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A L B E R T A S E C U R I T I E S C O M M I S S I O N

IN THE MATTER OF the Securities Act (S.A. 1981, c. S-6.1, as amended)
(the "Act")

and

IN THE MATTER OF Cartaway Resources Corporation
(formerly Cartaway Container Corporation),
First Marathon Securities Limited, John Ivany,
Christopher Michael Stuart, William DeJong, Walter Nash,
Robert Arthur Hartvikson and Blayne Barry Johnson
(collectively, "the Respondents")

REASONS FOR DECISION OF THE

ALBERTA SECURITIES COMMISSION

BEFORE:	Eric T. Spink, Vice-Chair John W. Cranston, Commission Member James E. Allard, Commission Member	
APPEARANCES:	A. Brown and L. Rudan	for the staff of the Alberta Securities Commission ("staff")
	A.D. Macleod, Q.C. and L. Rollheiser	for John Ivany
	T. J. Mallett, F.R. Allen and L. Eastwood	for William DeJong
HEARD:	In Calgary, Alberta September 27, 28, 29 October 12, 14, 18, 19, 20 November 5, 8, 9, 12, 13, 15, 17 and 18, 1999	

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I. INTRODUCTION

(A) Hearing

This is a hearing under Sections 165 and 167.1 of the Act. It deals with a portion of the allegations contained in an Amended Notice of Hearing dated September 23, 1998. The original Notice of Hearing, dated July 20, 1998, named ten respondents. This hearing dealt with only two: John Ivany and William DeJong.

Preliminary matters were addressed on September 24, 1998. We heard evidence and submissions over a period of 16 days between September 27 and November 18, 1999. The Commission then adjourned to consider its decision.

(B) History of these and related proceedings

This hearing dealt with a relatively small number of specific issues arising out of the larger affairs of Cartaway Container Corporation, later Cartaway Resources Corporation ("Cartaway"). Cartaway's story may be briefly and generally described as follows.

In July of 1994, a group of brokers working in the Vancouver and Calgary offices of First Marathon Securities Limited ("FMSL") bought a controlling interest (56% of the outstanding shares) in Cartaway. Cartaway was then a small company listed on the Alberta Stock Exchange ("ASE") with a garbage-container-rental business in Kamloops, British Columbia.

On April 19, 1995, Cartaway announced a private placement (the "Private Placement") of 7 million units at a price of $0.125 per unit. Each unit consisted of one Cartaway share and one warrant entitling the holder to purchase an additional Cartaway share at a price of $0.20 for a period of two years. The Private Placement was largely purchased by the controlling shareholders and other employees of FMSL.

On June 29, 1995, Cartaway announced that it had acquired a number of mineral claims in and around the Voisey Bay area of Labrador. There was intense interest in the Voisey Bay area because, in October of 1994, Diamond Fields Resources Inc. discovered a major deposit of nickel, copper and cobalt there. The Diamond Fields discovery was reported to contain 8% of the world's nickel reserves.

In May of 1996, Cartaway reported promising visual results of drilling on one of its properties, and Cartaway's share price on the ASE rose dramatically, reaching a high of $26.00 on May 16, 1996. Assay results released on May 17 and May 21, 1996 showed insignificant mineralization and, on May 21, Cartaway's share price closed at $2.78.

The Alberta Securities Commission, the British Columbia Securities Commission ("BCSC"), and the Toronto Stock Exchange all initiated proceedings in relation to these events. The respondents included Cartaway, various directors and officers of Cartaway, FMSL, and various FMSL employees.

All of the Toronto Stock Exchange allegations were settled or otherwise resolved. All of the respondents in the BCSC proceedings settled, except for Robert Arthur Hartvikson "Hartvikson") and Blayne Johnson ("Johnson"), two employees of FMSL in Vancouver. In Alberta, all of the

proceedings were settled or otherwise resolved, except for the allegations against two Cartaway directors, William DeJong ("DeJong") and John Ivany ("Ivany").

(C) Allegations

The allegations against DeJong and Ivany were that:

1) in the spring of 1995, DeJong failed to promptly disclose a material change in the affairs of Cartaway, being the change in Cartaway's business from a garbage-container-rental company to a Voisey Bay mining exploration company, contrary to s. 118(1) of the Act and contrary to National Policy 40;

2) in May of 1996, Ivany distributed drill core samples prior to assay, thereby informing certain persons of a material fact before that material fact was generally disclosed, contrary to s. 119(3) of the Act, and contrary to National Policy 40; and

3) Ivany and DeJong caused Cartaway to issue a news release dated May16, 1996 containing a misrepresentation, contrary to s. 161(1)(b) of the Act, and contrary to the public interest.

The allegations relate to two distinct periods in Cartaway's history. Allegation #1 relates to the early part, up to June of 1995. Allegations #2 and #3 relate to events that occurred approximately one year later.

II. ANALYSIS AND FINDINGS

The allegations described above must be considered in the context of the rather complex history of Cartaway. Although some of the background facts were not disputed, there was conflicting evidence about a number of events. For the sake of clarity, we describe many of our background findings without describing all of the conflicting evidence. All our findings, however, reflect the same assessments of credibility and reliability of evidence that are described in detail in relation to certain key findings.

(A) Allegation #1—undisclosed material change

1. Summary of issues and findings

It was not disputed that Cartaway's decision to become a Voisey Bay mining exploration company was a material change as defined by subsection 1(k.1) of the Act, which says:

> "material change", when used in relation to the affairs of an issuer, means a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer and includes a decision to implement the change made by the board of directors of the issuer or by senior management of the issuer who believe that confirmation of the decision by the board of directors is probable;

The issues are:

- When did the material change occur?
- Did DeJong, as a director of Cartaway, fail to promptly disclose the material change?

We find that the material change occurred sometime between April 5 and April 19, 1995. It is not necessary to determine the exact date because, in any event, we find that the material change occurred prior to the Private Placement and was not disclosed until June 29, 1995.

We find that DeJong did not know, and could not reasonably be expected to have known, when and how the material change actually occurred. We find that information about the material change was concealed from DeJong, and that incorrect information was given to DeJong, under circumstances where it was reasonable for DeJong to rely upon the information he received as being complete and accurate. We find that DeJong could not reasonably be expected to have seen through the deception worked upon him, and that he fulfilled his obligations as a director of Cartaway in accordance with the information presented to him.

We find that there were two versions of the events surrounding Cartaway's transition from a garbage-container-rental company to a Voisey Bay mining exploration company. There was a public version presented to securities regulators, DeJong and almost everyone else. There was also a secret version that included events known only to a small group of people who, motivated by personal gain, did not disclose and actively concealed those events from everyone else, including DeJong.

2. The public version of events surrounding Cartaway's material change

DeJong is a securities lawyer practicing in Calgary. In June of 1994, he was contacted by a friend and business associate, Larry Birchall ("Birchall"), a broker with FMSL's Calgary office. Birchall indicated that he and the Branch Manager of FMSL's Calgary office, Michael Stuart ("Stuart"), were interested in acquiring a "clean shell", and asked if DeJong could help them locate one.

A "clean shell" is parlance for a certain type of public company that could be used as a launch vehicle for a new business transaction. DeJong passed along Birchall's request to Scott Ratushny ("Ratushny"), who specialized in reorganizations of junior issuers. Within a few days Ratushny referred DeJong to Cartaway.

DeJong passed that information along to Birchall. Birchall and Stuart were interested, and they went to Kamloops, B.C. to meet with Cartaway and conduct their due diligence. On July 26, 1994, Cartaway announced that a group controlling approximately 56% of its outstanding shares had agreed to sell its block of shares to an undisclosed purchaser at a price of $0.10 per share. The sales agreement was dated effective September 1, 1994. The total purchase price was $360,000. The purchasers were Ratushny and eight FMSL brokers, including Birchall and Stuart from Calgary, and Hartvikson and Johnson from Vancouver. Ratushny purchased just over 1% of the control block. The remainder was purchased by the eight FMSL brokers.

DeJong and his law firm acted on behalf of the purchasers in the transaction. Upon the conclusion of the transaction, DeJong and Stuart became directors of Cartaway, with Stuart acting as president. All of Cartaway's previous directors resigned except for Charles Mitchell, who stayed on in order to run the company's existing small business in the short term. Everyone understood that the longer-term objective was for Cartaway to become involved in a new business or transaction, and that FMSL had a significant amount of what was described as "deal flow" through their office.

Very little happened with Cartaway until the spring of 1995. The annual general meeting of shareholders was called for April 28, 1995 to deal with normal matters. This was combined with a special meeting to consider a resolution to issue up to 6 million additional shares, the structure and pricing of which would be within the discretion of the board of directors. The special meeting was intended to satisfy an ASE Policy requiring shareholder approval of any share issue that would increase the float by more than 25%. Cartaway's existing float was just less than 6.5 million shares. DeJong prepared the Information Circular for the special and annual general meeting, dated March 21, 1995. In early April, DeJong went to Phoenix for a vacation, returning on April 24 or 25.

While DeJong was away, Stuart made arrangements for the Private Placement of 7 million units. Stuart discussed this with Charles Mitchell and with an official with the ASE. Stuart issued a news release on April 19, 1995 announcing Cartaway's intention to proceed with the Private Placement, subject to various regulatory approvals. The stated purpose of the Private Placement was to "provide sufficient working capital to permit Cartaway to expand its operations into new business ventures".

When DeJong returned from Phoenix on April 25, 1995, Stuart told him about the Private Placement. DeJong understood that the stated purpose of the Private Placement was proper, and he had no objections. DeJong and his law firm worked on the details and prepared most of the documents, and the Private Placement closed without incident on May 5, 1995, raising $875,000. Cartaway filed a material change report dated May 10, 1995, signed by Stuart, describing the Private Placement and saying:

> Proceeds of the issue will be used to fund future, as yet undetermined, assets of the Corporation.

The Private Placement was largely purchased by the controlling shareholders of Cartaway, their families and other employees of FMSL. The eight FMSL brokers who had acquired the control block in 1994 purchased, directly or through their families, roughly 82% of the Private Placement. Other FMSL employees purchased just over 3%. Canaccord Capital Corporation purchased just over 11%. Cartaway director Charles Mitchell purchased 50,000 units, or about 0.7%. DeJong purchased 40,000 units, or about 0.6%, at a cost of $5,000.

As soon as the Private Placement was announced, the price of Cartaway shares on the ASE started to increase. Cartaway stock closed on April 18, 1995 at $0.18, with volume of 24,000. The following day, when the Private Placement was announced, it closed at $0.39, with volume of 107,000. Over the next few weeks, the price continued to increase, closing at $0.95 on May 12, 1995.

On May 12, 1995 Stuart contacted the ASE and asked them to halt trading in Cartaway shares. The ASE did so. Stuart did not consult with DeJong beforehand, and when DeJong contacted Stuart on May 12 to ask why he halted the stock, Stuart said only that it would be impossible to do any kind of deal with the stock price running up as it was. Stuart did not then mention Voisey Bay.

DeJong testified that he first heard about the possibility of Cartaway being involved in Voisey Bay on May 15, when Stuart asked him to arrange a meeting with the ASE to discuss a potential transaction. At that time, Stuart gave DeJong the impression that no deal was yet in place, and that there were still a number of issues that needed to be addressed in order to finalize the transaction. When DeJong and Stuart met with the ASE the following day, Stuart indicated that Cartaway was negotiating to acquire some Voisey Bay claims, but that the vendor group might very well deal instead with a company listed on the Vancouver Stock Exchange.

Stuart wrote a letter to the ASE dated May 17, 1995, outlining the matters to be resolved so that the transaction could proceed. Over time, all those matters were resolved and Cartaway issued a news release on June 29, 1995, part of which said:

> The Company reports that it has changed its business direction to the exploration of natural resource properties and has the rights to acquire the property interests described in this news release. These claims are mainly located in the Voisey Bay and Harp Lake areas of Labrador....
>
> The Company has on an arm's length basis acquired or has the right to acquire, directly or indirectly, majority interests in a total of 24,690 mining claims located in the Voisey Bay and Harp Lake areas of Labrador, making it one of the largest single mineral claim owners in these areas.

The news release gave some details of the transactions. It also announced certain management additions, including that John Ivany had been appointed Chief Executive Officer ("CEO"), President, Secretary and a director of Cartaway and that Walter Nash ("Nash") had been appointed Vice President, Exploration. Stuart remained as a director.

Cartaway subsequently filed a material change report dated July 5,1995, signed by Stuart, containing much the same information as the news release. It stated that the date of the material change was June 29, 1995. Cartaway stock resumed trading on the ASE on July 4, 1995.

The news release and the material change report did not tell the whole story of how Cartaway acquired mining claims in Voisey Bay, and we now turn to examine a number of events that were not publicly disclosed at the time.

3. Undisclosed events surrounding Cartaway's material change

(i) The role of 489895 B.C. Ltd.

Of the 24,690 mining claims referred to in Cartaway's news release and material change report, approximately 25% were acquired through 489895 B.C. Ltd. ("489") as follows:

- 489 entered into an option agreement dated April 27, 1995 with White Wolf Explorations Ltd. to acquire an interest in 978 claims. That option was subsequently assigned by 489 to Cartaway by agreement dated June 7, 1995.

- 489 entered into an option agreement dated May 3, 1995 with 455702 B.C. Ltd. to acquire an interest in 491 claims. That option was subsequently amended by a letter agreement dated June 5, 1995 and then assigned by 489 to Cartaway by agreement dated June 7, 1995.

- 489 entered into an option agreement dated May 29, 1995 with Tenajon Resources Corp. to acquire an interest in 509 claims. That option was subsequently amended by a letter agreement dated June 5, 1995 and then assigned by 489 to Cartaway by agreement dated June 7, 1995.

- Cartaway entered into a share exchange agreement with 489 dated June 7, 1995 by which Cartaway acquired all of the outstanding shares of 489 and, indirectly, the 6,158 Labrador mining claims then owned by 489.

489 appeared to be a private company controlled by Stewart Bethune ("Bethune"). In fact, 489 was controlled by Hartvikson and Johnson, and Bethune's role was purely as a facade.

Bethune was a production manager working in the film industry in Vancouver, and a long-time friend of Johnson. Sometime prior to February 3, 1995, Johnson asked Bethune to become president and secretary of 489. Bethune was told that the purpose of 489 would be to purchase mineral claims, that this would be an opportunity for him to learn about the investment business, and that his duties would be minimal.

Bethune became president and secretary of 489 effective February 3, 1995. He resigned effective August 17, 1995. During that period, Bethune's role was completely passive. He made no financial contribution to 489. All the money in 489's bank account came either from Johnson, or Johnson's wife. Bethune did whatever he was told to do by Hartvikson and Johnson, who either instructed Bethune directly or through Mr. Seifert or Mr. Paton of the Vancouver law firm of Maitland & Company. Bethune signed whatever cheques or other documents were put before him. He apparently understood nothing about the transactions or activities of 489.

In his evidence, Bethune could recall attending only one meeting where mineral claims were discussed. That meeting involved Johnson and two other people, but Bethune said that he did not understand the discussion, nor did he know why he was there.

(ii) Acquisitions of mining claims by 489

The panel heard evidence from Lawrence Barry and Matt Mason, both of whom were involved in staking and selling mineral claims that eventually found their way into Cartaway. Mr. Mason was a partner in the Hunter Exploration Group ("the Hunter Group"). Mr. Mason controlled a numbered company, 455702 B.C. Ltd. ("455"), which would finance the staking of mineral claims by Mr. Barry, who was employed as a land man by the Hunter Group. Mr. Barry would sometimes also stake claims on his own behalf.

Mr. Barry testified that, in March of 1995, he staked approximately 1100 claims in the Voisey Bay area of Labrador on behalf of the Hunter Group. These claims were known as the "Kogaluk claims". Mr. Barry then went to Vancouver on April 3 to attempt to sell them. He attended a meeting with Murray Pezim and subsequently, probably on April 4 or 5, a meeting with Hartvikson and Johnson. The meeting with Hartvikson and Johnson had been arranged by Milan Zipay, who acted as a facilitator in bringing the parties together. At that meeting, the claims were discussed and Hartvikson and Johnson expressed interest in acquiring them. Terms were discussed, but no deal was made. Mr. Barry testified that he did not have authority to close any deal involving these claims.

The next day, there was another meeting to discuss the sale of the Kogaluk claims. It involved Mr. Barry, Mr. Mason, Johnson and Bethune. Bethune was introduced as someone who had a company that the Kogaluk claims would go into. Mr. Mason testified that the meeting was short, and that at the end of the meeting he had agreed to sell the Kogaluk claims.

The essence of the terms of sale of the Kogaluk claims was that the vendors were to receive $300,000 in cash and 1.2 million shares in a publicly-traded company. These terms were reflected in a letter agreement with 489 dated May 15, 1995. The final details of the transaction, including the identity of the publicly-traded company, were left to be determined. The vendors were not told that Cartaway would acquire the claims, or that they would receive Cartaway shares, until some time in June of 1995.

This extended period of fluidity, before the final details of the transaction were settled, was apparently normal for this type of "handshake deal". It was clear that Mr. Mason always intended to honour this handshake deal, subject only to the purchaser fulfilling its obligations.

In addition to the Kogaluk claims, Cartaway acquired another 4,000 Labrador mineral claims from Mr. Barry through 489, and another 16,618 claims directly through the Hunter Group. Mr. Barry staked the 4,000 claims on May 17. The 16,618 claims were staked near the end of May, under the terms of an agreement with Cartaway dated May 26, 1995. The combination of transactions was desirable to the vendors because the value of the shares they received depended upon the success of the public company. Mr. Mason testified:

> And that's why I say, you know, that a deal is not a deal until the cheque's cashed, but, you know, we were amassing a huge, I believe it was the largest property area in Voisey Bay at the time.... So it was in our best interest to push everything we could towards that company and to give it the best chance it had.

We find that, from the vendors' perspective, the only uncertainty about the Kogaluk transaction was the name of the publicly-traded company that would issue the 1.2 million shares. The purchaser had the option of selecting the publicly-traded company and, provided a reasonable vehicle (like Cartaway) was available, closing the transaction was a certainty from the purchaser's perspective.

On April 27, 1995, after learning about the Private Placement, Mr. Mason purchased 28,000 Cartaway shares through the ASE at $0.34-$0.35 each. He testified:

> Well, I had been following the guys at First Marathon for quite a long time, their activities in Diamond Fields and Bre-X, and that's probably why Lawrence [Barry] went down there in the first place, is that they were very high profile. They could raise money, and the stocks that they invested in did well, and it wouldn't have mattered what it was.

Mr. Mason said nobody told him about Cartaway before he purchased the shares, explaining:

> We never knew, and I'll tell you why they never told us, [i]f they knew, because they didn't want anybody getting into the market.... [I]f I'm doing a private placement, I don't tell somebody else I'm doing it because they'll get into the market and buy stock.

We accept Mr. Mason's evidence. It is similar to the evidence of Milan Zupay, who asked to be involved in the Private Placement because he heard a rumour that something was going on with "the boys" (Hartvikson and Johnson). We find that neither of them knew for certain that the claims would go to Cartaway, but they were both perceptive enough to recognize the likelihood that it would happen.

(iii) Early exploration activities

In mid-to-late April of 1995, after having discussions with Matt Mason about the sale of Voisey Bay claims through people at FMSL in Vancouver, Ivany received a phone call from Hartvikson or Johnson indicating that they were looking for someone to manage a then-unnamed mining exploration company. Ivany met with Hartvikson and Johnson in Vancouver in late April or early May to discuss this in more detail. Hartvikson and Johnson told Ivany that they would try to assemble a large land position in the Voisey Bay area to put into one company and they wanted Ivany to consider becoming president of that company. Ivany considered this and, knowing that he would need someone to help manage the exploration process, he invited Nash to become involved.

Nash met with Johnson in Vancouver on May 4, and was told by Johnson that they had handshake deals on a number of claims in the Voisey Bay area. Shortly afterwards, Nash was told about some specific properties, including the Kogaluk claims and most of the other claims eventually acquired by Cartaway through 489. Nash agreed to act as the unnamed company's vice-president of exploration. Nash opened a bank account on May 10 and received $100,000 from Johnson on May 11, which he used to start organizing the exploration program.

The name of Cartaway was not mentioned to either Ivany or Nash until considerably later.

In our view, the recruitment of Ivany and Nash in this manner shows that 489, Hartvikson and Johnson treated their arrangements to purchase the Kogaluk claims, and other claims, as immediately effective and binding.

(iv) Birchall's daytimer

Birchall's daytimer provides significant evidence. There is an entry in the Birchall's daytimer under the date April 16, 1995. The notes refer, in abbreviated form, to 6,000,000 units consisting of one share and one warrant, at a price of $0.12 per unit. We find that this reference is to the Cartaway Private Placement.

Correspondence between Stuart and the ASE indicated that Stuart had discussions with the ASE on April 17 and 18 regarding a proposed private placement by Cartaway of 6,000,000 units, and that the proposal was increased to 7,000,000 units on April 19, 1995. It is clear, then, that the notes in Birchall's daytimer reflect the situation as it existed prior to April 19.

Birchall's notes also refer to 70,000 acres, 1.2 million shares and $300,000. We find that this reference is to the purchase of the Kogaluk claims.

Birchall testified that he had no memory of the conversation described by these notes, but that evidence was not credible. Birchall admitted having a conversation with Stuart sometime shortly after Birchall returned from vacation on April 16, 1995, so it seems clear, and we find, that the notes in Birchall's daytimer reflect a conversation he had with Stuart on April 17 or 18, 1995.

How would Stuart know about the purchase of the Kogaluk claims, and why would Stuart discuss these claims with Birchall during a conversation about the proposed Cartaway Private Placement? In our view, all the evidence points clearly to only one possible conclusion: Stuart was informing Birchall so that Birchall could participate in the plan, which already involved Stuart, Hartvikson and Johnson, to acquire cheap stock in Cartaway with the knowledge that Cartaway would later become a Voisey Bay mining exploration company.

(v) Stuart's role

On June 2, 1995, Stuart wrote a letter to the ASE in response to concerns raised by the ASE about the Private Placement and subsequent announcement of Cartaway's involvement in Voisey Bay. The letter says, in part:

> Cartaway was also approached on the possibility of using the company to participate in the activities going on at Voisey Bay and indicated our potential interest. However, neither myself nor the other directors were involved in early discussions regarding Voisey Bay.
>
> It became apparent that these resource ventures would require significant capital in amounts beyond that in the Cartaway treasury. It was difficult to have meaningful conversations with the other parties involved in the potential transactions without demonstrating cash in the till.

> Accordingly, to raise the required capital to have serious discussions, it was necessary to approach parties who understood the risks that none of the ventures being discussed could come to fruition and that funds could sit idle in Cartaway for a continued period of time. As a result, a large part of the [Private Placement] was placed with parties who already had exposure to the company and were familiar and comfortable with the principals.
>
> At the time of our discussions with [the ASE] regarding the financing, no agreement, letters of intent or verbal commitments had been made to anyone regarding Cartaway. Further, no meetings of the directors (verbal or in person) had taken place to review or approve any transactions. I would point out that we still have not finalized the agreements with the vendors of the company/properties.

Except for the fact that it does not mention the role of Hartvikson, Johnson and 489 in acquiring the Kogaluk claims, or Stuart's knowledge of the Kogaluk claims, the letter is otherwise a fairly accurate description of the events leading up to the Private Placement. At the hearing, however, Stuart backed away from the version described in the letter, saying that the letter's "wording is not very good" and that:

> Cartaway was not approached. I was never approached. The directors were never approached. I would have been referring to the fact that the people in our Vancouver office were approached, and it wouldn't have been about Cartaway, it would have been about vehicles for financing activities and where could claims be put and that sort of thing.

Stuart admitted discussing the Private Placement beforehand with Hartvikson and Johnson, but he was evasive in describing the nature of his discussions about Voisey Bay mining claims.

It is impossible to reconcile Stuart's evidence with the fact that he described the precise terms of the purchase of the Kogaluk claims to Birchall on April 17 or 18. In our view, the fact that Stuart discussed the Kogaluk claims with Birchall, but did not mention them to DeJong, shows that Stuart deliberately concealed that information from DeJong as part of a larger pattern of deception and concealment. During his testimony, Stuart acknowledged that he had concerns, which were shared by others at FMSL, that the dramatic increase in Cartaway's share price after announcement of the Private Placement was caused by rumours of Cartaway acquiring Voisey Bay mining claims, yet he never mentioned that to DeJong.

Stuart testified that he knew nothing of Hartvikson and Johnson's association with 489 until he read about it in the Notice of Hearing. Stuart also claimed that he was not aware that Cartaway had any real prospect of acquiring Voisey Bay mining claims until May 12, 1995, when he met with Mr. Mason for the first time. It is not necessary for us to attempt to determine exactly what Stuart knew of Hartvikson and Johnson's association with 489, but we do find that Stuart knew that Hartvikson and Johnson had a deal to purchase the Kogaluk claims, that these claims would be acquired by Cartaway, and that Cartaway would thereby become a Voisey Bay mining exploration company, prior to announcing the Private Placement. It follows that Stuart must have known that

there was some plan by Hartvikson and Johnson to conceal their involvement, and it does not matter exactly how much Stuart knew about their use of 489 for that purpose.

When exactly did Cartaway, as a corporation, make the decision to become a Voisey Bay mining exploration company? Normally, we would look at the corporate decision-making process with a view to the considerations described in National Policy 40. However, that approach is not suited to a situation like this where the president of Cartaway acted upon undisclosed information and deliberately concealed that information from other directors. In our view, the material change occurred when the decision was taken by Stuart to make Cartaway a Voisey Bay mining exploration company. We find that occurred prior to the conversation between Stuart and Birchall, noted in Birchall's daytimer, which means that it occurred prior to April 19, 1995.

(vi) Role of Hartvikson and Johnson

We did not hear evidence from Hartvikson or Johnson, but there was considerable evidence concerning their actions in acquiring Voisey Bay claims through 489, their communications with Stuart, Ivany and Nash, and their participation in the Private Placement. In our view, that evidence was most consistent with Hartvikson and Johnson forming the intent to make Cartaway a Voisey Bay mining exploration company early in April of 1995, and acting in concert with Stuart to do so without publicly disclosing the true circumstances of the transactions.

(vii) Peter Brown's evidence

Peter Brown, chairman of Cannacord Capital Corporation, testified as to the circumstances of Cannacord's involvement in the Private Placement. He gave differing versions of the events. His memo to Cannacord's compliance officer dated July 9, 1997 said:

> I do not remember the exact date that I was approached to participate in the Cartaway private placement. The people in the First Marathon office in Vancouver are good friends of ours and Eric Savics of their office asked me down to talk about Cartaway with he and Blaine [sic] Johnson.
>
> The stated purpose of the funding was to acquire a major position in the Voisey Bay area. The discussions were not very detailed because I viewed it as a startup exploration company in an exciting geological area. At $0.125, and with the sponsorship of First Marathon, I couldn't see much risk.
>
> They offered us 800,000 units and we accepted. As it was a startup venture there is really not a lot of detail to discuss. We viewed this investment as a seed capital investment and not as a Cannacord project nor as a Cannacord underwriting account. Other than making this investment, we had very little contact with the company.

At the hearing, Peter Brown testified that the memo was not accurate. He said that he paid "almost zero attention" to his Cartaway investment, and that the memo was dictated without preparation at a time when he was unaware that the timing of the decision to make Cartaway a Voisey Bay mining exploration company was in issue. He said that, in determining that the memo was inaccurate, "I had to go back and recreate it and, you know, refresh my memory and talk to people...". After doing so, he recalled that, at the time he met with Eric Savics and Blayne Johnson, Cartaway was only a shell and that they were "thinking of either taking a position in a South American oil play or in Voisey Bay", but that nothing had been decided. He said he told them that he would prefer Voisey Bay, and he asked whether they had acquired any assets, and they said no.

In our view, Peter Brown's memo dated July 9, 1997 is the more reliable evidence of what occurred from his perspective, because it is his earliest and most spontaneous recollection of the events. Even so, we do not attach much weight to that evidence but note that it is consistent with our finding that the decision to make Cartaway a Voisey Bay mining exploration company occurred prior to the Private Placement.

(vii) DeJong's role

In one sense, every director of a public company has the same fundamental responsibilities. These are, in general terms, to supervise the management of the company having regard to company's best interests and compliance with applicable law. In order to determine what an individual director's obligations are under any particular circumstances, it is necessary to consider a number of factors that will vary with each director, including: the director's role with the company; the director's individual experience, skills and expertise; and the information available to the director.

DeJong's role was as both a director and legal counsel to Cartaway. DeJong had considerable experience and expertise in both these capacities.

Even though DeJong was not involved in the management of Cartaway, his dual role as director and lawyer gave him access to more information regarding Cartaway's affairs than an outside director (a director who was not an officer or employee) would normally have. That was especially true in relation to Cartaway's material change because DeJong dealt with almost every detail of the transactions involved. Because of this dual role, DeJong was an inside director, and assumed a higher degree of responsibility, in relation to these transactions.

DeJong was expected to understand the information provided to him in relation to these transactions, to make appropriate enquiries wherever the information was incomplete or suspicious and, generally, to ensure that everything was lawful and properly reported. The test is whether DeJong exercised appropriate prudence and due diligence under the circumstances. We find that he did.

DeJong impressed us as a credible witness. His version of the events was clear and consistent. We accepted all his evidence. This was in marked contrast with Stuart and Birchall, both of whom were evasive and unreliable witnesses.

We accept DeJong's evidence that Stuart said nothing to him about Cartaway becoming involved in Voisey Bay until May 15, 1995 and that, even then, Stuart suggested that no deal was yet in place. We find that Stuart deliberately misinformed and misled DeJong. In effect, Stuart used DeJong to present the public version of events surrounding Cartaway's material change.

DeJong testified that he and others in his office dealt with Mr. Seifert and Mr. Paton, both lawyers with the Vancouver firm of Maitland and Company, who represented 489 in relation to Cartaway's transactions with 489. DeJong said that they received every indication that 489 was, indeed, owned and operated by Bethune. DeJong described a particular conversation where he questioned Mr. Seifert about the late appearance of Randy Singh and Associates as a shareholder of 489 and was told by Mr. Seifert that Randy Singh and Associates was Bethune's offshore holding company and that the transaction was structured for tax purposes. We don't know why Mr. Seifert said that, but it was not true. We find that DeJong was justified in relying upon this misinformation, which was consistent with the misinformation he received from Stuart.

DeJong knew Birchall on both a professional and social basis. We find that Birchall deliberately did not tell DeJong about his conversation with Stuart concerning the Kogaluk claims, and that this was another important element in the overall deception of DeJong.

Staff acknowledged that there was no direct evidence that DeJong knew about the material change. Staff argued that DeJong had "constructive knowledge", meaning that he ought to have known or that he was willfully blind to information that should have informed him.

In our view, the test to be applied here is whether, on an objective analysis of all the circumstances, DeJong could reasonably be expected to have known of the material change. Our conclusion is that DeJong could not reasonably be expected to have known.

We find that the Private Placement, and the subsequent acquisition of Voisey Bay mining claims by Cartaway, were not unusual or suspicious on their face, bearing in mind that key elements were deliberately concealed from DeJong and from the market generally. DeJong was not willfully blind, he was deliberately deceived. We find that DeJong acted reasonably in relying, to the extent he did, upon Stuart and others to tell him the truth. To expect DeJong to have detected the rather elaborate deception being worked upon him would be to impose an impossibly high standard on a director in his position.

(viii) Conclusion

We find that a material change occurred in the affairs of Cartaway when Stuart, in collusion with Hartvikson and Johnson, decided to make it a Voisey Bay mining exploration company, sometime between April 5 and April 19, 1995. We find that DeJong did not fail to disclose the material change because he did not know, and could not reasonably be expected to have known, when and how the material change actually occurred. We find that DeJong fulfilled his obligations as a director of Cartaway with respect to the material change in accordance with the information presented to him.

(B) Allegation #2—distribution of drill core samples

1. Summary of issues and findings

There was no dispute about the fact that Ivany distributed drill core samples prior to assay. The samples were from the first drilling done on Cartaway's "Cirque property" in northern Labrador. The Cirque property was widely viewed as Cartaway's most promising prospect, so the drilling results were the focus of intense market attention at the time.

The only issue is whether, by distributing the drill core samples, Ivany informed certain persons of a material fact contrary to s. 119(3) of the Act, and contrary to National Policy 40.

Section 119(3) of the Act says:

> No reporting issuer or person or company in a special relationship with a reporting issuer shall, other than when it is necessary in the course of business, inform another person or company of a material fact or material change with respect to the reporting issuer before the material fact or material change has been generally disclosed.

"Material fact" is defined in s. 1(l) of the Act, which says:

> "Material fact" when used in relation to securities issued or proposed to be issued means a fact that significantly affects or would reasonably be expected to have a significant effect on the market price or value of the securities;

National Policy 40 requires issuers to disclose "material information", which includes both material facts and material changes.

We find that the distribution of drill core samples did not violate s. 119(3) of the Act, or National Policy 40, because the drill core samples were not material facts or material information. They could not reasonably be expected to have a significant effect on the market price or value of Cartaway's securities.

2. Technical aspects of Cartaway's exploration program in Labrador

It is useful to describe, in general terms, some of the key technical aspects of Cartaway's exploration program.

The Diamond Fields nickel and copper discovery at Voisey Bay was one of the most significant in the world. Several witnesses described Cartaway's Labrador mining claims as an "area play", meaning that the most attractive claims were either located in close physical proximity to Voisey Bay, or had similar geological or geophysical characteristics.

Cartaway's exploration program involved aerial and ground geophysical testing, which was designed to look for an ore deposit similar to the "Voisey Bay model", which consisted of massive sulphides, mainly pyrrhotite, but also containing economic quantities of chalcopyrite (a copper/iron sulphide) and pentlandite (a nickel sulphide).

Sulphides refer to various types of metal sulphides, which are the most common form of economic concentrations of metals. Massive sulphides refer to situations where sulphides form a high percentage (roughly, over 50%) of the rock, in contrast with disseminated sulphides where smaller quantities of sulphides are dispersed throughout the rock.

Pyrrhotite is an iron sulphide that is quite common. Pyrrhotite has no economic value in itself, but it sometimes occurs along with other, more valuable, sulphides such as chalcopyrite and pentlandite.

3. The Cirque property

Under the direction of Ivany and Nash, Cartaway moved quickly on its exploration program in Labrador. By the fall of 1995, they had identified a number of prospective drilling targets, based on geophysical data. On September 27, 1995, Cartaway issued a news release describing an extensive drilling program on various properties, including the Cirque property.

Between September of 1995 and May of 1996, Cartaway issued many news releases describing its exploration and drilling program. The drilling results were all rather disappointing. Several of these releases described the Cirque property and plans to drill there as soon as conditions permitted. Cartaway announced on May 1, 1996 that drilling had started on the Cirque property.

The Cirque property was special. It contained two geophysical anomalies that indicated possible similarity with the Voisey Bay model, making it the most promising of all the claims held by Cartaway. An attempt had been made to drill on the Cirque property in November of 1995, but severe weather caused this to be suspended, which only increased the anticipation.

Ivany was concerned by the extent to which Cartaway shareholders were intensely focussed on the Cirque property. As Ivany described it:

> [W]e had a number of targets, but they were dwarfed by this damn Cirque anomaly. And the concern we had was, gee, this was turning into what we hoped it would never turn into, was a one-target company in the minds of most people. And so we were trying to draw people's attention to the fact that, you know, that we do have 30,000 claims here in Labrador, we do have a whole number of geophysical prospects, and — but, you know, you can't push a rope uphill. People were focused on this Cirque thing, and they wanted to do it. I suspect that people — it certainly was never anything I did or Nash did that focussed people to the extent they were focussed on the Cirque, but it — I think probably the people at First Marathon were carried away in their enthusiasm of this.

4. The May 8, 1996 news release

On May, 8, 1996 Cartaway issued a news release ("the May 8 release") describing the first two holes drilled on the Cirque property. It reported that the first hole encountered "five zones of network-textured to coarse-grained massive sulphides (mainly pyrrhotite) with significant visible chalcopyrite". It reported that the second hole encountered four zones of "[n]et textured to massive sulphides with significant visible chalcopyrite". It also reported that samples were in transit to the laboratory to be assayed.

These results were viewed as good news and the market reacted. Prior to issuance of the news release on May 8, Cartaway shares closed at $4.20 on volume of just over 50,000 shares. On

May 9, they closed at $7.75 on volume of over 400,000 shares. The share price continued to increase after that, closing on May 15 at $14.80.

5. Distribution of drill core samples

On May 8, 1995 Nash sent a small piece of the Cirque drill core to Ivany, who received it the following day. On May 9, Ivany showed the piece of drill core to three individuals in the FMSL office in Toronto. That same day, Nash received a telephone call from Johnson in Vancouver, which Nash described as "a little bit hostile". Johnson wanted a similar piece of drill core and Nash sent him one on May 9 without consulting Ivany in advance.

When Ivany learned that Johnson received the sample, he "viewed it as the same as me getting a piece, I suppose". Ivany also said that, in retrospect, he would have been reluctant to give a drill core sample to Johnson because he knew that Johnson would probably use it to promote Cartaway stock.

A number of witnesses testified that it was common for people in the mining business to carry and show core samples, but it was not clear whether this practice applies to core samples prior to assay. Some witnesses expressed the view that it is definitely not appropriate to distribute or show core samples prior to assay. The issue before us does not turn upon general practice in the mining business—it turns upon whether these particular core samples were material facts or material information.

6. Materiality

The core sample received by Ivany was entered in evidence and examined by several witnesses. They all agreed, and we find, that no new material fact or information could be gleaned from such a small sample.

The sample itself was described by several witnesses as unimpressive. It showed the existence of massive sulphides, mainly pyrrhotite, but it contained little chalcopyrite and no one could see that it contained any pentlandite. Even such an unimpressive sample could be dangerous if it were misrepresented, which is why it is generally unwise to distribute any samples prior to assay, but there was no evidence that the samples were misrepresented here.

The fact that the core samples did not even live up to the description in the May 8 release showed that the core sample was not a material fact in the sense that it would reasonably be expected to have a significant positive effect on the market price or value of Cartaway's securities.

It was also suggested that the core sample could be material in a negative sense because it showed that the May 8 release was overly optimistic. Mr. Leishman, a mining analyst, testified that he recommended selling Cartaway stock after Johnson showed him a core sample, but Mr. Leishman also recommended selling Cartaway stock before he saw the core sample. Mr. Leishman observed Cartaway very closely, and based his recommendations on his overall assessment of Cartaway, which was that Cartaway's prospects did not justify its share price. His meeting with Johnson and his view of the core sample supported his overall assessment, but it seems clear that the sample alone would not be material even to an expert such as Mr. Leishman, who acknowledged that such a small core sample is not truly representative of what may be in the hole.

7. Conclusion

We find that the distribution of drill core samples did not disclose a material fact or material information, and so did not violate s. 119(3) of the Act, or National Policy 40.

(C) Allegation #3—misrepresentation in the May 16, 1996 news release

1. Summary of issues and findings

There are four issues to be addressed in the context of this allegation:

- Was there "a misrepresentation as to the presence of pentlandite" in the May 16,1996 news release?
- If there was such a misrepresentation, was it contrary to subsection 161(1)(b) of the Act, or contrary to the public interest?
- If there was such a misrepresentation, was Ivany responsible for it?
- If there was such a misrepresentation, was DeJong responsible for it?

Section 1(m) of the Act says:

> "misrepresentation means
>
> (i) an untrue statement of a material fact, or
> (ii) an omission to state a material fact that is required to be stated, or
> (iii) an omission to state a material fact that is necessary to be stated in order for a statement not to be misleading;

Subsection 161(1)(b) of the Act says:

> Any person or company that does one or more of the following commits an offence:
>
> (b) makes a misrepresentation in any document required to be filed or furnished under this Act or the regulations;

We find that the May 16, 1996 news release contained a misrepresentation as to the presence of pentlandite. We find that this misrepresentation was not contrary to subsection 161(1)(b) of the Act because the news release was not required to be filed or furnished under the Act or the regulations. The news release was required to be issued by National Policy 40, and we find that the misrepresentation was contrary to National Policy 40 and contrary to the public interest.

We find that Ivany, as the CEO of Cartaway, was responsible for the misrepresentation.

We find that DeJong was not responsible for the misrepresentation.

2. Contents of the May 16, 1996 news release

The key portions of the May 16, 1996 news release ("the May 16 release") are as follows:

> Cartaway is pleased to announce that it has completed drilling hole number 3 at its 100 percent owned Cirque property....
>
> A new body of sulphide mineralization has been encountered at depth in a layered succession of gabbro and anorthosite in four zones over the interval between 127.30 and 194.80 metres. The zones are characterized by heavy concentrations of sulphide mineralization (pyrrhotite, pentlandite and chalcopyrite) with average chalcopyrite mineralization between 5-10 percent.... Samples are being prepared for shipment to the laboratory for analysis for copper, nickel and cobalt.
>
> Assay results from the first two holes will be released Friday, May 17, 1996.

The alleged misrepresentation in this news release is the inclusion of the single word: "pentlandite". In order to properly consider whether the reference to pentlandite was a misrepresentation, we must examine the broader context of the May 16 release.

3. Cartaway's drilling program on the Cirque property in May of 1996

Ivany, the president and CEO of Cartaway, was trained as a lawyer and had many years of executive experience with junior and senior mining companies. In May of 1996, Ivany was also the executive vice-president of another public company, and he worked out of that company's offices in Toronto.

Nash was Cartaway's vice-president in charge of exploration. Nash was a highly-experienced exploration geologist. He did some field work in Labrador but also worked out of Cartaway's office in Pickering, Ontario.

Nash hired Tim Beesley ("Beesley") as Cartaway's senior geologist in 1995. Beesley was also a highly-experienced exploration geologist. He had done field work for Cartaway in Labrador but, by May of 1996, he was working mainly from Cartaway's office in Pickering.

In April of 1996, Nash hired Fred Sharpley ("Sharpley") to supervise the drilling on the Cirque property and to log the drill core. Sharpley had over 35 years of experience as a geologist and was well-regarded. Shortly before drilling started on the Cirque property, Nash worked together with Sharpley when he logged the drill core on another of Cartaway's properties, and Nash observed that Sharpley "was a very meticulous logger".

Drilling on the Cirque property commenced on May 1, 1996. The drilling site was approximately 15 kilometres from the Cartaway field camp at Putt Lake. The drilling crew worked in shifts of 12 hours per day. At the end of each shift, Sharpley would travel from the Putt Lake camp to the drilling site by helicopter, monitor the situation, and bring the core back to the camp to be logged.

Logging the core involved visual observation of the core and recording the rock type and mineralization with specific reference to the position on the core. Intervals or zones of mineralization were identified by Sharpley in his log and marked on the core with crayon. A technician would then split those portions of the core in half, with one half sent for assay and the other half kept for reference.

There was a satellite telephone at the Putt Lake camp and, each day, Sharpley would fax his drill logs to Pickering, where they would be reviewed by Beesley and Nash.

4. Process for preparing and issuing news releases regarding the Cirque property

The May 8 release was initially drafted by Beesley, with over-riding input from Nash, based upon Sharpley's drill logs. It was Nash, for example, who chose to use the phrase "significant visible chalcopyrite" in the May 8 release. Once Beesley and Nash were satisfied with the draft news release, it was sent to Ivany for his review.

Ivany testified that he exercised final approval over all news releases, but that he seldom had any editorial comment on the technical descriptions in the news releases. Ivany admitted that he "didn't have a lot of experience with issuing visual base metal results". Once Ivany approved the news release, it was sent to Cartaway's investor relations firm in Vancouver for actual distribution.

Other members of Cartaway's board of directors were not consulted about the preparation or wording of these news releases, but they were sent to the directors a few minutes before they were generally released.

The May 16 release was prepared the same way, except that Nash and Beesley also spoke to Sharpley by telephone about whether Sharpley had seen any pentlandite in the core. At no time did Ivany speak to Sharpley or review Sharpley's drill logs.

5. Market reaction to news releases regarding the Cirque property

It is impossible to gauge precisely the effect upon the market of each of the May 8 and May 16 releases. The market in Cartaway shares was highly speculative before the May 8 release. Cartaway shares were trading above $4.00, and with roughly 30 million shares outstanding, some observers felt the share price was already too high. There was tremendous anticipation about the drilling program on the Cirque property, and the market seemed to react very positively to the May 8 release describing visual results from the first two holes. Cartaway's share price rose from $4.20 on May 8 to roughly $22.00 by the time of the May 16 release. After the May 16 release, Cartaway's share price reached $26.00.

Ivany was sensitive to the market when he decided to issue the May 8 news release. He testified that he felt the information from the first two holes was material because "...like it or not, this was our number one target. This was the focus of the investment community". Ivany also testified:

> So I think internally we recognized and we were fully conscious about what we were doing, but we also had this kind of frothy marketplace out there. And we're not ignorant or stupid people, we knew there was a lot of hype going on about this stock, and we knew that there had been —a lot of the hype was very simplistic: This is the next Diamond Fields; they're going to drill this. It's like shooting fish in a barrel, away we go. And I don't know how you dampen than [sic] enthusiasm responsibly. I mean, if somebody could blatantly — I mean, you have a responsibility if you're managing a company not to trash it in the press, but, you know, you have to — so our view was we've lost control of the system here, the stock is going to run where it's going to run, so we might as well get as much of what we know out there as anybody else, and people, people are on their own buying this stock.

Ivany was also concerned about information leaking out. He noted that sulphides are easily identified by drill cuttings and the weight of the core, so "...if there is going to be a leak of anything, the fact that we had hit sulphides would be the most likely leak, and so we thought it best to tell the world that we had sulphides".

In the week between the May 8 and May 16 releases, market conditions were, as described by Ivany, "super-heated" and "a feeding frenzy of people who think they're onto the next Diamond Fields here". Ivany testified:

> Actually, I had a couple of calls from people who purported to be fund managers who were telling me that they had been told by mainly the First Marathon group that this was...going to be the next Diamond Fields, and they were just checking with management before they bought. One phone call I remember in particular, the fellow said to me, "What do you think?"... and I said, "Well, how much stock are you planning to buy?" And he said, "Oh probably half a million shares." My reaction to him was, "Well, look, I can't tell you whether you should buy or not, but I'll tell you, this is three holes in the middle of nowhere without any assays." And his response was, I remember it very clearly, was, "Look, I missed Diamond Fields and it hurt me. ...if this is the next Diamond Fields, it will be a significant piece of my portfolio; and if it isn't, it's a rounding error for me." I mean, that was the kind of thought process that was going into the buy side on this...stock.

During this period, Ivany was in daily contact with Johnson, and Ivany knew that FMSL had 10 million Cartaway shares on its books. During this period, Ivany also learned that Nash had sold 50,000 Cartaway shares into the market at $9.00. Ivany described his reaction this way:

> I said in my view, that wasn't the smartest thing he ever did, because when you're involved in the management of one of these companies and you're in the middle of a drilling program, the allegation is going to be made that you had inside information

> whether you believe you did or not. You're going to have trouble if something goes wrong, and you seem to have made a profit at the expense of other people, and left it at that.

When Nash called Ivany on May 15 to tell him that the 3rd hole showed increased levels of chalcopyrite in the deeper part of the core, Ivany described his reaction this way:

> So I said, "Well, God, we better, we better put it out, If we don't put it out and the market is running, we're going to be really criticized for not putting it out, but make sure it's right".

We heard evidence suggesting alternate explanations for the increase in Cartaway's share price during the period from May 8 through May 16, but none of these explanations were cogent. We are satisfied that the May 8 and May 16 releases, combined with promotional comments made by FMSL brokers, were the major factors causing the price increase. We find that the market could properly be described as irrational or frenzied prior to the May 16 release, and that the May 16 release did not create, but merely confirmed, the market's expectations about Cartaway being the next Diamond Fields.

6. The reference to pentlandite in the May 16, 1996 news release

Sharpley's drill logs did not include any record of pentlandite anywhere in the drill core. It was acknowledged that it is difficult to visually identify pentlandite in drill core, and that chalcopyrite is much easier to identify. Sharpley's drill logs did show a large increase in the levels of chalcopyrite at levels below 127 metres, with some intervals described as containing 5-10% chalcopyrite. When Beesley and Nash saw this, they wondered about pentlandite because the Voisey Bay model would include as much, or more, nickel (pentlandite) as copper (chalcopyrite).

Ivany knew that "...given the modeling we were using, we would have expected there to be nickel or pentlandite if we were starting to get elevated chalcopyrite". He also said that, when he discussed the elevated chalcopyrite with Nash, he would have asked Nash about nickel and his recollection was that Nash said he would "check it out".

Beesley and Nash called Sharpley to ask him about pentlandite. There is conflicting evidence about what was said. According to Nash, when he asked about whether there was pentlandite in the core, Sharpley said that he was looking at a seam or a vein of it at that moment. There was evidence that pentlandite rarely occurs in seams or veins and we do not accept Nash's evidence on this point, but prefer the evidence of Sharpley and Beesley.

Sharpley described his conversation with Nash as follows:

> I said to him, I thought I saw pentlandite in the core, but at the same time I did not put it in the logs, so the confidence level wasn't such that I wanted to put it in the logs.

Nash could not remember asking Sharpley why pentlandite was not recorded in the drill logs. Sharpley's evidence is consistent with Beesley's evidence that "Fred [Sharpley] allowed that he thought he had seen some pentlandite". Beesley also said, "He saw some...not anything he had logged over these intervals, but he saw grains. He thought he saw grains."

When Nash reported back to Ivany, Nash evidently recounted his own version of Sharpley's description of pentlandite in the core. Ivany said:

> I don't know that we actually focussed on the fact that it was or wasn't in the log at that point, and I think before the release went out, I probably was aware that it wasn't in the log, but Sharpley had told them in the conversation they had that he was "looking at pentlandite" as they spoke.

Ivany was asked whether he discussed with Nash the significance of the fact that Sharpley had not noted any pentlandite in the drill logs. He answered:

> Not in any great detail. When Walter [Nash] asked him and he got that answer ["looking at pentlandite"] back, I think that was...enough for us to say, we'd better mention it.

7. The availability of expedited assays

Ivany testified that he was under pressure from the ASE to release information about the Cirque property, which he interpreted as implicit authorization to release visual results. In our view, it is clear that the ASE wanted Cartaway to release assay results, and Ivany should have understood that.

There was evidence that assay results on the Cirque drilling could have been obtained more quickly. We accept that evidence, but we also note that the issue here is not whether visual estimates should have been disclosed, it is whether the May 16 release contained a misrepresentation. The availability of expedited assays is, therefore, only relevant as part of the context to the May 16 release.

8. Visual estimates versus assay results

The assay results for holes #1 and #2 were received late on May 16 and released on Friday, May 17. They showed insignificant amounts of copper, nickel and cobalt. This triggered a huge sell-off of Cartaway shares, the volume of which overwhelmed the ASE's trading system and prevented trading that day.

The assay results for hole #3 were received over the long weekend and released on Tuesday, May 21. They were equally disappointing. The low nickel assays showed that there was probably no pentlandite in the core. The low copper assays showed that Sharpley's visual estimates of chalcopyrite were as much as 10 times higher than what was actually in the core. Cartaway's share price closed at $2.78 on May 21.

We heard considerable evidence, expert and otherwise, about whether it was generally proper to disclose visual estimates of drill core in base metal exploration. It is clear that disclosure standards have changed since May of 1996, as reflected by the recommendations for improved standards contained in the Final Report of the Toronto Stock Exchange and Ontario Securities Commission Mining Standards Task Force issued in January 1999, entitled "Setting New Standards". The general propriety of disclosing visual estimates in May of 1996 is not in issue here, and need not be decided, but it is useful to examine the evidence to show the full context to the disclosure of visual estimates in the May 16 release.

The evidence showed that, in May of 1996, it was unusual to disclose visual estimates in base metal exploration, but that disclosing visual results could be appropriate in certain circumstances, such as where an exploration company decided to abandon further exploration on a property based on negative visual estimates. We heard that visual estimates are also useful and may be disclosed where they are part of a longer-term assessment of a particular geological setting. This involves a process where geologists repeatedly check their visual estimates against assay results and so "adjust their eye" to the point where they are able to make reasonably reliable visual estimates on core samples in a particular location.

We note that Sharpley had no opportunity to adjust his eye to the Cirque property prior to the May 16 release. When asked whether there was any effort to put a rush on the assays for holes #1 and #2, Beesley said:

> No. ...it was decided by management that since the first two holes had been described in the earlier press releases that...no results would be announced ...[or] received until the analyses from the first two holes were completed, so...the lab was instructed not to give us partial results, no results at all until the entire first and second hole had been completed, so this created a time lag in the ...results from the first hole.

When Beesley was asked if the assay results help the field geologist adjust to the particular area, Beesley said:

> [T]here were no more high chalcopyrite estimates from holes four on, let's put it that way.

Sharpley did not know that estimates from his drilling logs were being included in Cartaway news releases. One of the experts, Dr. Westoll, said:

> ...to see these kinds of estimates in the public domain is simply not what they were ever designed for. I think that if most field geologists felt that their drill logs, their first-run drill logs were going to appear in a press release, first of all, they would be horrified, and secondly, they wouldn't put half of what they put in a drill log. They would be conservative.

We accept Dr. Westoll's view.

It also appeared that Sharpley was unable to view the core after it was split, and that a partial explanation for Sharpley's overestimates was "smearing" of chalcopyrite along the surface of the core. Beesley mentioned, as another possible explanation for Sharpley's error, the "sheer volume of core that...[Sharpley] was dealing with".

We find that Sharpley made an error in his visual estimates of chalcopyrite. Although the magnitude of his error is surprising, the fact that he erred in his estimates is not surprising at all.

Another expert witness, Mr. Vaughan, indicated that the May 16 release was "consistent with standards in place at the time...providing it was factually accurate." To the extent that Mr. Vaughan was suggesting that it would be always be appropriate to disclose visual estimates, provided the disclosure accurately described the visual estimates, we disagree. In our view, any determination about the propriety of disclosing visual estimates in 1996 must also have included serious consideration of the reliability of those visual estimates. If the visual estimates were not sufficiently reliable, then it would be inappropriate to disclose them.

We do agree with Mr. Vaughan, however, that factual accuracy in reporting visual estimates is essential. Factual accuracy is synonymous with "truth" in this context. The issue here is not whether the visual estimates in the May 16 release were sufficiently reliable to warrant their release according to the standards in place at the time. The issue here is whether the particular reference to pentlandite in the May 16 release was a true statement of the visual estimate made by Sharpley.

9. Was the reference to pentlandite in the May 16 release a misrepresentation?

The Act's definition of "misrepresentation" includes "an untrue statement of a material fact".

The overall context of the situation is important in determining how a reasonable observer would interpret the reference to pentlandite in the May 16 release. The release said:

> The zones are characterized by heavy concentrations of sulphide mineralization (pyrrhotite, pentlandite and chalcopyrite) with average chalcopyrite mineralization between 5-10 percent.

There was some dispute over how that reference to pentlandite should be interpreted. Ivany and Nash suggested that it did not imply heavy concentrations of pentlandite. We find that it did imply heavy concentrations of pentlandite, and that both Ivany and Nash should have recognized that fact at the time.

On a simple grammatical analysis of the sentence, the modifier "heavy" appears to apply equally to pyrrhotite, pentlandite and chalcopyrite. This is confirmed to a knowledgeable reader by the fact that the sentence goes on to specify percentages of chalcopyrite mineralization that are consistent with the "heavy" description.

The inclusion of specific percentage estimates for chalcopyrite mineralization does not suggest lesser concentrations of pentlandite. Many people were looking at Cartaway's disclosure and drawing comparisons with the Diamond Fields discovery at Voisey Bay, which was widely known to contain as much or more nickel as it did copper. This was confirmed by one of the expert witnesses, Mr. McOuat. A mining analyst, Mr. Leishman, in describing the May 16 release, said:

> And they also describe pentlandite, which at times can be certainly more difficult to recognize, but based on my experience in evaluating other projects in Voisey Bay, you would automatically assume that nickel sulphide, the nickel content would be even greater than the copper sulphide or than the copper content.

This was the same assumption that caused Ivany to ask Nash about nickel or pentlandite when he first heard about the elevated chalcopyrite levels recorded for drill hole #3.

Taking the entire context into account, we find that the reference to pentlandite in the May 16 release would be interpreted by most reasonable observers as a visual estimate of pentlandite in quantities similar to those reported for chalcopyrite. We find that reference to be a material fact. The market speculation leading up to the May 16 release was based on the possibility that Cartaway might be "the next Diamond Fields", so it was obvious that the market would react to news of pentlandite in such quantities.

It is clear, however, that no visual estimate of such quantities of pentlandite had actually been made, and that Cartaway had no information that justified disclosing a visual estimate of pentlandite in such extravagant terms. The reference to pentlandite in the May 16 release was an untrue statement of a material fact and, therefore, a misrepresentation.

In our view, the evidence showed that it was inappropriate for Cartaway's May 16 release to mention pentlandite at all, given the fact that Sharpley did not record any pentlandite in his drill logs. Mr. Leishman said that he found it very shocking that pentlandite would be mentioned in the news release if it was not recorded in the drill logs. Dr. Westoll said unequivocally that pentlandite should not have been included in the news release. Mr. McOuat testified that he would not have mentioned pentlandite in the news release even if he had spoken to Sharpley and Sharpley had said that he thought he saw some.

Mr. Vaughan was the only mining expert who testified that it was acceptable to refer to pentlandite in the May 16 release, but he put several qualifications on that opinion. He said he would have first asked Sharpley why pentlandite was not recorded in the drill logs, and satisfied himself that Sharpley had positively identified pentlandite in the core. Mr. Vaughan gave a hypothetical example where Sharpley may have said that he identified pentlandite after examining the split core in sunlight. It was not clear whether Mr. Vaughan thought that such a conversation would justify the high levels of pentlandite represented by the May 16 release. We have grave doubts that it could, but we need not decide that because the evidence is clear that no such conversation occurred.

In our view, even if Sharpley had told Nash that he was "looking at pentlandite" (as Nash reported to Ivany), that falls far short of being a visual estimate of the high levels of pentlandite represented by the May 16 release. We find that Sharpley did not express any confidence about there being pentlandite in the core because he had no such confidence, which is why pentlandite was not recorded in the drill logs. Sharpley merely acknowledged that he thought he saw some pentlandite. In light of that, the reference to pentlandite in the May 16 release was an untrue statement of a material fact and, therefore, a misrepresentation.

10. Subsection 161(1)(b) of the Act, National Policy 40, and the public interest

Subsection 161(1)(b) of the Act makes it an offence to make "a misrepresentation in any document required to be filed or furnished under this Act or the regulations". A news release may be required to be filed by subsection 118(1)(a) of the Act, but only if the news release relates to a material change. Although the information in the May 16, 1996 release was material, it is doubtful that it constituted a material change as defined by the Act. Therefore, the misrepresentation did not violate subsection 161(1)(b) of the Act.

National Policy 40, entitled "Timely Disclosure", became effective December 1, 1987. It describes requirements that supplement the provisions of the Act. The Introduction to the Policy says, in part:

> Where the requirements of the Policy go beyond the technical requirements of existing legislation, the securities administrators and stock exchanges request that issuers, their counsel, and market professionals regard such requirements as guidelines to follow in order to assist in the operation in Canada of an open and fair marketplace which merits the trust and confidence of the investing public.

The Policy goes on to require issuers to disclose material information, and says that "[a]nnouncements of material information should be factual and balanced....".

In this case, we have found that the reference to pentlandite in the May 16 release was an untrue statement of a material fact and, therefore, a misrepresentation. We find that it was also a violation of National Policy 40.

National Policy 40 does not have the force of law. Its requirements are guidelines. Those guidelines are understood to represent the disclosure requirements applicable to all issuers whose securities are publicly traded in Canada, on the basis that violation of those guidelines will generally trigger the public interest jurisdiction of securities regulators. The public interest jurisdiction of securities regulators is discretionary, so we do not automatically conclude that conduct is contrary to the public interest merely because it violates the requirements of National Policy 40. However, given the importance of accurate and timely disclosure of material information as described in National Policy 40, it is clear that the misrepresentation in the May 16 release was contrary to the public interest.

11. Duties of directors in relation to news releases

(i) Directors' duties generally

We were referred to a number of decisions dealing with the duties of directors in different contexts.

The Ontario Securities Commission considered this subject in *Re Standard Trustco Ltd.* (1992), 6 B.L.R. (2d) 241 *("Standard Trustco").* In that case, there was an issue about whether a number of directors acted contrary to the public interest by approving certain financial statements after concerns had been raised by the Office of the Superintendent of Financial Institutions

("OSFI") and the Canada Deposit Insurance Corporation ("CDIC"). The Ontario Securities Commission said [at p. 285]:

> We are of the opinion that, in relying on management to the extent they did and only taking the steps they did, the respondent directors failed to exercise the kind of prudence and due diligence that they ought to have exercised, given the information they had about the financial condition of Standard Trust...and the seriousness of the concerns expressed by OSFI which were shared by CDIC. In reaching this conclusion we have taken into account the fact that almost all of the directors, if not all, had backgrounds which suggested that they were a relatively sophisticated group.
>
> It was not appropriate in the circumstances for the respondent directors to have placed as much reliance on management as they did....Directors should not rely on management unquestioningly where they have reason to be concerned about the integrity or ability of management or where they have notice of a particular problem relating to management's activities.

The respondent directors in *Standard Trustco* included senior management, members of the audit committee, and outside directors. The responsibility of each group was considered separately because each had a different role and different access to information. With respect to outside directors, the Ontario Securities Commission said [at p. 292]:

> Outside directors should play an important and effective role on a board because of their separation and independence from management. They should ask questions of management and others in order to properly oversee the company's operations and disclosure, particularly where they have notice that the company may have serious financial problems. In some cases it is appropriate for outside directors to make inquiries and have discussions in the absence of management where they have a concern about something which management has done. In this case, the outside directors failed to fulfil their role.

In *Revelstoke Credit Union v. Miller* (1984), 24 B.L.R. 271 (B.C.S.C.) *("Revelstoke")*, a credit union sued its auditors for failing to detect unauthorized activities by a credit union manager. The auditors alleged that the credit union's directors were negligent in failing to detect the unauthorized activities. McEachern, C.J.S.C. said [at p. 299]:

> With regard to the directors, I am satisfied none of them had any actual knowledge of the [unauthorized activities], nor do I think they should have. They were entitled, in my view, to leave the management of the credit union to [the manager], and they could only be faulted if something actually came to their attention which should have put them on notice, or if they failed to ensure the systems in place were adequate.

In *In re Caremark International Inc. Derivative Litigation* ((1996), 698 A.2d 959, *("Caremark"),* the Court of Chancery of Delaware considered the issue of whether a board of directors breached their fiduciary duty to the corporation in relation to alleged violations by the corporation's employees of certain federal and state laws. In considering the subject of "potential liability for directoral decisions" the court said [at p. 967]:

> Director liability for a breach of the duty to exercise appropriate attention may, in theory, arise in two distinct contexts. First, such liability may be said to follow *from a board decision* that results in a loss because that decision was ill advised or "negligent". Second, liability to the corporation for a loss may be said to arise from an *unconsidered failure of the board to act* in circumstances in which due attention would, arguably, have prevented the loss.... The first class of cases will typically be subject to review under the director-protective business judgment rule, assuming the decision made was the product of a *process* that was *either* deliberately considered in good faith or was otherwise rational.... What should be understood, but may not widely be understood by courts or commentators who are not often required to face such questions, is that compliance with a director's duty of care can never appropriately be judicially determined by reference to the content of the board decision that leads to a corporate loss, apart from consideration of the good faith or rationality of the process employed. That is, whether a judge or jury considering the matter after the fact, believes a decision substantively wrong, or degrees of wrong extending through "stupid" to "egregious" or "irrational", provides no ground for director liability, so long as the court determines that the process employed was either rational or employed in a good faith effort to advance corporate interests. To employ a different rule — one that permitted an "objective" evaluation of the decision — would expose directors to substantive second guessing by ill-equipped judges or juries, which would, in the long-run, be injurious to investor interests. Thus, the business judgment rule is process oriented and informed by a deep respect for all good faith board decisions. [footnotes omitted, emphasis in original]

In considering the subject of "liability for failure to monitor" the court referred to the decision of the Delaware Supreme Court in *Graham v. Allis-Chalmers Mfg. Co.* (1963), 188 A.2d 125 where the court stated [at p. 130] that "absent cause for suspicion there is no duty upon the directors to install and operate a corporate system of espionage to ferret out wrongdoing which they have no reason to suspect exists." After reviewing developments in this area since 1963, the court in Caremark said [at p. 970]:

> In light of these developments, it would, in my opinion, be a mistake to conclude that our Supreme Court's statement in Graham concerning "espionage" means that corporate boards may satisfy their obligation to be reasonably informed concerning the corporation, without assuring themselves that information and

> reporting systems exist in the organization that are reasonably designed to provide to senior management and to the board itself timely, accurate information sufficient to allow
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> management and the board, each within its scope, to reach informed judgments concerning both the corporation's compliance with law and its business performance.
>
> Obviously the level of detail that is appropriate for such an information system is a question of business judgment. And obviously too, no rationally designed information and reporting system will remove the possibility that the corporation will violate laws or regulations, or that senior officers or directors may nevertheless sometimes be misled or otherwise fail reasonably to detect acts material to the corporation's compliance with the law. But it is important that the board exercise a good faith judgment that the corporation's information and reporting system is in concept and design adequate to assure the board that appropriate information will come to its attention in a timely manner as a matter of ordinary operations, so that it may satisfy its responsibility.
>
> Thus, I am of the view that a director's obligation includes a duty to attempt in good faith to assure that a corporate information and reporting system, which the board concludes is adequate, exists, and that failure to do so under some circumstances may, in theory at least, render a director liable for losses caused by non-compliance with applicable legal standards [footnote omitted].

We distinguish between the test to be applied in determining whether directors have met their regulatory obligations (as described in *Standard Trustco,* which we refer to here as the "regulatory test") and the test for determining whether directors are civilly liable for their actions (as described in *Revelstoke* and *Caremark*, which we refer to here as the "negligence test"). In our view, the regulatory test imposes a higher standard upon directors than the negligence test because the regulatory test involves an objective evaluation of the director's conduct, while the negligence test does not.

The Ontario Securities Commission noted in *Standard Trustco* that the disclosure standards imposed on officers and directors are, to some extent, codified in corporate legislation or established by practice, and [at p. 284]:

> In addition, securities regulators through legislation, policies and decided cases have enunciated what they consider to be appropriate standards of conduct for directors and officers of public companies, which may go beyond the requirements of corporate law in order to protect the public interest.

The distinction between the regulatory test and the negligence test may be illustrated by the following example: a director makes a stupid, egregious decision, employing a process that was either rational or employed in a good faith effort to advance corporate interests. That director would not be civilly liable to the corporation because the corporation chooses its own directors and it cannot properly hold those directors to an objective standard of prudence or due diligence beyond the Caremark criteria. If, however, an objective evaluation of the decision shows it to be contrary to the public interest, or a violation of securities law, then regulators may have a right and a duty to intervene in order to protect the integrity of the markets. The director's good faith, or reliance on a rational process, may be relevant factors to be considered, but they do not necessarily determine whether the decision is contrary to the public interest or a violation of securities law.

This distinction is reflected in the approach taken in *Standard Trustco,* where the Ontario Securities Commission said [at p. 280]:

> While the commission should consider the state of mind of the respondents in deciding whether to exercise its public interest jurisdiction, it is not determinative. It is not necessary for us to find that the respondents acted wilfully or deceitfully in order to exercise our public interest jurisdiction. In the case of Gordon Capital Corp. v. Ontario (Securities Commission) (1990), 13 O.S.C.B. 2035 (O.S.C.), affirmed (1991), 14 O.S.C.B. 2713, 1 Admin L. R. (2d) 199, 50 O.A.C. 258 (Div. Ct.) at p. 2714 [O.S.C.B.], Craig J. stated:
>
> > "The fact that Gordon may have acted without malevolent motive and inadvertently is not determinative of the right of the OSC to exercise its regulatory and discretionary powers to impose a sanction upon Gordon."

In this case, we apply the regulatory test described in *Standard Trustco*: whether a director exercises appropriate prudence and due diligence, which will be determined having regard to the particular circumstances of the director, the information available and the systems in place to deal with such information. Bearing in mind the distinction between the regulatory test and the negligence test described above, it is also useful to consider the factors described in *Revelstoke* and *Caremark* in determining whether a director has exercised appropriate prudence and due diligence under the particular circumstances of the case.

We were also referred to the recent decision of this Commission in *Re Naxos Resources Ltd. et al*. (1999), 8 ASCS 921. In that case, the Commission found that several outside directors were not responsible for improper press releases issued by the company, despite the fact that some of the directors "appeared to have exercised poor judgement from time to time in that they should have brought more discipline to the process of press releases....". The Commission also said [at p. 924]:

> The Board of Directors of Naxos was not a "working Board" in terms of knowledge of the day to day operations of the company. It appears that the Board was satisfied that the controls placed on the issuance of press releases were sufficient even if in hindsight it was not.

That statement is an observation on the facts of that particular case and should not be construed as a statement of the test to be applied in considering the issue of whether an outside director is responsible for improper news releases. In our view, the test is not simply whether a particular director is satisfied with the process for issuing news releases. The test involves a full and objective evaluation of whether that director exercised appropriate prudence and due diligence in establishing and relying upon the process, having regard to the particular circumstances of the case.

Although we agree with and apply the regulatory test described in *Standard Trustco*, it is important to note the significant differences between the particular circumstances in *Standard Trustco* and this case. *Standard Trustco* involved a senior issuer—a financial institution operating under regulation by OSFI and CDIC, as well as by securities regulators. *Standard Trustco* involved a situation where the entire board was actually involved in a decision to approve certain financial statements at a time when the entire board had information from senior regulatory authorities that raised serious concerns about the propriety of those statements. *Standard Trustco* did not involve any issue of deficient corporate systems.

By contrast, Cartaway was a junior exploration company. Ivany was, but the board was not, actually involved in the decision to issue the May 16 release. Staff's allegations against DeJong are, in essence, that he failed to ensure that Cartaway had systems in place to prevent the May 16 release. Staff argued that DeJong had a duty to put systems in place to handle unusual circumstances such as the overheated market in Cartaway shares. Staff suggested that, if DeJong and other directors had reviewed Cartaway's technical news releases beforehand, the misrepresentation may not have occurred.

We turn now to examine the particular circumstances that are relevant in applying the regulatory test to the actions of Ivany and DeJong in the context of Cartaway.

(ii) General circumstances of the Cartaway board of directors

A board of directors should be composed of individuals who bring a variety of experience and skills to the table. Each board will function differently, and there is no single process that defines a properly-functioning board.

We find that there was nothing unusual about the composition of the Cartaway board. Ivany had extensive relevant senior management experience in mining and corporate governance. He was supported by an experienced head of exploration (Nash) and a board composed of capable persons with a balance of backgrounds. We note that one of the Cartaway directors, Matt Mason, testified that he felt that he had no business being a director. That may have been true, but it did not appear to affect the operation of the Cartaway board.

(iii) Management versus supervision

We agree with the recommendations contained in the 1994 Report of the Toronto Stock Exchange Committee on Corporate Governance in Canada, entitled "Where Were The Directors?—Guidelines For Improved Corporate Governance In Canada", which indicate that the principal responsibility of the board of directors is the stewardship of the company, to oversee the conduct of the business and to supervise management, who are responsible for the day-to-day conduct of the business.

The board should be involved in all major decisions affecting the company but, absent information or a pattern of actions that give rise to concern by the board, the board should not normally intervene in the day-to-day affairs of the company.

The boards of junior companies normally lack the resources, and the need, to establish formal, defined, documented processes for dealing with management. It is normal and appropriate for such boards to rely to some extent on the personal reputations of other directors and officers of the company. In this case, the evidence showed that Ivany and Nash had good reputations within the mining industry.

As the CEO, Ivany was the interface between the board and the public, and between the board and management. The CEO will normally be held to a higher standard than the board and the rest of management because the CEO bears direct responsibility for establishing the standards of behavior and processes of the corporation. The CEO may delegate duties to the rest of management, but the CEO will always remain primarily responsible for overseeing the performance of such duties, especially in junior companies that generally lack documented procedures.

(iv) Responsibility for technical news releases

Generally, it is management's responsibility to prepare and issue news releases except where the board has the duty to review the underlying content before release, such as when reporting certain financial results. To keep the board informed, management should provide a copy of all press releases directly to the board at the same time as the information is released to the public. This is what happened with Cartaway.

Although DeJong was still providing legal services to Cartaway from time to time, those services did not relate to the issuance of technical news releases regarding Cartaway's exploration program. DeJong did not have any special expertise or access to information in relation to such releases, so his duty of prudence and due diligence would be the same as for any non-expert outside director.

The evidence showed that, under normal circumstances, it would have been unusual and unproductive to involve outside directors like DeJong in the process of preparing technical news releases on exploration results, unless the director had some special expertise that was apparently needed.

As described in *Standard Trustco*, there is a duty upon outside directors to intervene, by whatever means necessary, where they have notice of potential problems. In *Standard Trustco* the outside directors duty arose from the fact that officials from OSFI and CDIC attended a board meeting and advised the directors of serious financial problems. In our view, that situation is readily distinguishable from the situation with Cartaway, where the only circumstance that might have put the outside directors on notice was the overheated market in Cartaway shares following the May 8 release. We do not see that the outside directors could reasonably have been expected to call a special meeting, or put special procedures in place to prevent misrepresentations in technical news releases, when there was no suggestion that the May 8 release was improper. Without some notice of potential problems, or some history or pattern of misconduct by management, outside directors cannot be reasonably expected to anticipate future problems or misconduct. We also consider the short time period involved here as a factor in assessing the board's duty to intervene.

During April and May of 1996, the Cartaway board members would be expected to be aware of events surrounding Cartaway, but we find that they had no reason to intervene in the preparation of the technical news releases reporting on the results of the drilling program. The outside directors could reasonably rely on Ivany and Nash, both of whom were experienced and reputable managers with exploration expertise. It was reasonable for the board to rely specifically upon Ivany, as CEO, to ensure that the requisite due diligence was performed and that there was proper disclosure of all material information.

12. Was Ivany responsible for the misrepresentation?

We find that Ivany was responsible for the misrepresentation in the May 16 release.

As the CEO of a junior issuer, Ivany was expected to have intimate knowledge of the important events affecting the company, and to exercise effective managerial control over the processes involved. Ivany failed to do that in relation to the May 16 release.

We find that Ivany delegated too much responsibility to Nash. Ivany knew that Johnson and others at FMSL were promoting Cartaway as the next Diamond Fields, that the market for Cartaway shares became super-heated after the May 8 release, and that Nash was selling Cartaway shares into the market at that time. Knowing that pentlandite was not recorded in the drill logs, Ivany should have been much more critical in assessing Nash's reported discussions with Sharpley about pentlandite. Ivany had known and worked with Nash for many years, so it is understandable that Ivany would be inclined to trust and rely upon Nash, but Ivany had a duty to exercise special care in releasing further information to the market under those circumstances. Instead, Ivany appears to have relied upon his general direction to Nash to "make sure it's right", which we cannot regard as the proper fulfillment of a CEO's responsibilities.

What should Ivany have done? In our view, it should have been apparent to Ivany that the ambiguity of the reference to "significant visible chalcopyrite" in the May 8 release allowed a market over-reaction, which demonstrated the danger of releasing visual estimates under such circumstances. The experience of the May 8 release should have made Ivany more cautious about the contents of the May 16 release. The fact that assay results on the two holes described in the May 8 release were due later on May 16 also suggested a cautious approach to the May 16 release. Those assays would be the most reliable material information on the Cirque drilling and the first trustworthy gauge of the reliability of Sharpley's visual estimates. In our view, the May 16 release should have said only that Cartaway had encountered a new zone of massive sulphides in hole #3, and that samples had been sent for assay. That would have been a true statement of the reliable material information Cartaway had at the time.

It was suggested that the intensely speculative market in Cartaway shares produced a heightened obligation upon Ivany to release visual estimates, and that persons selling Cartaway shares into the market could be aggrieved if it turned out that the company did not release promising visual estimates, but waited instead to disclose assay results. This argument was, in essence, that if the visual estimates had been borne out by the assay results, there would have been no problem.

We reject that argument because it fails to recognize the over-riding importance of ensuring the reliability and accuracy of public company disclosure. Investors have a right to assume that public companies will promptly disclose any reliable material information, and that such disclosure will be scrupulously accurate. If someone chooses to speculate on the basis of rumors or other unreliable information, they do so at their own risk. The fact that the market appears to be reacting

to speculation does not justify feeding that speculation with unreliable or inaccurate information. In our view, a speculative market demands increased attention to the reliability and accuracy of disclosure because of the obviously increased risks associated with the release of unreliable or inaccurate information in such a market.

It is evident that Ivany became swept up in the vortex of speculation surrounding Cartaway at the time. However, at the time he was dealing with the May 16 release, Ivany's duty as an experienced executive and as the CEO of Cartaway was to exercise rational, professional judgment and control over the contents of Cartaway's news releases. Ivany failed to do that and, in our view, his approval of the May 16 release displayed a reckless and cavalier approach that fell far below the standard expected of persons in his position under those circumstances.

It is appropriate to note here that Ivany received no financial benefit, directly or indirectly, from Cartaway. Although Ivany had options and Cartaway shares, he did not exercise any options nor did he sell any shares.

13. Was DeJong responsible for the misrepresentation?

No, DeJong was not responsible for the misrepresentation.

Cartaway's process for issuing news releases was not unusual. On a reasonable and objective analysis, the process did not appear to be inadequate prior to the May 16 release, so there was no duty upon the outside directors to change the process or put special procedures in place at the time. We find that DeJong had no reason to believe or suspect that Ivany would make a misrepresentation in the May 16 release, nor was the misrepresentation the result of an inadequate process for issuing news releases. The misrepresentation was the result of a major error by Ivany, which DeJong could not reasonably have been expected to anticipate.

14. Conclusion

We find that there was a misrepresentation as to the presence of pentlandite in the May 16, 1996 news release. That misrepresentation was not contrary to subsection 161(1)(b) of the Act, but it was contrary to National Policy 40 and contrary to the public interest.

We find that Ivany was responsible for the misrepresentation. We find that DeJong was not responsible for the misrepresentation.

(D) <u>Burden of Proof</u>

In serious matters like the present case we naturally require a relatively high degree of proof, which was clearly satisfied by the evidence here.

III. SUBMISSIONS RESPECTING ORDERS IN THE PUBLIC INTEREST

We have found that Ivany was responsible for the misrepresentation in the May 16 release, which was contrary to National Policy 40 and contrary to the public interest. That leaves to be addressed the question of what order or orders the Commission should make.

At the hearing, Mr. MacLeod made some submissions regarding the Commission's public interest jurisdiction suggesting that, under the circumstances, it may not be in the public interest for the Commission to issue any order against Mr. Ivany. Without making any decision with respect to those submissions, we will reconvene the hearing in order to receive further submissions on this question. We ask that counsel for Commission staff, in consultation with Mr. Ivany's counsel, make the necessary arrangements with the Secretary to the Commission.

Dated at the **City of Calgary** in the **Province of Alberta**, this 11th day of August, 2000.

"Original Signed By"
Eric T. Spink, Vice-Chair

"Original Signed By"
John W. Cranston, Commission Member

"Original Signed By"
James E. Allard, Commission Member