the false certificates allegation and the providing misleading Trust OMs allegation had the same basis as the material misrepresentation allegations addressed earlier – the alleged failures of the Trust Respondents to disclose the Neo Shares Profit in Trust OMs 1 and 2. That is, Staff contended that because of the Trust Respondents' failures to disclose the Neo Shares Profit in Trust OMs 1 and 2, those Trust OMs contained false certificates when signed and when provided to Trust Securities purchasers, and were misleading when provided to the ASC.

(B) The Trust Respondents

[239] Beyer and the Aitkens Respondents did not directly respond to these two allegations, other than to say that they must fail because the allegations under s. 92(4.1) of the Act were not sustainable. We agree that is the case for the allegations as they relate to Trust OMs 3 and 4, for which we found no material misrepresentations. However, that argument clearly fails regarding Trust OMs 1 and 2 because of our earlier finding of breaches of s. 92(4.1). When asked during oral argument whether the converse were true – that is, if a s. 92(4.1) contravention were found, does it follow that we must find a contravention of s. 2.9(13) of NI 45-106 and s. 221.1 of the Act – Beyer and the Aitkens Respondents argued only that a due diligence defence applied. The other Trust Respondents made no submissions on either of these two allegations.

(iii) Analysis

[240] There was no dispute that the Trust Respondents signed or were responsible for the certificates in Trust OMs 1 and 2. There was also no dispute that the Trust Respondents were responsible for the provision of Trust OMs 1 and 2 to the ASC.

[241] In at least one previous instance, an ASC panel found a contravention of s. 221.1 of the Act following a finding of a s. 92(4.1) breach: *Shire* at para. 165. Similar to this case, there did not appear to have been any consideration given by the parties in *Shire* as to whether the prospect of finding several securities law contraventions from the same conduct might engage considerations comparable to the *Kienapple* principle in criminal law (*R. v. Kienapple*, [1975] 1 S.C.R. 729, as explained below). The Alberta Court of Appeal applied the *Kienapple* principle in the administrative law context in *K.C. v. College of Physical Therapists of Alberta*, 1999 ABCA 253. There, the therapist, K.C., had been convicted of professional misconduct under the *Physical Therapy Profession Act*. Of the 12 convictions, K.C. appealed 11, 10 of which were quashed (at paras. 1-2). The court referred to *Kienapple* in concluding that certain of the convictions must be quashed (at paras. 63-64):

> Multiple convictions for the same conduct are prohibited. In a criminal context, a verdict of guilty on two counts, with the same or substantially the same elements making up the offences charged in both counts, results in the application of the rule against multiple convictions: R. v. Kienapple, [1975] 1 S.C.R. 729 at 751. The relevant inquiry is whether the same cause, matter or delict, rather than the same offence, is the foundation for both charges: Kienapple at 750. The rule does not bar several convictions if they are in respect of different factual events. The rule against multiple convictions applies when the counts arise from the same transaction: R. v. Prince, [1986] 2 S.C.R. 480 at 490. Therefore in order for the rule to apply there must be both a legal nexus, that is no additional or distinguishing elements in the second offence, and a factual nexus, that is the same act must ground each of the charges. The rule against multiple convictions applies to allegations of professional misconduct made against members of a self-regulated profession: . . . .
>
> In each case the applicability of the rule depends upon the facts. Here there is both a sufficient factual and legal nexus to warrant its application. The allegations in counts I. and II. arise out of the same conduct or transaction and the same factual circumstances, the letters to the Minister and the refusal to cooperate with M. on July 30, 1997. Both charges incorporate the professional misconduct language of ss. 37(1)(a) and (c); both charges involve identical legal elements. It is impossible to conclude that the charges relate to distinct delicts, causes or matters which properly sustain separate findings of guilt. While count II. is slightly more detailed than count I. a finding of guilt under count II. necessarily results in a finding of guilt under count I. The rule against multiple convictions applies and one set of convictions must be quashed. I will permit the more particular convictions to override the general and will quash the convictions for failure to accept the registrar's authority and failure to cooperate with the investigator under count I.

[242] We note that the OSC has been inconsistent in its application of *Kienapple* to securities law proceedings: see *Re Coventree Inc.* (2012), 35 OSCB 119 at para. 65; *Re Sulja Bros. Building Supplies, Ltd.* (2010), 33 OSCB 10180 at para. 8; and *Re Boock* (2013), 36 OSCB 9361 at para. 108.

[243] In the absence of any argument on the issue, we are not inclined to decide the applicability of *Kienapple* in the Alberta securities law context. However, we are concerned that there may be a sufficient legal nexus among the elements making up a contravention of s. 92(4.1) of the Act on the one hand and those establishing a contravention of s. 2.9(13) of NI 45-106 and s. 221.1 of the Act on the other hand, such that the latter two could be entirely subsumed within the former in the case of a misrepresentation contained in an OM. We have the same concern about the factual nexus – essentially the same conduct seems to have grounded each of the alleged contraventions.

(iv) Conclusion on False Certificates and Misleading OMs

[244] In our view, the important issue of the applicability of *Kienapple* in ASC proceedings should be argued fully by all parties before any determination is made on the point. As there were no arguments made before us on this issue, we make no findings on the allegations against the Trust Respondents of breaches of s. 2.9(13) of NI 45-106 and s. 221.1 of the Act. We also make no findings regarding alleged authorizing, permitting or acquiescing in any such breaches by Aitkens or Beyer.

(d) Illegal Distributions

(i) Allegations

[245] As set out earlier, Staff alleged that the Trust Respondents, Foundation Capital and Foundation Securities breached s. 110(1) of the Act by illegally distributing Trust Securities.

(ii) Parties' Positions

(A) Staff

[246] Staff contended that the OM Exemption was not available for any of the Trust OMs because at the relevant time, s. 2.9(2) of NI 45-106 required delivery to a purchaser of an OM which was "in compliance with" the requirements set out in s. 2.9 of NI 45-106. Again, however, we limit the discussion to Trust OMs 1 and 2, given our findings about misrepresentations. Staff argued that the material misrepresentations in Trust OMs 1 and 2 meant that the OM Exemption was unavailable. Staff then contended that no other exemptions were available for the distributions of Trust Securities to "at least some of the investors". Therefore, in Staff's view, with no exemptions available (and no prospectus being filed and receipted), at least some of the distributions of the Trust Securities were illegal distributions.

(B) The Trust Respondents, Foundation Capital and Foundation Securities

[247] Beyer and the Aitkens Respondents made no submissions on this point, other than their already-mentioned general argument that there were no material misrepresentations and thus no other allegations could follow. We accepted this argument regarding Trust OMs 3 and 4. The other Trust Respondents and Foundation Securities made no submissions.

(iii) Analysis

[248] There was no dispute here that the alleged illegal distributions of Trust Securities involved a security, a trade and a distribution. Therefore, the threshold requirements for considering s. 110 of the Act were met.

[249] Again, we were given no submissions addressing whether the *Kienapple* principle might preclude findings of both misrepresentation in an OM pursuant to s. 92(4.1) of the Act and illegal distributions pursuant to s. 110(1) of the Act – by reason that the same alleged misconduct (material misrepresentations) would underlie both allegations. However, while the factual nexus giving rise to the two allegations is apparent, there is no apparent legal nexus between them. The legal elements making up the two alleged contraventions are distinct, as are the regulatory purposes underlying the applicable provisions in the Act. This distinction was heightened here by the fact that Foundation Capital and Foundation Securities were alleged to have breached s. 110(1) of the Act but not to have committed the same breaches that were alleged against the

other Trust Respondents. We are therefore satisfied that the *Kienapple* principle does not apply in these circumstances.

[250] That said, consideration of the *Kienapple* principle was unnecessary in any event because, as set out below, we found that Staff did not prove their allegations of illegal distribution.

[251] Staff relied on their assertion that Trust OMs 1 and 2 contained material misrepresentations as *ipso facto* sufficient for us to find the OM Exemption unavailable. In support of that proposition Staff cited *Capital Alternatives*.

[252] In past decisions, including *Capital Alternatives*, ASC panels have found the OM Exemption unavailable if the OM in question contained significant and pervasive misrepresentations which "went to the heart of what an [OM] is supposed to do: inform investors, fairly and reliably, about (among other things) the issuer they are being asked to invest in, its management, its business and business objectives, and how the investors' money will be used" (*Capital Alternatives* at para. 279; see also *Arbour* at para. 861). The panel in *Capital Alternatives* went on to state (at paras. 280-82):

> It is not necessary for us to decide whether every defect in an [OM] renders the OM Exemption . . . unavailable. In this case, we consider that the OMs were wholly inconsistent with the securities regulatory regime developed for exempt distributions, the use of [OMs] and [disclosure of scientific or technical information concerning mineral projects].
>
> The [OM] is the core investor protection mechanism on which the OM Exemption is built; we stated above that it was the foundation of the OM Exemption. We consider that the defects in the OMs were so serious and pervasive that they fatally undermined that foundation in this case.
>
> What transpired was contrary to the letter, the spirit and the very premise of the OM Exemption. As a result, we find that the OM Exemption was not available for the [d]istributions.

[253] We note that in *Capital Alternatives* the panel expressly declined to decide whether every defect in an OM would render the OM Exemption unavailable. *Capital Alternatives* itself involved multiple egregious deficiencies and contraventions in the subject OMs – including deficient disclosure about the issuer's business, assets and principals, use of proceeds, risk factors and financial statements – which "were so serious and pervasive that they fatally undermined [the foundation of the OM Exemption]" (at para. 281).

[254] In *Arbour* (at para. 860), another ASC panel remarked:

> Although it is expected that all trades and distributions of securities made in reliance on a registration or prospectus exemption will comply strictly with the requirements of the exemption, there may be circumstances in which deficiencies and non-compliance attract liability but may not preclude reliance on the OM Exemption. . . .

[255] However, similar to *Capital Alternatives*, the OMs at issue in *Arbour* were so defective that the panel agreed with the characterization that the impugned documents were permeated with a "'culture of falsehoods'" (at para. 861). Those falsehoods need not be enumerated here, but they far exceeded the gravity – quantitatively and qualitatively – of the misrepresentations we have found in Trust OMs 1 and 2. Though we do not trivialize the significance of the

deficiencies we have found in Trust OMs 1 and 2, those OMs, taken as a whole, gave prospective investors enough accurate information about the issuer and its management, its business and its use of proceeds to allow those investors to make substantially informed investment decisions. The fundamental nature of the investment was accurately portrayed, even though one key fact was omitted. In the circumstances, we do not consider that that omission alone renders the OM Exemption unavailable.

(iv) Conclusion on Illegal Distributions

[256] We find that the allegations of illegal distributions are not proved, and therefore dismiss the allegation that the Trust Respondents, Foundation Capital and Foundation Securities breached s. 110(1) of the Act. We also dismiss the allegations regarding alleged authorizing, permitting or acquiescing in illegal distributions by Aitkens or Beyer.

J. Undisclosed Neo Working Interest

1. Allegations

[257] As mentioned, Staff alleged that the Trust Respondents contravened: s. 92(4.1) of the Act by omitting certain statements in the Trust OMs; s. 2.9(13) of NI 45-106 by furnishing false certificates in the Trust OMs; s. 221.1 of the Act by providing misleading Trust OMs to the ASC; and s. 110 of the Act by illegally distributing Trust Securities (which latter contravention was also alleged against Foundation Capital and Foundation Securities). Staff also alleged that Aitkens and Beyer authorized, permitted or acquiesced in such misconduct by the Trust, 0865701, HCMI, Foundation Capital and Foundation Securities.

[258] We discuss here those allegations in the context of the omission from the Trust OMs of information regarding the Neo Working Interest. Staff's allegation was effectively that the Trust Respondents omitted to disclose in Trust OMs 2, 3 and 4 that, under the Neo Consulting Agreement, "Neo would acquire a working interest equal to 5% of any oil and gas properties acquired by Foundation Resources LP, and an option to acquire an additional 20% working interest in those properties". The remainder of Staff's argument focused on the non-disclosure of "up to a 25% working interest in" such properties.

2. Analysis

(a) Omission

[259] There was no dispute that the Neo Working Interest was not disclosed in Trust OMs 2, 3 and 4. The only mention of the Neo Consulting Agreement (which agreement set out details of the Neo Working Interest) was in Trust OMs 2 and 3: "In addition to its oil and natural gas production operations Neo is contracted to provide oil and gas consulting services to Foundation Resources LP, at both the field level and the executive level."

(b) Parties' Positions

(i) Staff

[260] As noted, Staff maintained that the failure to disclose the Neo Working Interest in Trust OMs 2, 3 and 4 effectively misled investors to assume that the Trust would wholly own oil and gas assets acquired or to be acquired by Foundation Resources LP when the reality was that Neo could own up to 25% of those assets. Staff claimed that the significance of the Neo Working Interest omission was evident from Baker's testimony when he said that the value of the properties in which Neo might earn the Neo Working Interest "could be measured in the millions

of dollars". Indeed, Staff suggested there was evidence that Neo believed the Neo Working Interest could be valued in the hundreds of millions of dollars. According to Staff, "[i]t would have been important or useful for investors to know that the assets they were effectively investing in could be dealt with in this way." Staff also noted that Neo disclosed the Neo Working Interest in its December 16, 2010 OM because Neo thought the information was material.

(ii) Beyer and the Aitkens Respondents

[261] Beyer and the Aitkens Respondents answered by first asserting that Trust OMs 2 and 3 contained sufficient disclosure of the Neo Consulting Agreement, and that no disclosure was warranted in the May 12, 2011 Trust OM4 because the agreement was being "unwound" as of January 2011. They then submitted that Staff would have needed to prove three points to show that the Neo Working Interest was material:

- "that a 5% working interest as consideration to the operator Neo [was] material";
- "that there [was] a likelihood of exercise by Neo of the option for a 20% working interest"; and
- "that a 20% working interest for the operator of oil and gas assets [was] material".

[262] Beyer and the Aitkens Respondents contended that Staff led no evidence of the Neo Working Interest's materiality – either at 5% or the contingent additional 20% – and said that Staff acknowledged through evidence they led that no consideration was given to the likelihood of Neo exercising the option to acquire the additional 20% Neo Working Interest or whether that option was material.

[263] Beyer and the Aitkens Respondents further argued that Neo was not in a financial position to exercise the option to acquire the 20% Neo Working Interest, which was corroborated by Neo's subsequent insolvency. They also contended that the Neo Working Interest had the effect of aligning the interests of Foundation Resources LP with those of Neo, especially when taking into account Foundation Resources LP's ownership of Neo Shares. Lastly, as with the Neo Shares Profit, Beyer and the Aitkens Respondents referred to Staff's acknowledgement that the omission of the Neo Working Interest from the relevant Trust OMs did not affect the Trust's profitability, capital structure, credit arrangements or actual business.

(c) Materiality

(i) 5% Neo Working Interest

[264] Staff did not make submissions as to whether the 5% Neo Working Interest was by itself material, instead treating both aspects of the Neo Working Interest together.

[265] Beyer and the Aitkens Respondents contended that the 5% Neo Working Interest was not material because it created no significant ownership change for the relevant assets and because a working interest is a "common method of compensation" for operating oil and gas assets.

[266] We cannot conclude from the evidence before us that the omission of details in Trust OMs 2, 3 and 4 relating to the 5% Neo Working Interest would reasonably have been expected to have had a significant effect on the value of the Trust Securities sold pursuant to those Trust OMs. Any reasonable investor would know that the consulting services that Neo was to provide

to Foundation Resources LP would come at a cost, and there was no evidence to suggest that a 5% working interest was unreasonable consideration for those services. The Neo Consulting Agreement was negotiated between arm's length parties, and we are not persuaded that the 5% Neo Working Interest would, if disclosed to investors, have been important or useful in deciding whether to purchase Trust Securities.

(ii) Contingent 20% Neo Working Interest

[267] Again we note that Staff did not directly address the contingent aspect of the additional 20% Neo Working Interest, instead treating the 5% and the additional 20% together.

[268] In our view, it was important to consider the contingent nature of that 20% portion of the Neo Working Interest. In assessing the materiality of contingent events – such as an option – we have, as mentioned, adopted the reasoning of the OSC panel in the *Sheridan* case. That is, a contingency will be considered material if there is a high probability of the event manifesting, and if the event's effect on the issuer is significant.

[269] The preponderance of the evidence concerning the likelihood of Neo exercising the option to acquire the 20% Neo Working Interest pointed in one direction – such exercise was remote. Beyer testified that Neo never had the funds to exercise the option, and in fact used the majority of funds raised by Neo in early 2010 to pay down bank debt. Baker seemingly agreed that Neo's liquidity was restricted in the months following the execution of the Neo Consulting Agreement, indicating that in April 2010 Neo was most likely "drawn [$]4 and a half or $5 million on a [$]6 or $7 million line of credit". This was consistent with Neo's audited financial statements for the year ended March 31, 2010, which indicated that Neo had drawn $4.75 million on a $6 million bank operating credit facility, and that Neo had a working capital deficit of approximately $5 million.

[270] Baker also construed the option to acquire the 20% Neo Working Interest as engaged only "once Foundation was making money on that, so after all of their costs had been paid and after the return of any additional incremental capital". In other words, it was apparent that Neo had no intention of exercising the option until the exercise price was nil – that is, after net revenues from any given acquisition had equalled the purchase price of the asset plus associated capital expenditures. There was no evidence to suggest that net revenues from any of the assets subject to the Neo Consulting Agreement were anywhere near the purchase price and related capital expenditures for those assets. In short, we are not persuaded that, at the time Trust OMs 2, 3 and 4 were provided to Trust Securities investors, there was any near-term prospect of the option to acquire the additional 20% Neo Working Interest being exercised.

[271] Even if the option to acquire the 20% Neo Working Interest were exercised, Beyer refuted Staff's suggestion that this would "dilute the interest that the FROG investors had" in any relevant oil and gas properties, since the proceeds from the exercise could be used by the Trust for another acquisition to its benefit. Beyer characterized the Neo Working Interest as a "win-win" – a characterization with which Baker seemingly agreed when he testified that the purpose of the Neo Consulting Agreement was to align Neo with the Trust's investors, such that "[w]e would make money if [the Trust investors] made money". Put another way, Beyer and Baker suggested that the Trust (and its investors) would be better off with a 75% interest in an oil and gas property that had paid out, than they would be with a 100% interest in a property that would

not generate sufficient net revenue to meet acquisition and capital costs. Aitkens also rejected the idea of such dilution, stating that "[i]f you're adding value to both sides of the equation, I don't see how it dilutes".

[272] We were not directed to any evidence that established which properties were subject to the Neo Working Interest, nor were we provided with evidence concerning their respective purchase prices, capital expenditures thereon or net revenues therefrom. It was thus impossible for us to measure the significance of the effect that Neo's exercise of the option would have had on the Trust. While there was some evidence before us indicating that Baker ascribed considerable value to the Neo Working Interest (potentially "in the millions of dollars"), we were left guessing as to how he arrived at that conclusion, including what assumptions were used in estimating that value. (We note that Staff's reference in argument to evidence that Neo believed in a potential value "in the hundreds of millions of dollars" in fact had nothing to do with the Neo Working Interest, but was an $800 million estimated value of Neo's gas properties suggested by Bunting in an email to Aitkens.) Similarly, we give little or no weight to an $8 million estimated value ascribed to the Neo Consulting Agreement by Redtail – this was in a document evidently prepared to assist in the marketing of Neo Shares in late 2010 with, again, no hint of the methodology or assumptions used in forming that estimate.

[273] In summary, there was insufficient evidence that the additional 20% Neo Working Interest, if disclosed in Trust OMs 2, 3 and 4, would reasonably have been expected to have had a significant effect on the value of the Trust Securities sold pursuant to those Trust OMs.

(d) Conclusion on Neo Working Interest

[274] We find that the allegations of misrepresentations relating to the Neo Working Interest are not proved. Accordingly, we dismiss the allegation that the Trust Respondents breached s. 92(4.1) of the Act by not disclosing the Neo Working Interest details of the Neo Consulting Agreement in Trust OMs 2, 3 and 4.

[275] Given this conclusion, we do not consider Staff's allegations that misrepresentations concerning the Neo Working Interest resulted in false certificates, misleading OMs and illegal distributions of Trust Securities. We also do not address the allegations that Aitkens and Beyer authorized, permitted or acquiesced in breaches concerning the Neo Working Interest.

VI. ANALYSIS – SV PROJECT AND HV PROJECT

[276] The underlying structure and the allegations were similar for both of these projects, as is our legal analysis. However, as there were some key factual differences, we set out the relevant facts separately.

[277] We often address the SV Project and the HV Project together, and the SV Entities and the HV Entities together. To avoid repetition, references to the projects and entities are to be read as referring to the respective projects and entities, unless the context indicates otherwise.

A. Allegations and Parties' Positions

1. Staff

[278] As mentioned, Staff alleged that Aitkens and SV Crossing perpetrated a fraud contrary to s. 93(b) of the Act. Staff impugned:

- transfers totalling $3.56 million to 1379599 between about April 7, 2010 and March 25, 2011; and
- a transfer of $100,000 to 1252064 on or about April 22, 2009.

[279] Staff made parallel allegations relating to money raised for the HV Project, alleging that Aitkens and HV Landing also perpetrated a fraud contrary to s. 93(b) of the Act. Staff impugned:

- a transfer of $1 million to 1357686 on or about December 10, 2010;
- transfers of "at least $634,401 to 1252064" between October 18, 2010 and May 25, 2011;
- transfers of $330,000 to HCMI between December 20, 2011 and March 1, 2012;
- a transfer of $300,000 to HCMI on or about December 22, 2011 (which amount was then transferred from HCMI to Foundation Mortgage "3" Corporation (**FM3**)); and
- a transfer of $37,500 to Foundation Mortgage on or about May 16, 2011.

[280] Staff also maintained that Aitkens authorized, permitted or acquiesced in the alleged fraud perpetrated by SV Crossing and HV Landing, and that all of the alleged misconduct relating to the SV Project and HV Project was contrary to the public interest.

[281] Staff acknowledged that SV Crossing and HV Landing paid the purchase price for the SV Land and HV Land, as contemplated and disclosed in the SV OMs and HV OMs. However, Staff contended that the remaining money – instead of being used for working capital in connection with the development of the SV Land and HV Land, as stated in the SV OMs and HV OMs – was paid to Aitkens-controlled companies. In Staff's view, those payments were a fraudulent use of the money.

[282] Essentially, therefore, Staff argued that money raised under the SV OMs and HV OMs for the development of the SV Land and HV Land was instead used for other purposes within the web of entities operated by Aitkens. Staff did not allege that Aitkens improperly took any money out of the SV Entities or the HV Entities for his personal use, only that such transfers were not made for legitimate SV Project and HV Project business reasons.

2. Aitkens

[283] Aitkens' defence was two-fold. First, he disputed the accuracy of Staff's evidence regarding the various transactions and impugned the credibility of those presenting such evidence. Second, he claimed that he "honestly believed that he was entitled to use the money from projects [for which it] was not currently needed to assist other projects that had an imminent need for cash". Aitkens argued that "to prove that a fraud has been committed, Staff must establish that an act of dishonesty or deceit has been committed and that this act was intended to deceive or defraud another person".

[284] Aitkens alluded to another argument, although he did not seem to pursue it strongly. Referring to amounts purportedly raised under the AI Exemption of over $4.9 million for the HV Project and almost $4.8 million for the SV Project, Aitkens submitted that "[a]n Accredited

Investor, by its very definition, cannot rely on the terms set out in an [OM], thereby lessening the arguments of fraudulently misleading any such investors".

[285] SV Crossing and HV Landing were unrepresented and made no submissions.

B. Conflicting Evidence from Narfason and Aitkens

[286] As discussed earlier, some of the evidence from Narfason and Aitkens conflicted. Most significantly, Aitkens claimed that he had little communication with Narfason after a certain point and that he (Aitkens) was not asked for his explanation for certain contentious payments from the SV Entities or the HV Entities.

[287] Questioned by the panel as to whether "Harvest representatives" were asked about "the whereabouts of documents that might support what [he had] referred to as intercompany advances without justification or without documentation", Narfason stated that questions about "the purpose and the basis for those transfers" were asked "many times":

> Initially the response was that the offering memorandums allow use of money for general corporate purposes. There was a clause in the offering memorandum that said you could use it on that basis, which then was implied to say that you could take money from, [for] example, like Legacy Communities and invest 5 million of that money into a 125 investment in Panama. That's what we were told, in that example.
>
> Many other times, we weren't given any explanation as to why, and it was -- it was without fail every company was stripped of its working capital.

[288] Aitkens had testified that he was not included in CCAA process discussions after August 2012, and that if he had been, he "could've answered so many of these questions". Narfason acknowledged that the frequency of his contact with Aitkens changed as they "moved through [their] investigation" and it became apparent "there [were] potential conflicts with Mr. Aitken[s] being a controlling mind of a number of companies" and therefore occupying roles as both the borrower and the lender. This led to the appointment of the chief restructuring officer, with whom the Monitor began "to deal heavily" instead of Aitkens. However, Narfason made it clear that Aitkens had been the person who initially gave the "general corporate purposes" explanation, as early as "December of 2011, into [the] early months of 2012", perhaps April or May. In other words, Aitkens was given – and took – the opportunity to explain the transactions early in the process. Moreover, Narfason noted that Aitkens and his counsel would have had the opportunity to review draft reports prepared by the Monitor before they were filed with the court in the CCAA proceedings. Presumably, Aitkens would or could have seen the Monitor's concerns set out therein and could have addressed them or provided the missing documentation if it existed.

[289] When asked about the SV Project and HV Project in particular, Narfason responded:

> We didn't get a satisfactory answer. We got a -- it was just using it for general -- there was a catch answer, general corporate purposes. And it didn't make sense to us, that [1379599] needed money for general corporate purposes. And then if you follow what happened to the money in [1379599], it goes completely out of [1379599] to the various Harvest entities to the point where [1379599] has no money, and -- and so it just goes like a starburst.
>
> . . .

> Most times there was no -- there was -- the explanation was there was no documents, and initially when this first started way back with the first entity, Legacy, there were promissory notes created to evidence the intercompany transfers, but those promissory notes were few and far between, and in the case of Harbour View or Stoney [View], there was no promissory notes, there was no documents. And when asked what the basis was, it was no supporting documents were provided.

[290] Narfason also stated that "[l]ater in 2012", he asked why $3.6 million more than the SV Land purchase price was transferred from "Stoney View" to 1379599, but "got no answer for that". Further to the answer quoted in the previous paragraph, Narfason clarified that while he could not recall if he received the "general corporate purposes" explanation specifically regarding the SV Project and HV Project, "[t]hat [explanation] was a standard mantra that Mr. Aitkens would give us for various companies at various times." He then stated that he "clearly got no explanation as to why that money was leaving [the HV Entities] and why we had to urgently put [them] into receivership to stop the money from flowing". We note that this evidence was consistent with statements to the same effect in a February 1, 2013 affidavit Narfason swore for the CCAA proceedings involving the HV Entities.

[291] As we earlier determined, when faced with conflicting evidence from Narfason and Aitkens, we considered Narfason to be more credible and preferred his evidence to that of Aitkens. In this instance, that means that we did not believe Aitkens' protests that he was effectively ignored, and thus had no opportunity to explain the reasons for the impugned transfers. We did, however, believe Narfason's evidence that Aitkens was asked for explanations, provided the "general corporate purposes" explanation, and would have seen and could have commented on draft reports prepared by the Monitor. We also note that Aitkens' explanations given in his testimony before us were consistent with his earlier explanations for the intercompany transfers as described by Narfason. Overall, there was sufficient evidence presented for us to reach a conclusion on the reason for the impugned payments.

C. SV Project

1. SV OMs' Stated Use of Proceeds

[292] The SV Capital 2008 OM and the SV Capital 2010 OM stated that the majority of money raised would be loaned to SV Crossing to acquire the SV Land and for "a working capital facility" to be used for developing the SV Land. The SV Crossing 2008 OM and the SV Crossing 2010 OM stated that SV Crossing would use the proceeds of each of those OMs – together with proceeds loaned to SV Crossing by SV Capital – to pay for the SV Land and "as a working capital facility" to be used for developing the SV Land.

[293] Immediately following the "Use of Net Proceeds" section in the SV Crossing 2008 OM and the comparable "Use of Available Funds" section in the SV Crossing 2010 OM was a section titled "Reallocation", which stated that "[SV Crossing] intends to use the net proceeds [or available funds] of this Offering as stated. [SV Crossing] will reallocate the net proceeds only for sound business reasons." The SV Capital 2008 OM and the SV Capital 2010 OM had comparable wording: "[SV Capital] intends to use the net proceeds [or available funds] of this Offering as stated. [SV Capital] will reallocate the net proceeds of this Offering only for sound business reasons."

[294] The SV OMs stated that certain specified entities were to receive money from SV Crossing or SV Capital, with such money logically coming from investor funds:

- Both SV Crossing OMs provided that SV Crossing would pay Foundation Capital "a management fee of 1% of the [SV] Loan proceeds advanced to [SV Crossing], to a maximum of $200,000 per annum".
- SV Crossing would also reimburse Foundation Capital "for its out of pocket expenses in relation to day to day operations of" SV Crossing.
- The SV Capital 2008 OM noted that Foundation Capital had advanced $23,250 to SV Capital "to pay for the costs of this Offering and will be repaid from the net proceeds of the Offering".
- Eyelogic and KMC Capital Inc. (**KMC**) were to receive "a percentage of funds raised from" the SV Capital offerings, if raised through registered or tax-deferred plans. Eyelogic's payments were for "administration", while KMC's were for "Consulting". Both types of payments were to be made annually.

[295] We note again that not all of the money raised for the SV Project was raised using the OM Exemption. However, the subscription agreements attached to the SV OMs in evidence referred to purchasers in Ontario purchasing as "accredited investors", implying that at least some accredited investors were to receive the SV OMs.

[296] Beyer testified that, for offerings with an OM, "procedurally" all investors would have to sign a document acknowledging receipt of the OM, even though he knew that accredited investors did not need to receive an OM or sign an acknowledgement. For offerings made only to accredited investors, he could not "specifically recall if there was a different process or not", although he "surmise[d] not". He also stated that "all documentation was provided to [accredited investors], and it could be that the offering memorandum was included. I don't know that." Aitkens testified that he was not sure whether accredited investors would have received OMs. He also stated that investors would be given "as much information as they required", confirmed that OMs "were available to anyone that wanted one", and testified that if accredited investors "wanted an OM, I'm sure that they would have got an OM". Aitkens' testimony was consistent with Beyer's that some accredited investors may have received an OM (except for accredited investors buying securities when no OM was available).

[297] We are satisfied from Aitkens' and Beyer's testimony that at least some, if not the majority, of the SV Entities' accredited investors received a copy of an SV OM.

2. SV Project's Actual Use of Proceeds

[298] The disclosure, including financial statements, in the SV Crossing 2010 OM and the SV Capital 2010 OM set out some details of how the SV Project's investor money was used. There was also other evidence as to the actual use of proceeds.

(a) OM Evidence

[299] The SV Crossing 2010 OM stated that SV Crossing had already paid $21.9 million of the $23.7 million SV Land purchase price to 1379599. According to the SV Crossing 2010 OM, $1,718,423 remained owing to 1379599 for the SV Land purchase (the other approximately $81,577 apparently having been paid on December 31, 2009 but not included in the

$21.9 million amount given in the SV Crossing 2010 OM). It was common ground that the remainder of the SV Land purchase price was paid from the money raised, as disclosed in the SV OMs.

[300] The notes to SV Capital's financial statements for the period ended July 31, 2009 (just over a year, SV Capital having been incorporated on July 24, 2008) indicated that during that period, SV Capital had incurred $5,129 for "administration services" from Eyelogic and $107,976 for "consulting services" from KMC. Both amounts were "fully reimbursed by [SV Crossing] and form[ed] part of the [SV Loan] amount". SV Capital also paid $238,933 to Foundation Capital for "commissions", which was also reimbursed by SV Crossing and formed part of the SV Loan amount.

(b) Other Evidence

[301] Staff relied on Narfason's evidence regarding the use of the SV Entities' investor money for the impugned transfers – that is, the money transferred from SV Crossing in excess of the purchase price for the SV Land.

[302] Both the Monitor and the chief restructuring officer had access to the books and records of the SV Entities, such as they were: Narfason agreed that the "Harvest group of companies, including Harbour View and Stoney View, had poor accounting records". Accordingly, the Monitor "reconstructed the inflows and outflows of the money . . . based on bank statements and source documents that [it] could obtain". Some of the SV Entities' records were entered into evidence, along with a summary of the Monitor's findings in the form of a letter to Staff dated October 23, 2014 (the **Narfason SV Report**).

[303] We note that Aitkens' counsel repeatedly referred to the Narfason SV Report (and a comparable report for the HV Entities, discussed below) as "ASC crafted". A letter from Staff to Narfason dated September 26, 2014 did ask Narfason to prepare a sources and uses of funds analysis, summarizing "the flow of funds among [the] various entities". We do not consider that there was anything improper about a request for such an analysis, and do not consider that by drafting a response to that request, Narfason was "crafting" a report in the pejorative sense suggested by counsel for Aitkens.

[304] The Narfason SV Report included a summary of the Monitor's sources and uses of funds analysis, which set out the intake of funds from investors and the subsequent disbursement of those funds by the SV Entities. This enabled the Monitor to determine what assets the SV Entities had and the potential for restructuring. The Narfason SV Report showed inflows (from capital raised) to the SV Entities of approximately $31.6 million between October 1, 2007 and August 24, 2012, and outflows of approximately $31.6 million during the same period.

[305] Most of the $31.6 million in outflows was spent on the purchase of the SV Land and certain associated costs; the purchase price was paid in full by April 7, 2010. However, the Monitor also noted the "Intercompany Advances" already mentioned – $3.56 million to 1379599 and $100,000 to 1252064 – which were the basis for Staff's allegations of fraud. Narfason testified that SV Crossing had been "stripped [of] all its working capital" by way of this $3.66 million in "Intercompany Advances". Because "there was no documentation" – such as

loan agreements or promissory notes – to explain or support those advances, the Monitor had concerns.

[306] Narfason testified regarding several specific transfers of money from SV Crossing, and Aitkens also gave evidence regarding these transfers. Staff endeavoured to show how 1379599 and 1252064 used the money they received from SV Crossing, suggesting that such uses were not for the benefit of the SV Entities.

3. Transfers Involving 1379599

(a) Amounts Transferred from SV Crossing to 1379599

[307] The Narfason SV Report referred to approximately $3.56 million transferred from SV Crossing to 1379599 between April 7, 2010 and March 25, 2011 (we are satisfied that the $81,577 discrepancy noted in the Narfason SV Report related to the SV Land purchase price, as noted above). As also noted above, the Monitor did not have "[d]ocumentation supporting the additional payments to" 1379599.

[308] The first step Staff needed to prove was that money was transferred from SV Crossing to 1379599. The evidence indicated that the following amounts (totaling $3.56 million) were transferred from SV Crossing to 1379599, after accounting for money owing to 1379599 for the SV Land purchase:

- $50,000 on April 7, 2010;
- $250,000 on April 21, 2010;
- $500,000 on June 2, 2010;
- $750,000 on June 14, 2010;
- $500,000 on June 22, 2010;
- $10,000 on July 2, 2010;
- $50,000 on July 9, 2010;
- $500,000 on September 27, 2010;
- $250,000 on November 2, 2010;
- $200,000 on November 3, 2010; and
- $500,000 on March 25, 2011.

[309] We are satisfied that the impugned $3.56 million was paid from SV Crossing to 1379599 by way of the listed 11 transactions. Moreover, Aitkens – although not recalling all the transactions specifically – acknowledged that such transfers would have been made.

(b) Amounts Transferred from 1379599 to Others

[310] As the next step, Staff attempted to show that the $3.56 million transferred by SV Crossing to 1379599 was "then diverted on a seemingly 'as needed basis' throughout the Aitkens realm", rather than being used to develop the SV Project. We examined the evidence in this regard. There were three significant common points.

[311] First, Staff led evidence relating to amounts transferred from 1379599 on the same days or shortly after the days money was transferred to 1379599 from SV Crossing. This was done in an effort to show that the money went to other projects in "the Aitkens realm".

[312] Staff seemed to acknowledge that some funds were still owed by the SV Entities to connected entities through management, administration or commission arrangements. The Monitor's "Combined Sources and Uses of Funds" for SV Capital and SV Crossing (in a December 17, 2012 report) estimated amounts that would have been owing by SV Crossing or SV Capital to other companies for such purposes (totaling $937,329):

- $824,896 owed to Foundation Capital for management services and not paid;
- $41,428 owed to KMC for consulting services and not paid;
- $44,885 of commissions not paid; and
- $26,120 owed to Eyelogic for administrative fees and not paid.

[313] Aitkens disputed some of these amounts. He submitted that "Stoney View owed management fees of at least $825,000 and marketing expenses of and administration and legal fees for securities closings of $678, 850 [sic]" – a total of approximately $1.5 million. This was based on Aitkens' testimony: when asked how certain money transferred from SV Crossing "was for the benefit of Stoney View", Aitkens responded that "Stoney View" still owed "Foundation Capital or affiliates" $1.5 million (for management fees "and out-of-pocket expenses"), and that such affiliates would include 1379599. Aitkens' submitted management fee figure was comparable to that set out by the Monitor. However, Aitkens' total of $678,850 for the other expenses was considerably higher than the Monitor's total of $112,433 for the other expenses.

[314] Second, Aitkens generally agreed – or at least did not disagree – with Staff's contentions regarding how 1379599 dealt with the money it received from SV Crossing. This aspect of Staff's evidence was weak with respect to the specific transactions yet strong in showing a pattern of payments. For the specific transactions, Staff pointed Aitkens to unattributed handwritten notations on bank statements. Those notations appeared to use information from SV Crossing and 1379599 ledgers to show that certain amounts were paid by 1379599 to certain recipients. Staff did not take Aitkens directly to those ledgers. Aitkens commented more than once that he did not know the source of the handwritten notations, and Staff neither explained nor clarified this for him or for the panel. Given the questions posed, it was not surprising that Aitkens could not always recall a certain transfer or confirm a certain recipient of the impugned funds. We declined Staff's invitation to take a negative view of Aitkens' credibility regarding these transfers based on his inability to recall such specifics when pointed only to unattributed notations. However, Aitkens did confirm multiple times that money transferred from SV Crossing to 1379599 was used for the Harvest group of companies as a whole. We refer to such confirmation below when discussing Aitkens' general and specific testimony regarding the impugned transfers.

[315] Third, Staff did not allege that any of the money that was the subject of impugned transfers had been improperly used by Aitkens for his personal benefit. For example, Staff stated in Aitkens' cross-examination that ". . . [they were] not saying you're not entitled to make a living". We discerned no indications that Aitkens improperly used any of the disputed amounts for his personal benefit, apart from indirect benefits he may have received through his ownership of some of the entities involved.

[316] We are satisfied that money was transferred from 1379599.

Specific Comments by Aitkens

[317] Aitkens made some specific points when questioned about some of the particular transactions:

- Asked about amounts transferred out of 1379599's account after the April 7, 2010 transfer in, Aitkens acknowledged that he or Moore would have directed transfers of money from 1379599's bank account. Although not recalling the specific transfer from 1379599 to "OKKO" on April 7, 2010 (as suggested by the bank statement notation), Aitkens said that if the money did go to OKKO, then "presumably, an investment in OKKO would -- was going to make money to pay back into the -- into the -- into the -- to pay -- pay off the loan", which "was to enhance value for the -- for the Harvest group of companies". When confronted with the fact that sending money to OKKO was not a stated use in the SV OMs, Aitkens replied: "Well, one of the -- one of the things that was -- that was driving -- driving me was to enhance value for all the projects so that we could have a -- a good and profitable exit for the investors."

- Asked about a $50,000 transfer noted to have been made by 1379599 to "Planet Panels" after the June 2, 2010 transfer of $500,000 from SV Crossing, Aitkens explained that Planet Panels was a company with a particular environmentally-friendly home-building system. Aitkens stated that "the companies were meant to enhance value" and "give a further exit to the project". Asked about a later transfer also apparently made to Planet Panels, Aitkens acknowledged that "we funded Planet Panels". Asked about a June 2 transfer of $104,550 noted as being made to "BK Hill", Aitkens testified that he "would assume" that was correct. Aitkens agreed that BK Hill was "Priest Lake, . . . the project down in the States". Witness FJ testified that BK Hill was his company and that BK Hill and "Harvest Capital" had a 25%-75% joint venture in an Idaho project called Priest Lake. Aitkens agreed that a transfer on June 3 of $7,500 "could've been" paid to 1252064 (we earlier concluded that Aitkens was the guiding mind of and controlled 1252064).

- Aitkens was asked about transfers from 1379599's bank account following the June 14 transfer of $750,000 from SV Crossing. He did not recall a June 14 payment of $660,000 to a law firm (Schinnour Matkin Baxter), but confirmed "we did deal with Schinnour Matkin Baxter". Aitkens testified "I can guess . . . it was for some kind of land -- or some kind of transaction". When asked about a transfer of $100,000 out of 1379599's bank account to "IPM3", Aitkens testified that "IPM [was] one of our project managers who worked on various projects". Aitkens did not claim that IPM was directly connected to the SV Project, but agreed that charges such as the $660,000 to the law firm and the $100,000 to IPM were "typical" uses of SV Project money, adding:

> . . . it was to enhance the value again. These -- all of these transactions were all papered. They were all -- they were all accounted for. And when the project over here that was being developed was going to -- was going to be exited

> whichever way it was going to be exited, then the money would be repaid back to the -- the -- the entity that it -- that it was paid from -- or was borrowed from, I mean. So -- but all of these transactions were all papered. It wasn't as though we just did this willy-nilly. So . . .

- Aitkens was asked about a transfer of approximately $205,000 from 1379599 to "BK Hill" on June 22, following a $500,000 transfer from SV Crossing to 1379599. Aitkens testified that he did not remember that transaction but confirmed that the Harvest group of companies "did fund a project in -- called [BK] Hill in Priest Lake". Aitkens also confirmed that a June 28 cheque to "OKKO Communities" was signed by him and was a payment out of 1379599's bank account. Aitkens further confirmed a cheque to himself for $35,000 (June 28; Staff did not claim that there was anything improper about that particular payment) and to "Doug Alger In Trust" for $150,000 (June 30). The latter was for "a waterfront property development in Lac Ste. Anne".

- Aitkens was again asked about BK Hill when he was taken to the September 27 transfer of $500,000 from SV Crossing to 1379599 and a subsequent transfer, apparently to BK Hill, of $103,740. Aitkens testified that he could not identify that particular transfer, but did agree with Staff's statement that "[BK] Hill was one of the recipients of funds from the Harvest group of companies".

- Aitkens testified that he was unable to recall specific payments made from 1379599's bank account following transfers in from SV Crossing on November 2, 2010 ($250,000) and November 3 ($200,000).

General Comments by Aitkens

[318] In his cross-examination by Staff, Aitkens made general comments regarding the justifications or explanations for certain transfers from SV Crossing:

> Q . . . The money that was paid to [1379599] could've gone to other Harvest entities or other nominee companies and -- to further whatever project they were in. Is that what you're saying?
>
> A Well, I -- I mean, each individual -- we were -- the -- the -- the stated goal was to deal and enhance the value on all of the projects. We had so much interest -- there [were] so many groups looking to acquire a large critical mass of development property in and around the hub of -- between Calgary to Edmonton. As a result of that, we became -- we've talked -- we talked to many groups -- we had groups over from China. We had groups over from Korea. Strangely enough, I had a -- a phone call from one of the -- or not a phone call -- an email from one of the distributors in that -- the Korean, he didn't know anything about all the stuff that was going on. The fellow from Korea with the company there who did the LOI coming to town and wanted to know if we still had land for sale. You know, so there's -- they were looking for a critical mass. We were trying to enhance the value of the overall project so we could -- we could -- the easiest way to make money for investors is to sell the properties. And that's what you wanted, was an exit, right? So that's what we were looking for, was an exit for -- for the properties. So . . .
>
> Q Okay. But the people that invested in Stoney View would've had no idea that you were doing that, would they?

A Well, when they invested in Stoney View, they invested -- they wanted to make a return on their money, which is exactly what -- what -- what I was trying to do and what we as a company were trying to do to enhance value on their -- on their investment.

Q Right. But the answer to my question is no, right? They would've had no idea that that's what --

A Well, all depends on who they were. If -- if we -- if the people that we talked to who -- some of the larger investors -- excuse me -- they -- they would've known that. I didn't let a lot of people know about a lot of the things that were going on. Not even -- like, there was a very small group of people who knew what was going on because of the -- the -- we were having, like, a considerable amount of interest and -- from China. . . . And they were -- they were -- they were -- they were very interested in what we were doing.

And so we were trying to -- we were trying to enhance value on the -- and treat the projects as though they were one entity and to -- so we could -- we could sell it. And we literally -- with -- if the economy hadn't tanked, we came within a whisker of -- of having that exit. So . . .

Q You were, in effect, treating all of the Harvest group of companies as one company?

A Well, our goal was to amalgamate all of the companies. That was our goal when -- that's when -- when we hired PricewaterhouseCoopers in 2009, that was the goal. And that's why we set up the mutual fund trust, was to move all of the projects and all of the companies under one -- one roof . . . .

[319] Staff and Aitkens also engaged in the following exchange:

Q . . . I can go through all these statements one at a time, or you can agree that these moneys were not used on behalf of Stoney View Crossing, the $3.56 million.

A No. I don't agree about that at --

Q It was paid --

A -- about that at all.

Q Okay. It was paid into [1379599], and then we can see it just starbursting out. It all disappears within days of it landing.

A All of these transactions were -- were not just paying for willy-nilly things. They were for enhancing value of projects. And -- which would enhance the value of Stoney View, Harbour View, this project, that project. It was to add value to the -- to the -- to the completeness of -- of everybody's -- everybody's investments.

Q Okay.

A It wasn't -- these weren't things that I spent on myself or anything. These were -- these were projects that were there for the -- for the enhance -- or for the -- for the benefit, ultimately, of the investors.

Q They were all companies underneath the umbrella of the Harvest group of companies or Foundation?

A Well, other than the ones we had in joint venture. We had a number of joint ventures, yes.

. . .

A . . . And so the goal was to make the overall -- the overall company attractive so we could be the object of a takeover or a -- be the object of a -- of a group purchase. . . .

Q I understand. But the people that invested in Stoney View wouldn't have known that, would they?

A No. And -- and --

Q Based upon the offering memorandum?

A No. . . .

[320] Aitkens elaborated further that "if we had some capital to invest that wasn't required", then that capital had to be used to generate interest, given that guaranteed investment certificates with banks were not paying well. He explained that the bond structure required them to "try and keep ahead of that ever-rolling interest that was coming", "because when maturity comes, you either need to get an extension or you needed to pay it. So we were trying to always stay ahead of that. That was -- that was the stated goal or the business purpose for -- for doing that."

Documentary Evidence from Aitkens

[321] Aitkens tendered several loan agreements, promissory notes and similar documents. For example, he discussed in his testimony two promissory notes regarding two respective transfers of amounts from one of the SV Entities to 1379599.

[322] The November 2, 2010 transfer for $250,000 was the subject of a "Promissory Note" of the same date. That note provided for an interest rate of 6% per annum and a maturity date of May 31, 2012. The terms in a Promissory Note for the November 3, 2010 transfer of $200,000 were identical. Aitkens testified that both documents were likely prepared by "our bookkeeper" and that he signed them "on or close to" their respective dates. In cross-examination, Aitkens testified that the documents were a "rudimentary" way of tracking "the amounts of ins and outs from various companies".

4. Transfers Involving 1252064

[323] Again as a first step Staff established that SV Crossing transferred money to 1252064: $100,000 on April 22, 2009. Aitkens agreed that this sum could have been paid "for fees owing", because "a lot of the marketing expenses were paid out of [1252064]".

[324] As the second step, Staff argued that money was transferred by 1252064 to other entities controlled by Aitkens, rather than being used for development of the SV Project. Staff took Aitkens through some transfers made from 1252064's bank account. Aitkens could not identify one for $20,000 marked with an unattributed handwritten note "HCM", although he acknowledged again that "if one company needed money for a debt or for a payment or something, then we would've transferred. So this wouldn't be unusual, no."

[325] We are satisfied that money was transferred from 1252064.

D. HV Project

1. HV OMs' Stated Use of Proceeds

[326] The HV Capital 2009 OM and the HV Capital 2010 OM stated that the majority of the net proceeds raised under the former and $600,000 of the net proceeds raised under the latter "shall be loaned" to HV Landing to acquire the HV Land and for "a working capital facility" to be used for developing the HV Land. The HV Landing 2009 OM and the HV Landing 2010 OM stated that HV Landing would use the net proceeds raised under each of those OMs – together with proceeds loaned to HV Landing by HV Capital – to pay for the HV Land and "as a working capital facility" to be used for developing the HV Land.

[327] Immediately following the "Use of Net Proceeds" section in the HV Landing 2009 OM and the HV Capital 2009 OM and the comparable "Use of Available Funds" section in the HV Landing 2010 OM and the HV Capital 2010 OM was a section titled "Reallocation". This stated that HV Landing or HV Capital "intends to use the net proceeds [or available funds] of this Offering as stated. [HV Landing or HV Capital] will reallocate the net proceeds [or available funds of this Offering] only for sound business reasons."

[328] The HV OMs stated that other entities were to receive money from HV Landing or HV Capital, with such money logically coming from investor funds:

- Both HV Landing OMs provided that HV Landing would pay Foundation Capital "a management fee of 1% of the [HV] Loan proceeds advanced to it, to a maximum of $200,000 per annum".
- The HV Loan amount would include all costs of the HV Capital offering, payable by HV Landing.
- HV Landing would also reimburse Foundation Capital for its "out of pocket expenses in relation to day to day operations of" HV Landing.
- The HV Capital 2009 OM noted that estimated costs of the HV Capital 2009 offering were advanced to KMC and were to be reimbursed from the proceeds of the HV Capital 2009 offering. The HV Capital 2010 OM stated that estimated offering costs of up to $30,000 were to be paid by HV Landing.
- Under an "Administration Agreement", Target was to receive a percentage of the funds raised from the HV Capital offerings, if raised through registered or tax-deferred plans.

[329] We note that not all of the money raised for the HV Project was raised using the OM Exemption. However, the subscription agreements attached to the HV OMs in evidence referred to purchasers in Ontario purchasing as "accredited investors". Based on the review of Aitkens' and Beyer's testimony, above, we are satisfied that at least some, if not the majority, of the HV Entities' accredited investors would have received a copy of an HV OM.

2. HV Project's Actual Use of Proceeds

[330] The disclosure, including financial statements, in the HV Landing 2010 OM and the HV Capital 2010 OM set out some details of how the HV Project's investor money was used. There was also other evidence as to the actual use of proceeds.

(a) OM Evidence

[331] The HV Landing 2010 OM stated that HV Landing had already paid $9.15 million of the $9.75 million HV Land purchase price to 0747618 – $1.6 million directly to 0747618 and $7.55 million to 1252064, at 0747618's direction. $600,000 remained owing to 0747618 for the HV Land purchase. It was common ground that the remainder of the HV Land purchase price was paid from the money raised, as disclosed in the HV OMs.

(b) Other Evidence

[332] Staff relied on Narfason's evidence regarding the use of the HV Entities' investor money for the impugned transfers – that is, the money transferred from HV Capital (in excess of amounts transferred to HV Landing as the HV Loan) and the money transferred from HV Landing in excess of the purchase price for the HV Land.

[333] The Monitor was also involved with the HV Entities, of which it had become aware through its restructuring work for the Harvest group of companies. While Narfason said they did not get into "significant discussions" about the HV Entities until late 2012, the Monitor sought to put the HV Entities into receivership in early 2013 upon finding that significant funds had been moved to 1252064 from the HV Entities' accounts. Again, Narfason testified that the Monitor had "full access" to the books and records of the HV Entities, some of which were entered into evidence. As stated above in relation to the SV Entities, the records for the HV Entities were poor. As was done for the SV Entities, a summary of the Monitor's findings in respect of the HV Entities' financial transactions was prepared in the form of a letter addressed to Staff and dated October 23, 2014 (the **Narfason HV Report**). Like the Narfason SV Report, the Narfason HV Report included a summarized sources and uses of funds analysis.

[334] According to the Narfason HV Report, the HV Entities together raised $16,136,902 from "Bondholders" between February 1, 2009 and October 31, 2012. Narfason testified that the records of the HV Entities did show money being spent to acquire the HV Land and pay certain related costs – including approximately $1.131 million for "Land Development" – but that the Monitor "also identified a significant amount of money coming out of [the HV Entities] that was going to other Harvest group entities, and [it] could see no basis for that money going to those other entities". Narfason noted that the Monitor could not locate documentation or other information which would explain or support these transactions.

[335] Staff guided Narfason through a description of several specific transfers of money from the HV Entities, and Aitkens gave evidence regarding these transfers. Staff also endeavoured to show how the transferees used the money, arguing that such uses were not for the benefit of the HV Entities. The Narfason HV Report set out $2,901,901 in "Cash Outflows" by way of "Intercompany Advances". The recipients were as follows:

- $37,500 from HV Capital to Foundation Mortgage on May 16, 2011;
- $1,000,000 from HV Capital to 1357686 on December 7, 2010;
- $330,000 from HV Capital to HCMI on December 20 or 22, 2011 ($250,000) and March 1, 2012 ($80,000) (the evidence was inconsistent regarding the December date);

- $300,000 from HV Capital to FM3 on December 22, 2011 (via HCMI); and

- $1,234,401 to 1252064 ($1,084,501 from HV Landing between October 18, 2010 and May 25, 2011, plus $149,900 from HV Capital on a date unknown).

3. Transfers Involving Foundation Mortgage

[336] We are satisfied that $37,500 was transferred from HV Capital to Foundation Mortgage on May 16, 2011, based on the documentary evidence and Aitkens' agreement.

[337] The evidence was unclear as to why HV Capital transferred money to Foundation Mortgage. HV Capital's general ledger showed a transfer of $37,500 described as "Due from Foundation Mortgage '1'". Foundation Mortgage's "General Ledger" showed a deposit of that amount on May 16, 2011, categorized there as "Loan Interest Income". However, in the Narfason HV Report, Narfason wrote that the Monitor did "not believe that this classification [was] correct as Harbour View's records show[ed] no indication of a loan from" Foundation Mortgage.

[338] Aitkens testified that he paid interest payments "for Foundation Mortgage 1 and 2" from "the nominee companies". Aitkens also testified that the money "may have gone towards one of the projects or to -- to assist the investors." When asked if he considered this payment to be "authorized by the reasonable business purposes clause" (a misstatement of the HV OMs' wording, "sound business reasons"), Aitkens replied "[y]es", and agreed that it was "for the general benefit of the Harvest group of companies", which he stated "in turn, benefits the specific companies as well".

[339] The Foundation Mortgage ledger also showed a cheque on the same date for the same amount, categorized as "Bonds Payable". That cheque was payable to an individual, with the notation "50% bond redemption". Before the money was transferred in from HV Capital, Foundation Mortgage's bank account was in a deficit position of almost $4,000. Staff argued that the $37,500 payment led to "[t]he logical inference . . . that the funds were used to pay off an investor in" Foundation Mortgage. We note that copies of other Foundation Mortgage cheques in evidence bore notations indicating "bond redemption".

[340] We are satisfied that money was transferred from Foundation Mortgage.

4. Transfers Involving 1357686

[341] We are satisfied that HV Capital transferred $1 million to 1357686 in December 2010. This was evident from HV Capital's bank statements and 1357686's bank statements and general ledger. Aitkens agreed that $1 million was paid by HV Capital to 1357686.

[342] There was, however, a problem with the submissions relating to the date of the transfer. The evidence showed 1357686 receiving two transfers for the same amount – one December 7, 2010 and one December 10, 2010. The Narfason HV Report appeared to conclude that the transfer from HV Capital was the amount shown on 1357686's bank statement as received on December 7, 2010. Although the general ledger descriptions of the December 7 and December 10 deposits were not discussed during the hearing, those descriptions satisfy us that

the transfer from HV Capital was the one 1357686 received on December 10, 2010. We do not consider reliable Aitkens' acknowledgment in his testimony that the $1 million was paid by HV Capital to 1357686 on December 7 because Staff pointed Aitkens only to that December 7 amount, and did not ask him to address the December 10 amount or the corresponding entries in 1357686's general ledger.

[343] Given that Staff considered the December 7 amount to be from HV Capital, Staff referred to the approximately $658,000 paid out of 1357686's bank account over December 7, 8 and 9. In our view, those amounts are not relevant to the allegations before us because they were made before 1357686 received the transfer of $1 million from HV Capital on December 10.

[344] Although Staff did not consider payments made by 1357686 after 1357686's December 10, 2010 receipt of $1 million from HV Capital, 1357686's general ledger showed that it issued a number of cheques and payments – ranging in amount from as little as $85.68 to as much as $135,000 – subsequent to that date and through to the end of 2010. In addition, Aitkens made some general comments with respect to the fact that the HV OMs did not refer to "providing funds to 1357686": "Well, again, I -- I think we discussed that about the business uses of funds." He acknowledged that he "didn't specifically talk to a lawyer about Harbour View funds" but had "talked to lawyers prior on -- about the general concept".

[345] We are satisfied that money was transferred from 1357686.

5. Transfers Involving HCMI

[346] Narfason identified $330,000 transferred to HCMI by HV Capital, and Aitkens acknowledged that he made such transfers as follows:

- $250,000 on December 20 or 22, 2011 (the evidence was inconsistent); and
- $80,000 on March 1, 2012.

[347] Both amounts were apparently used for interim – or debtor-in-possession (**DIP**) – financing. This was evident from the documentary evidence, and was confirmed by Aitkens' testimony.

[348] Narfason testified that he learned in 2012 that money transferred to HCMI was used for interim financing for other Harvest group entities. According to Narfason, "Harbour View had cash on hand at the time of the CCAA/receivership, so it didn't need interim financing". Narfason also testified that, in what was apparently a discussion early in the CCAA process (not relating to the HV Entities at that point): ". . . they needed a mechanism to fund these companies to restructure them, and if money was going to come from other Harvest-related entities, we very clearly discussed it -- it would come -- can't come from other -- other entities where bonds were raised in them".

[349] In contrast, Aitkens claimed that "everybody -- all the professionals in the room" -- knew that the DIP money came from the HV Entities. When challenged as to whether it was an "authorized use in the Harbour View OM to fund DIP financing for" other entities, Aitkens replied:

> Well, again, to answer the same question again, if all of the companies would have gone into bankruptcy as a result of that, which is what I was told by the proposed monitor at that time and the professionals in the room, then I would say that [using the HV Capital money for DIP financing] was a very good use -- business use of finances . . .

[350] We are satisfied that money was transferred to HCMI. It is unnecessary to determine if any or all of "the professionals in the room" were aware that the money from the HV Entities was used as DIP financing for other entities in the Harvest group. The key issue is whether the initial transfers perpetrated a fraud.

6. Transfers Involving HCMI and FM3

[351] We are satisfied that an additional $300,000 was transferred from HV Capital to HCMI on December 22, 2011. Although less clear, we are also satisfied that the $300,000 was then transferred to FM3 on December 22, 2011. These specifics were set out in the Narfason HV Report and were consistent with banking records and notations in HCMI's general ledger. The evidence indicated that Aitkens was a 27.5% shareholder of FM3 in November 2011.

[352] Aitkens' testimony was consistent with a payment being made from the HV Entities to HCMI. He also referred to a document in evidence "made as of" December 22, 2011, which documented a loan of up to $300,000 from the HV Entities to HCMI. Aitkens stated that this loan agreement "ended up funding [a project in Priest Lake] for Noel Winter" (**Winter**). FM3 was not mentioned in that agreement.

[353] The other evidence regarding FM3 was inconsistent. HV Capital's general ledger described the $300,000 transfer in December 2011 as a transfer to FM3 for "Due from Priest Lake Project". According to the Narfason HV Report, the Monitor could not "further verify" this information as it did not have "possession of FM3's records". However, Narfason testified that he understood from discussions with Winter "that FM3 lent that money onward to BK Hill which was -- is referred to as Priest Lake, but the money went from Harbour View to FM3 and then on to Priest Lake". Although Winter from FM3 testified, he was not asked about this $300,000 amount. FJ (involved with the Priest Lake project) testified that no money ever came to that project from FM3.

[354] Aitkens initially disagreed that the $300,000 was transferred to FM3 and "then advanced down to Priest Lake". He later acknowledged that he wrote the cheque and that the money went to FM3, but he maintained that he was "not 100 percent familiar" with what happened to the money after that.

[355] On balance, as noted, we are satisfied that FM3 did receive $300,000 from the HV Entities via HCMI, and that that money was sent to the Priest Lake project. However, the key issue here is whether the transfer to HCMI (for whatever reason it was made) was part of conduct which perpetrated a fraud on HV Project investors.

7. Transfers Involving 1252064

[356] We are satisfied that $1,234,401 was transferred to 1252064 from HV Landing ($1,084,501) and HV Capital ($149,900) between October 18, 2010 and May 25, 2011. Staff acknowledged that $600,000 of that apparently related to the purchase of the HV Land. This left approximately $635,000 alleged by Staff to have been improperly transferred to 1252064 (we

consider a $599 difference not investigated by Narfason to be insignificant). Narfason testified that there was "no basis" for "Harbour View" to advance $635,000 to 1252064 as "an intercompany loan".

[357] Aitkens agreed that 1252064 was paid approximately $635,000 more than the amount to which it was entitled for the HV Land purchase. He stated, however, that the HV Land agreement was "subject to certain other considerations -- other -- certain other facts". This seemed to be a reference to "management fees" and "out-of-pocket expenses", and to Aitkens' contention that Narfason did not take into account "the whole concept of the other expenses".

[358] Staff made submissions regarding the transfers of $485,000 of that $635,000:

- $340,000 on February 28, 2011 (apparently from HV Capital's bank account to HV Landing's bank account to 1252064);
- $35,000 on April 19, 2011 from HV Landing's bank account to 1252064's bank account; and
- $110,000 on May 2, 2011 from HV Landing's bank account to 1252064's bank account, with the notation "Due to Harbour View" and the further explanation, "Wages".

[359] As the next step, Staff attempted to prove that these amounts were transferred from 1252064's bank account to other entities or projects in which Aitkens was involved. We examined the evidence in this regard. As with the impugned transfers stemming from the SV Project investments, there were three significant common points here.

[360] First, Staff led evidence relating to amounts transferred from 1252064 on the same days or shortly after the days money was transferred to 1252064 from the HV Entities. This was done in an effort to show that the money was used "to pay expenses on other projects".

[361] Staff acknowledged that some money was owed and paid for management fees and administrative expenses, but relied on the Narfason HV Report's quantification of those as $150,000 and $293,726, respectively. Those amounts set out by Narfason were accounted for separately from the impugned payments to 1252064; in other words, Narfason did not consider the impugned $635,000 paid to 1252064 to include amounts owing for management fees or administrative expenses.

[362] Aitkens testified that the amounts set out by Narfason for management and administrative expenses were too low. According to Aitkens, Narfason did not take into account the fact that "we were still owed marketing and out-of-pocket expenses according to the contract" nor the fact that not all management fees owing had been paid. In total, Aitkens testified that approximately $800,000 was still owed, which would more than account for the $635,000 transferred from the HV Entities to 1252064. In so claiming, Aitkens returned to his contention that Narfason had not asked Aitkens sufficient questions about the HV Project. Aitkens testified that "every transaction would have been papered. If Mr. Narfason would've asked me and -- we would've provided them." We earlier stated we did not believe Aitkens' testimony that Narfason did not ask questions of Aitkens and, conversely, we did believe Narfason's testimony that he did ask questions of Aitkens. We also note that Aitkens provided some documentation at the hearing,

such as promissory notes, but those were limited in number and scope and apparently had not been provided during the Monitor's review. Without more, we declined to accept Staff's insinuation that the documents Aitkens tendered at the hearing were created after the fact in an attempt to legitimize the impugned transfers. However, we did not rely on these documents. As stated later in this decision, documents cannot cure inadequate disclosure in OMs.

[363] Second, as with the SV Project transfers out of SV Crossing, Aitkens generally did not dispute that certain money was transferred from 1252064 to other Aitkens-connected entities. Again, this aspect of Staff's evidence was weak for the specific transactions yet strong in showing a pattern of payments. For the specific transactions, Staff again pointed Aitkens to unattributed handwritten notations on bank statements, which were apparently derived at least in part from ledgers also in evidence. However, Staff did not take Aitkens directly to such ledgers. As with the transfers from SV Crossing, it was clearly difficult for Aitkens to recall or confirm certain transfers or recipients. Again, we did not negatively view Aitkens' credibility in this regard. However, Aitkens did confirm multiple times that money transferred from the HV Entities to 1252064 was used for the Harvest group of companies as a whole. We refer to such confirmation below when discussing Aitkens' general and specific testimony regarding the impugned transfers.

[364] Third, Staff did not allege that any of the money that was the subject of impugned transfers had been improperly used by Aitkens for his personal benefit. We discerned no indications that Aitkens improperly used any of the disputed amounts for his personal benefit, apart from indirect benefits he may have received through his ownership of some of the entities involved.

[365] We are satisfied that money was transferred from 1252064.

Specific Comments by Aitkens

[366] Aitkens made some specific points when questioned about some of the particular transactions:

- Aitkens was asked about money transferred out of 1252064's bank account after the $340,000 was transferred in on February 28, 2011:
  - He agreed it was "possible" that he "directed" that $49,485 be transferred from 1252064 to BK Hill on February 28, 2011. FJ was not asked about this specific transfer, but did testify that amounts were received from 1252064, among other numbered companies.
  - When asked if he recalled what a $343,828 "Web payment" out of 1252064's bank account that same day "was about", Aitkens replied that he did not. Other evidence described that transfer as being to Pritchard and Company, with the note "Due from HGLP".
  - Staff did not ask Aitkens about two cheques written by 1252064 that day ($1,653.75 and $5,250, respectively).

- Aitkens was not asked about two transfers to Foundation Capital ($15,000 and $35,000, respectively) made on April 19, 2011 (the same day that $35,000 was transferred to 1252064 from the HV Entities).

- Aitkens acknowledged transferring $110,000 from HV Landing to 1252064 on May 2, 2011. He agreed that the unattributed handwritten notation "FCC" with respect to a transfer of the same date from 1252064's bank account indicated a transfer to Foundation Capital, but stated "I can't be certain that's where it went. But that's what the note says. I'm not sure." Also recorded was a transfer of the same date and for the same amount from 1252064's bank account to FCC, with the notation "Due from FCC". Staff then asked Aitkens about various smaller amounts transferred from 1252064, including some categorized as "Rent/Lease", "Fees/Dues", "Advertising" and "Natural Gas". Aitkens commented briefly on these, then stated:

> Well, as I said, we were -- these were expenses on -- that were enhancing -- meant to enhance the value of the projects. That was -- they were enhancing the value of the projects by keeping bills paid, by keeping lights on, and by having people paid for their work, so we could continually enhance value.

General Comments by Aitkens

[367] In relation to his testimony about the May 2, 2011 transfer, when asked whether his reference to "the projects" meant "the projects in the Harvest group of companies", Aitkens replied: "Generally, yes. Yes." He further explained that "we" took money from the SV Entities or the HV Entities and used it to pay expenses for the Harvest group of companies "a number of times", and "we used funds for what -- what we felt were good business practices. If we wouldn't have -- if we wouldn't have paid expenses, then -- then -- then for sure it would have been bad business practices."

[368] Staff and Aitkens also engaged in the following exchange:

> Q And . . . the people that invested based upon the Harbour View offering memorandum would not have known that their funds were being paid to the benefit of other private entities that you --
>
> A Again, some of --
>
> Q -- controlled?
>
> A -- some of the larger investors would have. But -- but that's [a tack] we were taking when we were raising money from accredited investors. Some of those very people were people that I had bounced some of these ideas off of -- or some of these things off and gave me guidance. So . . .
>
> Q I understand that. But the people that invested in Harbour View based upon the Harbour View offering memorandum would not have known that you were going to take their funds and transfer them to other private companies that you controlled or to other projects in the Harvest group of companies?
>
> A Well, they signed -- we -- we felt -- I felt -- the lawyers that I talked to talked about good business reasons. And to enhance the value of the -- of this project and that project is a good business reason to -- to use capital. . . . I mean, we didn't take it and spend it over here and spend it over there. Everything -- the decisions were, we felt at that -- at the time, very wisely made, and we tried to invest in very, very good projects. . . .

. . .

A [Harbour View investors] would've known that these funds could be used for – for good business reasons. That's what the OM said.

E. Analysis on Allegations of Fraud

1. The Law

[369] During the relevant period, s. 93(b) of the Act stated: "[n]o person or company shall, directly or indirectly, engage or participate in any act, practice or course of conduct relating to a security . . . that the person or company knows or reasonably ought to know will . . . perpetrate a fraud on any person or company."

[370] Since the term "fraud" is not defined in the Act, ASC panels in decisions such as *Arbour* (at para. 975) and *Re Kostelecky*, 2017 ABASC 42 (at para. 95) have adopted the elements of fraud enunciated by the SCC in *R. v. Théroux*, [1993] 2 S.C.R. 5. Those elements are (at para. 27):

(a) a "prohibited act, be it an act of deceit, a falsehood or some other fraudulent means";

(b) "deprivation caused by the prohibited act" (whether by "actual loss or the placing of the victim's pecuniary interests at risk");

(c) "subjective knowledge of the prohibited act"; and

(d) "subjective knowledge that the prohibited act could [result in] the deprivation of another . . .".

[371] As discussed in *Arbour* (at paras. 977-81), the *actus reus* of fraud is proved when it is established that 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 a certain situation was something other than what it really was . . .". In addition, the broad phrase "other fraudulent means" is intended to capture other dishonest acts which may not be "deceit" or "falsehood". *Arbour* noted that this category included situations of "personal use of corporate money, failure to disclose important facts, unauthorized diversion or taking of money or property, and the unauthorized use of investor money . . ." (at para. 980). Deprivation in the securities context need not involve actual loss to the investor – "prejudice or risk of prejudice to the economic interests of another" is all that is required (see *Arbour* at para. 981 and its reference to *Théroux* at paras. 16-17).

[372] Regarding the *mens rea* of fraud, it must be proved that the person involved "had subjective awareness of the person's prohibited act and that such act placed another's or others' economic interests at risk" (*Arbour* at para. 982). This subjective awareness can be inferred from the "totality of the evidence" (*Brost* at para. 48). 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).

[373] It is not necessary for Staff to show that a respondent specifically intended to be dishonest or to cause financial loss to others. In *R. v. Zlatic*, [1993] 2 S.C.R. 29 (the companion case to *Théroux*), the SCC explained as follows (at para. 40):

> . . . fraud by "other fraudulent means" does not require that the accused subjectively appreciate the dishonesty of his or her acts. The accused must knowingly, i.e. subjectively, undertake the conduct which constitutes the dishonest act, and must subjectively appreciate that the consequences of such conduct could be deprivation . . . .

[374] In *Théroux*, the SCC explained further (at para. 36):

> A person who deprives another person of what the latter has should not escape criminal responsibility merely because, according to his moral or her personal code, he or she was doing nothing wrong or because of a sanguine belief that all will come out right in the end. Many frauds are perpetrated by people who think there is nothing wrong in what they are doing or who sincerely believe that their act of placing other people's property at risk will not ultimately result in actual loss to those persons. If the offence of fraud is to catch those who actually practise fraud, its mens rea cannot be cast so narrowly as this.

[375] Thus, it does not matter whether a respondent may have hoped or believed no one would lose money. As the hearing panel stated in *Arbour* (at para. 976), "[o]nce the elements required for a finding of fraud have been established, a respondent's intention or motivation is irrelevant" (see also *Zlatic* at para. 27). This also means it is not necessary to show that a respondent accused of fraud personally profited from the wrongdoing (*Théroux* at para. 19 and *Arbour* at para. 981).

2. Prohibited Acts Resulting in Deprivation to Others

[376] Staff submitted that the prohibited acts were that "most of the money allocated towards working capital in [the SV Project and HV Project] was diverted by Aitkens to Aitkens' privately controlled companies . . . [r]ather than using the funds as represented in the [SV OMs and HV OMs]".

[377] We have already determined that the transfers at issue were made from SV Crossing and the HV Entities to various people and entities, including entities for which we have found Aitkens to be the guiding mind and to have controlled. Aitkens did not dispute that the majority of the impugned funds transferred from SV Crossing and the HV Entities were then transferred to other entities, and we so find.

[378] Therefore, the remaining issue to consider regarding *actus reus* is whether the transfers of funds from SV Crossing and the HV Entities were prohibited acts and resulted in deprivation to others.

(a) Prohibited Acts

[379] Staff argued that the mere transfer of funds from SV Crossing and the HV Entities "to [Aitkens'] private corporations . . . without informing investors or seeking their consent" was deceptive. Staff relied on the wording of the SV OMs and HV OMs, which essentially said that funds remaining after the respective land purchases would be used for "working capital". Staff also submitted that this money was "then used to pay expenses on an 'as needed' basis on behalf of" the transferee companies "and other syndicated projects".

[380] In his defence, Aitkens relied heavily on the "Reallocation" clause in each of the SV OMs and HV OMs – stating that reallocation of net proceeds would be done only for "sound business reasons". Aitkens also contended (not strongly) that sufficient money was raised from accredited investors – which "cannot rely on" OMs – that claims of "fraudulently misleading any such investors" were "lessen[ed]".

(i) Accredited Investor Argument

[381] We first discuss – and reject – Aitkens' apparent argument that money raised from accredited investors was not subject to the use of proceeds parameters disclosed in the SV OMs and HV OMs. Staff characterized this position as Aitkens thinking that "he could use accredited investor's [sic] funds for [purposes not set out in the SV OMs and HV OMs] because they weren't relying on the OMs".

[382] First, as noted, Aitkens did not strongly pursue this argument, meaning that we received few submissions for or against it.

[383] Second, we could not rely on the argument made by Aitkens as to the amounts raised under the AI Exemption from SV Project investors and HV Project investors. As noted earlier, we did not rely on the SV Entities' or HV Entities' Exempt Distribution Reports (which, in any event, showed amounts inconsistent with Aitkens' assertion). Although Aitkens contended that it was "proved through" his evidence that $4,797,000 was raised for the SV Project through accredited investors, we were not pointed to any source for this in the documentary evidence. Aitkens did testify that $5 million for each project was raised from accredited investors. Aitkens also testified regarding a document purportedly listing accredited investors in "HVL" and stating that $4,936,800 was raised from accredited investors. However, we are unable to rely on Aitkens' testimony on this point. The document on which he based his testimony seemed erroneously to be titled "HVL ACCREDITED" (presumably HVL was an acronym for HV Landing) and did not refer to HV Capital, which raised the majority of the HV Project money. Such carelessness in the title did not inspire us with confidence regarding the accuracy of the contents of the document. There was also no reliable indication of who prepared the document (other than Aitkens' vague testimony that it was prepared by "one of the admin staff") or on what basis (for example, it clearly was not prepared using the HV Entities' Exempt Distribution Reports because the numbers and names were significantly inconsistent).

[384] Third, as noted, the evidence satisfied us that at least some, if not the majority, of the accredited investors in both the SV Project and HV Project received OMs. Although OMs do not have to be given to accredited investors, accredited investors are entitled to rely on information they are given, particularly lengthy and detailed documents required by Alberta securities laws to contain certain information. Moreover, Aitkens testified that all accredited investors in the SV Project and HV Project would have received an "Executive Summary", even if they did not receive an OM. Beyer testified that he and others prepared both executive summary documents based on the SV OMs and HV OMs. Nothing in either executive summary suggested that funds raised would be used for purposes outside of the SV Project and HV Project.

[385] Fourth, we cannot agree with Aitkens' apparent position that some or all of the transferred amounts should be considered to have come from accredited investors and therefore were somehow to be excluded from the amounts Staff alleged were fraudulently transferred. It would be illogical and contrary to the public interest to assume – particularly after the fact, with no evidence, and given that money is fungible – that impugned transfers must have been made with money from accredited investors and thus not subject to disclosure in OMs regarding the use of proceeds.

(ii) Reallocation of Money Argument

[386] As shown by the earlier-quoted excerpts from his evidence, Aitkens contended that the money was transferred from SV Crossing and the HV Entities so that it could be used for all of the entities in the "Harvest group of companies", which would benefit all of the entities as a whole – he therefore characterized such transfers as having been made for "sound business reasons". In particular, he stated that the SV Entities and HV Entities benefited because this was the way holders of bonds in SV Capital and HV Capital could receive the promised interest payments for their bonds. In general, he stated that all of the entities in the "Harvest group of companies" benefited because strengthening the financial position of certain of those entities would make the conglomerate more attractive to prospective outside purchasers. Aitkens' submissions relied on this testimony, stating that Aitkens believed he was able to transfer money among projects to help those with "an imminent need for cash".

[387] A similar argument in similar circumstances was addressed in *Shire*. The OMs in *Shire* described the intention to use funds raised by the offering for real estate acquisition and development, but included reallocation clauses with virtually the same wording as those in the SV OMs and HV OMs. The individual respondent in *Shire* – Couch – relied on those reallocation provisions in an attempt to justify transfers made outside the scope of the OMs' use of proceeds provisions, primarily to related companies. The panel in *Shire* described Couch's argument in part as follows (at para. 112):

> Couch directed us to statements in the Impugned OMs . . . that, despite the Bearspaw OMs' disclosure of the intended uses of the money raised, the money might still be "reallocate[d]" for "sound business reasons". The intended implications of these submissions, in our view, were that: . . . investors under the Bearspaw OMs had fair warning that things might not go as described in the documents, and knew (or should have known) that their investments, and the handling of their invested money, depended on Couch's assessment from time to time of how to conduct the various businesses – of what would constitute "sound business reasons" . . . .

[388] This in essence was a large part of Aitkens' argument as well. When asked to comment on whether *Shire* sets out "an appropriate statement of the law" regarding construction of the reallocation clause in the SV OMs and HV OMs, counsel for Aitkens stated that Aitkens had "a belief, and this might shed light on whether that was a reasonable belief". We do not find that comment helpful. We conclude that the reasoning in *Shire* is logical and is persuasive in the current circumstances.

[389] The panel in *Shire* did not agree that the reallocation or "sound business reasons" clause should be construed so broadly. Neither do we. We adopt the analysis from paras. 188-95 of *Shire*:

> We reproduce again the "reallocat[ion]" warning from the Bearspaw OMs: "The Issuer intends to spend the net proceeds as stated. The Issuer will reallocate funds only for sound business reasons." Did this (as implied by Couch) give prospective investors fair warning of how she, and Bearspaw and Shire, would actually operate?
>
> The warning was, admittedly, worded broadly. It did not specify precisely what alternative uses might be found for Bearspaw investor money. That said, it was not open-ended.
>
> First, it must be read in context. That warning directly followed a fairly detailed discussion of how many dollars were to be spent on what aspects of the Bearspaw offering and business, most of that being the purchase and development of the Bearspaw Land. That, then, was the starting point for this reallocation disclosure.
>
> Second, the reallocation statements were themselves limiting. The first statement reiterated what we think a reader would reasonably have assumed, that the intention was to do with the money what had just been disclosed in some detail. The second statement casts a reallocation as something exceptional, "only" to happen in certain circumstances.
>
> Third, those certain circumstances were described as "sound business reasons". While not stated expressly, we think a reader would reasonably have inferred – and would have been entitled to infer – two things: (i) that the "business reasons" would have something to do with the business of Bearspaw, which (as discussed) was the purchase and development (and eventual resale) of the Bearspaw Land; and (ii) that the soundness of such exceptional business reasons would be assessed, in a businesslike way, with a view to their consistency with the interests of Bearspaw and its investors.
>
> To place any broader interpretation on the reallocation disclosure would, in our view, render the mandatory "use of net proceeds" disclosure in the Bearspaw OMs devoid of any value or purpose.
>
> We noted above the Bearspaw OMs' disclosure of various risk factors, including risks associated with new ventures or real estate generally. This disclosure did not, however, alert readers to the prospect that much Bearspaw investor money would be applied to purposes unrelated to the Bearspaw Land.
>
> It follows, and we find, that the Bearspaw OMs' disclosure of potential reallocation, and of risk factors, did not give prospective investors reasonable warning that their money would be used for non-Bearspaw-Land purposes as, we found above, it in fact was.

[390] Similarly, we have found that investors' money raised under the SV OMs and HV OMs was used for purposes unrelated to working capital for the development of the SV Land and HV Land. As in *Shire*, the starting points here were the specific use of proceeds provisions stating that investors' money would be used for the purchase and development of the SV Land and HV Land. Also as in *Shire*, the reallocation provisions in the present case were cast "as something exceptional, 'only' to happen in certain circumstances" (*Shire* at para. 191). Further, we agree with the conclusion that a reasonable reader (here, of the SV OMs and HV OMs) would reasonably and rationally infer that the "business reasons" would relate to the purchase and development of the SV Land and HV Land, and that the soundness of such reasons would be assessed in a business-like manner and in the interests of the investors in the SV Project and HV Project.

[391] We conclude that the SV OMs and HV OMs did not disclose to investors that their money would be used for purposes outside the scope of the use of proceeds disclosure in those OMs.

[392] We earlier referred to some promissory notes Aitkens put into evidence, apparently to legitimize the impugned transfers from SV Crossing and from the HV Entities. Aitkens claimed that there were many other such documents that could not be found; Staff were skeptical. However, we conclude that such documentation was irrelevant – even had there been documents for each of the impugned transactions from SV Crossing and from the HV Entities, it would not have assisted Aitkens in these circumstances. The problem Aitkens faced was that the transfers from SV Crossing and the HV Entities were not in accordance with the disclosure given to investors receiving and entitled to rely on the SV OMs and HV OMs. Even if the internal documents provided by Aitkens were legitimate and prepared contemporaneously, undisclosed internal documentation cannot cure inadequate disclosure in OMs.

[393] In the result, we are satisfied that there was a prohibited act. Aitkens' actions here (as the person who was the guiding mind of and controlled SV Crossing and the HV Entities) fell squarely within the description in *Arbour* of "other fraudulent means": situations of "failure to disclose important facts, unauthorized diversion or taking of money or property, and the unauthorized use of investor money" (*Arbour* at para. 980).

[394] We are further satisfied that SV Crossing and the HV Entities were also responsible for the statements in the SV OMs and HV OMs, respectively, and for the transfer of money for purposes contrary to those statements.

(b) Deprivation to Others

[395] We find clear deprivation in these circumstances. Such deprivation was either "exposure to risk of financial loss" or "actual financial loss" (or both) – in the words of *Shire* at para. 180. Investors in the SV Project and HV Project knew that much of their invested money would go towards the purchase of the SV Land and HV Land. However, the wording of the SV OMs and HV OMs led investors to believe that the remainder of their money would be used for the development of the SV Land and HV Land. Investors were not told that their money might or would be used for other projects or transferred to other companies with common ownership or common management. Although some of the money was spent on matters related to development, a significant amount of SV Project money and HV Project money was used for other purposes. This is clear from Narfason's evidence and from Aitkens' own testimony. This misuse of investors' money increased the risk that the SV Project and HV Project would fail for lack of development funds and contributed to the SV Entities' and HV Entities' financial difficulties.

3. Knowledge of Prohibited Acts Resulting in Deprivation to Others

[396] Aitkens' written submissions stated that Aitkens did not intend to commit fraud: he "honestly believed that he was entitled to use the money from projects [for which it] was not currently needed to assist other projects that had an imminent need for cash", such belief "bolstered by his interpretation of the [SV OMs and HV OMs] and also by conversations he had with legal counsel".

[397] In other words, Aitkens relied on his lack of intent to commit fraud. However, the law is clear that it is not necessary for Staff to prove that a respondent intended to be dishonest or to cause a financial loss to others. As previously quoted from *Théroux* (at para. 36):

> . . . Many frauds are perpetrated by people who think there is nothing wrong in what they are doing or who sincerely believe that their act of placing other people's property at risk will not ultimately result in actual loss to those persons. . . .

[398] As also stated earlier, the respondent must knowingly or subjectively "undertake the conduct which constitutes the dishonest act, and must subjectively appreciate that the consequences of such conduct could be deprivation" (*Zlatic* at para. 40).

[399] We earlier concluded that Aitkens was the guiding mind of and controlled SV Crossing. The evidence relating to the impugned transfers from SV Crossing included explanations by Aitkens for specific transfers and general explanations as to why money was transferred among those companies. We are satisfied that such amounts transferred from SV Crossing were transferred either by Aitkens or at his direction and that he knew that such transfers were being made.

[400] We earlier concluded that Aitkens was the guiding mind of and controlled the HV Entities. The evidence relating to the impugned transfers from the HV Entities included explanations by Aitkens for specific transfers and general explanations as to why money was transferred among those companies. We are satisfied that such amounts transferred from the HV Entities were transferred either by Aitkens or at his direction and that he knew that such transfers were being made.

[401] We are satisfied that Aitkens knew that the money raised through the SV OMs and HV OMs was to be spent on the purchase of the SV Land and HV Land. That was done. There was also disclosure regarding certain expenses (such as commissions, management fees and administration fees) being paid out of the funds raised. That was also done, although we rely on Narfason's evidence as to the amounts rather than on Aitkens' evidence.

[402] In all of the SV OMs and HV OMs, further disclosure stated that the respective net proceeds might be reallocated, but "only for sound business reasons" – which we have found could relate only to business reasons associated with the SV Project and HV Project. That was not done.

[403] We have already rejected Aitkens' interpretation of the "sound business reasons" clause. We now turn to whether his claimed reliance on legal advice regarding that clause was reasonable. We earlier set out our analysis of claimed reliance on legal advice when assessing the requisite knowledge level in the misrepresentation context. We apply the same approach here.

[404] Aitkens testified that he relied on the advice of legal counsel – DB and perhaps others – in concluding that the impugned transfers were within the scope of the "sound business reasons" clause. DB did not testify, nor were we pointed to any documentary evidence relating to any

such advice from DB or any legal counsel. In fact, Aitkens could not recall if the advice he claimed to have received had been put in writing. Without more, we cannot conclude that Aitkens received any legal advice on this topic, let alone assess its scope or reliability. Accordingly, we do not consider that legal advice was a factor in Aitkens' knowledge of the prohibited acts.

[405] Aitkens was the guiding mind of and controlled 1252064, 1379599 and HCMI. Therefore, we are satisfied that Aitkens was the person responsible for transferring funds from 1252064, 1379599 and HCMI.

[406] Based on Aitkens' explanations both at the time of the Monitor's investigation (relying on the evidence of Narfason as to Aitkens' earlier explanations) and during the hearing, we conclude that Aitkens knew or ought to have known that the transfers from SV Crossing and the HV Entities resulted in deprivation to others by placing their pecuniary interests at risk because he knew that such funds were ultimately being used for other projects and purposes, not for the development of the SV Land and HV Land. The legitimacy of such other projects and purposes was irrelevant. Aitkens' contention that he did not intend to commit fraud or to have investors lose their money was also irrelevant.

[407] Aitkens was the guiding mind of and controlled both SV Crossing and HV Landing. Accordingly, we are satisfied that SV Crossing and HV Landing also were responsible – in the words of *Arbour* at para. 985, their "directing [mind] knew or reasonably ought to have known that the acts of the corporation perpetrated a fraud". Given Staff's withdrawal of allegations against SV Capital and HV Capital, we make no findings relating to those companies.

4. Conclusion on Fraud Allegations

[408] Based on the law and analysis set out, we conclude that Aitkens, SV Crossing and HV Landing breached s. 93(b) of the Act by perpetrating a fraud on investors. We also find that Aitkens authorized, permitted or acquiesced in those breaches by SV Crossing and HV Landing.

VII. ANALYSIS – CONDUCT CONTRARY TO THE PUBLIC INTEREST

[409] Staff alleged that all of the alleged misconduct was conduct contrary to the public interest.

[410] For the allegations we sustained, it is unnecessary for us to make separate findings on the allegations of conduct contrary to the public interest. For the allegations we dismissed, it would be inappropriate to consider the allegations of conduct contrary to the public interest, as the NOH specifically linked the alleged misconduct and the alleged public interest contraventions.

VIII. CONCLUSION

[411] Having found breaches of Alberta securities laws by Aitkens, Beyer, the Trust, 0865701, HCMI, SV Crossing and HV Landing, this proceeding now moves into a second phase to determine what (if any) orders for sanctions and costs ought to be made against them.

[412] We direct Staff to provide to the panel (through the ASC Registrar) and to Aitkens, Beyer, the Trust, 0865701, HCMI, SV Crossing and HV Landing any written submissions that Staff wish to make on the issue of appropriate orders **by 4 pm on March 9, 2018**.

[413] Aitkens, Beyer, the Trust, 0865701, HCMI, SV Crossing and HV Landing may respond in writing to Staff's written submissions. Any such written submissions by those Respondents must be provided to each other, to the panel (through the Registrar) and to Staff **by 4 pm on March 29, 2018**.

[414] Staff may reply in writing to any such written submissions by those Respondents, such reply to be provided to the panel (through the Registrar) and to those Respondents **by 4 pm on April 6, 2018**.

[415] If any of these parties wishes to make supplementary oral submissions or to adduce evidence on the issue of appropriate orders, an in-person hearing session will be held on **May 18, 2018 beginning at 9 am**. Any party requesting such an in-person hearing session must so advise the Registrar **by 4 pm on April 11, 2018**, indicating whether that party proposes to adduce evidence (via witnesses or otherwise) and the amount of hearing time that party expects to require. (If a requesting party does propose to adduce evidence, under section 2.3 of Rule 15-501 *Rules of Practice and Procedure for Commission Proceedings* we direct that party to provide to the other parties **at least ten business days before the in-person hearing session**: (i) the names of all proposed witnesses; (ii) summaries of the proposed witnesses' anticipated evidence; and (iii) copies of all documents intended to be entered as evidence.) Even if no party requests such an in-person hearing session, one may be required by the panel. The Registrar will inform the parties as to whether an in-person hearing session will proceed.

February 15, 2018

For the Commission:

"original signed by"
Tom Cotter

"original signed by"
Terry Allen, CFA

"original signed by"
Webster Macdonald, QC