ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Felgate, 2020 ABASC 156 **Date: 20201006**

Nicholas John Felgate

Panel:	Kari Horn Tom Cotter Gail Harding
Representation:	Colin Schulhauser Amelia Martin for Commission Staff Brendan Miller for the Respondent (former representation, Jordan Bierkos)
Submissions Completed:	May 8, 2020
Decision:	October 6, 2020

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I. INTRODUCTION

[1] In a notice of hearing dated August 19, 2019 (the **NOH**), Alberta Securities Commission staff (**Staff**) alleged that the respondent, Nicholas John Felgate (**Felgate**) contravened s. 93.1 of the *Securities Act* (Alberta) (the **Act**) by failing to comply with a decision of the Commission (the Commission is defined in the Act as the "Alberta Securities Commission", which we refer to in this decision as the **Commission** or the **ASC**). The decision relevant to the allegation was an *ex parte* interim cease trade order dated March 2, 2018, as extended by orders dated March 16, 2018 and July 11, 2018 (respectively cited as *Re Felgate*, 2018 ABASC 35 (the ***Ex Parte* Order**), *Re Felgate*, 2018 ABASC 41 (the **First Extension Order**) and *Re Felgate*, 2018 ABASC 113 (the **Second Extension Order**), and collectively referred to as the **Interim Order**).

[2] The *Ex Parte* Order prohibited Felgate from trading in all securities and from using all exemptions under Alberta securities laws. The *Ex Parte* Order would have expired in 15 days, but was extended by the First Extension Order to July 31, 2018 and further extended by the Second Extension Order "until any proceeding initiated pursuant to the Act, including a trial in respect of an offence, is finally determined or otherwise concluded". Each of the three orders was made by the ASC pursuant to ss. 33 and 198(1) of the Act. To date there has been no "proceeding initiated pursuant to the Act" (other than the NOH), although we were informed that criminal proceedings have been initiated against Felgate in relation to loan agreements like those at issue here.

[3] The hearing into the merits of Staff's allegation (the **Hearing**) took place on October 31 and November 1, 2019. We received and considered documentary evidence, testimony from Staff witnesses, and written and oral submissions from both parties. Felgate's counsel to that point was Jordan Bierkos. Subsequent to oral submissions (which took place on January 28, 2020), the Ontario Court of Appeal released a decision in March 2020 addressing some similar issues: *Ontario Securities Commission v. Tiffin*, 2020 ONCA 217 – ***Tiffin*** (all references herein to *Tiffin* are to the Ontario Court of Appeal decision, unless otherwise noted). We communicated to the parties that we were willing to receive additional written submissions from both parties regarding that decision.

[4] We received written submissions on *Tiffin* from Staff on April 3, 2020. In lieu of written submissions on this issue from Felgate's former counsel, we received instead an April 9, 2020 letter from Felgate's new counsel, Brendan Miller. He stated in that letter that the Second Extension Order "is a nullity and therefore so are these proceedings". An April 13, 2020 letter from Felgate's new counsel clarified that he did not think that *Tiffin* affected the submissions made by Felgate's former counsel.

[5] Felgate's counsel asked that his April 9, 2020 letter be taken by the panel as an application (the **Nullity Application**). On April 14, 2020, we advised the parties that we considered the April 9 letter to be an application, and we set out dates for written submissions from the parties. We received written submissions from Staff on May 1, 2020 and a written reply from Felgate's counsel on May 8, 2020.

[6] After considering the parties' submissions on the Nullity Application, we informed the parties on May 15, 2020 (by email through the Registrar) that the Nullity Application was denied,

and that written reasons for that determination would be provided in this decision on the merits of Staff's allegation in the NOH. Those reasons are set out below.

[7] Our analysis and findings in respect of Staff's allegation in the NOH are also set out below. Stated briefly, we find that Felgate traded securities in violation of the Interim Order and, by doing so, failed to comply with a decision of the ASC made under Alberta securities laws and thus contravened s. 93.1 of the Act. This proceeding will now move into a second phase for the determination of what, if any, orders ought to be made against Felgate.

II. THE NULLITY APPLICATION

[8] As mentioned, we denied the Nullity Application. Our reasons for doing so are set out here.

A. Basis for the Nullity Application

[9] Felgate argued that the Second Extension Order was a nullity because it was not possible to have the Second Extension Order expire at the conclusion of a proceeding which had not yet been initiated. In other words, he contended that unless a proceeding under the Act has already been initiated, a panel extending an interim order is able to make an extension order expire only at a definite date, not at a conditional date, otherwise the extension could be "in perpetuity".

[10] The Second Extension Order stated:

> The Commission, considering that the length of time required to conduct a hearing, or a trial in respect of an offence, and to render a decision could be prejudicial to the public interest, orders under section 33(4) of the Act that the Interim Order is extended until any proceeding initiated pursuant to the Act, including a trial in respect of an offence, is finally determined or otherwise concluded.

[11] The current version of s. 33 of the Act has been in force since March 30, 2015 (the **Current Provision**) and states:

> 33(1) Notwithstanding anything in this Act, where
>
> (a) this Act
>
> (i) permits the Commission or the Executive Director to make a decision after conducting a hearing or after giving a person or company an opportunity to have a hearing, or
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> (ii) creates an offence,
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> and
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> (b) the Commission or the Executive Director considers that the length of time required to conduct a hearing, or a trial in respect of an offence, and to render a decision could be prejudicial to the public interest,
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> the Commission or the Executive Director may make an interim order at any time with or without conducting a hearing on notice to a person or company against whom the order is sought.

(2) If the Commission or the Executive Director makes an interim order under subsection (1) without conducting a hearing on notice to a person or company against whom the order is sought,

(a) unless the order otherwise provides, the order takes effect immediately on being made,

(b) the order expires 15 days from the day that it takes effect, and

(c) the Commission or the Executive Director, as the case may be, shall send to each person or company named in the interim order

(i) a copy of the interim order,

(ii) any evidence admitted in support of the interim order, and

(iii) an accompanying notice of hearing in respect of the extension of the interim order pursuant to subsection (4), if applicable.

(3) If the Commission or the Executive Director makes an interim order under subsection (1) after conducting a hearing on notice to a person or company against whom the order is made, the order takes effect immediately and remains in effect

(a) for the period of time specified in the order, or

(b) until any proceeding initiated pursuant to this Act, including a trial in respect of an offence, is finally determined or otherwise concluded.

(4) Before the expiry of an interim order, the Commission or the Executive Director, as the case may be, may extend an interim order for a specified period of time, or until any proceeding initiated pursuant to this Act, including a trial in respect of an offence, is finally determined or otherwise concluded, if

(a) the Commission or the Executive Director provides the person or company named in that order with an opportunity to be heard, and

(b) the Commission or the Executive Director considers that the length of time required to conduct a hearing, or a trial in respect of an offence, and to render a decision could be prejudicial to the public interest.

B. Parties' Positions

1. Felgate

[12] Felgate contended that there are two possible circumstances in which a panel may extend an interim order, given the expiry options set out in s. 33(4) of the Act. First, if an investigation is ongoing and no proceeding under the Act has been commenced, a panel may extend an interim order to expire after "a specified period of time". Second, if a proceeding under the Act has been commenced, a panel may extend an interim order to expire either after a specified period of time or when that already-commenced proceeding is concluded. Based on his reasoning, as no proceeding had been initiated against Felgate as of the date of the Second Extension Order, it was improper – thus invalid – for that panel to purport to issue an interim order which would not expire until a proceeding not yet commenced had been concluded.

[13] Felgate argued that a plain reading of s. 33(4) of the Act supported the Nullity Application, and that the provision as worded is not ambiguous. He submitted that interpreting the provision as contended for by Staff would require reading in wording so that the expiration provision in s. 33(4) and the Second Extension Order would state that the Interim Order was extended (with the emphasis indicating which words Felgate argued would have to be read in):

> . . . until any proceeding **to eventually be** initiated pursuant to this Act **at the discretion of the prosecution**, including a trial in respect of an offence, is finally determined or otherwise concluded. [Emphasis added by Felgate.]

[14] Felgate also contended that his interpretation was reinforced on constitutional grounds, because extending the Interim Order until the conclusion of non-existent proceedings which would only be initiated by Staff in their discretion would unlawfully sub-delegate the decision on the Interim Order's duration to the sole discretion of the prosecution. He stated that his argument was not a collateral attack on the Second Extension Order, but was a question of not being able to give meaning to the clause at issue in the absence of a proceeding having been commenced. He extended that argument to say that if there are two possible interpretations of a provision, one of which would be unconstitutional, then the constitutional interpretation must be chosen – and that his interpretation must therefore be chosen because impermissible sub-delegation to Staff would be unconstitutional.

[15] Felgate further argued that, if Staff's interpretation were correct, the Act would provide for the automatic termination of an interim order if the Executive Director decided not to file proceedings. Felgate therefore viewed the absence of such an automatic termination provision as supporting his interpretation.

[16] We note that Staff appeared to address Felgate's sub-delegation argument as being in the alternative to his plain meaning argument. Felgate's submissions made clear that he considered those to be parts of the same argument – i.e., there was improper sub-delegation because no proceeding had been commenced before the Second Extension Order was issued. As urged by Felgate, we treat those in our analysis as parts of the same argument.

[17] Felgate also argued that Staff's interpretation of s. 33(4) of the Act would require this panel to re-write the provision in issue thereby usurping the role of the Legislature. He contended that would be "naked legislating", which was rejected in *A.G. (Ontario) and Viking Houses v. Peel*, [1979] 2 S.C.R. 1134 at 1139.

[18] Felgate stated that amendments to s. 33 of the Act had to be considered, along with its original wording. He pointed to an amendment affecting the wording on which he based the Nullity Application. He noted that s. 33(3) used to provide that an extension order could be made "(a) for such period as the Commission or the Executive Director considers necessary, or (b) for such period until the hearing is concluded and a decision is rendered". That wording was in effect from January 1, 2002 to December 16, 2014. Effective December 17, 2014, the extension wording was amended to allow an extension "for a specified period of time or until any proceeding initiated pursuant to this Act is finally determined or otherwise concluded".

[19] We found Felgate's argument regarding the referenced amendments confusing and set it out here verbatim:

> The former section made it clear that it [sic] the extension in perpetuity was only for when a hearing was to be concluded and a decision issued. It removed the ability for the Panel to extend orders for a time period "considered necessary" and replaced it with "for a specified period of time". Clearly, this required proceedings to already be iniated [sic], otherwise s.33(3)(a) had to be used. It seems clear that the amendments were made to deal with the fact that the interim order was to apply to actual charges laid under the Act in Provincial Court. It did not change so as to allow an order to be granted in perpetuity while the Executive Director investigates.

[20] Although not mentioned by Felgate, the phrase was further amended, effective March 30, 2015 and now in s. 33(4) of the Act, to "for a specified period of time, or until any proceeding initiated pursuant to this Act, including a trial in respect of an offence, is finally determined or otherwise concluded". We discuss in our analysis all of the amendments to s. 33.

2. Staff

[21] Staff argued that Felgate's narrow interpretation is incorrect, ignoring "the plain, ordinary and contextually appropriate interpretation" of the provision, which clearly does not require that there be an existing proceeding before the "until any proceeding initiated" language can be used by a panel in setting the expiration time for an interim order. Staff also contended that there was no sub-delegation in the wording of the Second Extension Order because s. 214 of the Act gives an ASC panel the power, at all times, to revoke or vary the Interim Order, and Staff have never had any authority over the duration of the Interim Order.

[22] Refuting Felgate's assertion that Staff's interpretation would require additional words to be read into the s. 33(4) provision, Staff stated Felgate's interpretation was the one that would require additional words to be read in – specifically, that the phrase "any proceeding" would have to be read as "any extant proceeding". Staff said that approach is unnecessary and not the most appropriate interpretation.

[23] In addressing what they considered the appropriate interpretation, Staff referred to the Supreme Court of Canada's citation of E. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87 in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21: ". . . the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the *scheme* of the [legislation], the *object* of the [legislation], and the *intention* of Parliament" (emphasis added by Staff). Staff also referred to s. 10 of the *Interpretation Act* (Alberta): "An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects."

[24] Staff then set out the context for interpreting securities legislation, which is the protection of the investing public, a protective role that "must be recognized when assessing the way in which [securities commissions'] functions are carried out under their Acts" (*Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301 at 314). Staff also contended that interim orders are an example of protective measures used to prevent *prima facie* misconduct continuing "while an investigation and hearing proceed" (*Re Workum and Hennig*, 2008 ABASC 719 at para. 130). Further, Staff noted that s. 33(1) of the Act states that an interim order may be made "at any time", not only after a proceeding has been commenced.

[25] Regarding sub-delegation, Staff noted that an order may be varied by a panel at any time, on the application of a party or by a panel's own motion. Staff further argued that administrative tribunals, including the ASC, control their own procedures (subject always to procedural fairness and natural justice). Staff contended that, even after the Second Extension Order was issued, a panel would continue to exercise substantial control over that order and its expiration because a panel could revoke or vary the order. Staff's ultimate contention on this point was that Felgate was wrong in asserting that Staff's control over whether or when a proceeding would be commenced meant that Staff controlled the duration of the Interim Order. As an ASC panel has always had the authority to revoke or vary the Interim Order, its duration was not in Staff's control.

[26] Staff contended that statements of the panel issuing the Second Extension Order made clear that the parties and the panel knew that there was an ongoing investigation into Felgate's activities, but no proceeding had been commenced, and that the extension until a proceeding or trial was concluded was necessary to protect Alberta investors and the Alberta capital market. Staff also pointed to several past decisions of various ASC panels as confirming Staff's interpretation of the wording in s. 33(4) of the Act because those decisions extended interim orders until further investigation had occurred and proceedings under the Act had been initiated and concluded (e.g., *Re Breitkreutz*, 2015 ABASC 949 at para. 5; and *Re Currey*, 2016 ABASC 169 at para. 5). It is not evident that the interpretation argued for by Felgate was raised in those decisions referred to by Staff, so the panels in those cases would not likely have considered the issue before us. Therefore, the fact that those panels made certain extension decisions is not relevant, and we do not address that argument.

C. Analysis of Nullity Application

[27] To summarize, Felgate's argument that a proceeding had to have been initiated before the Second Extension Order could validly be made was two-fold:

- a plain reading of s. 33(4) of the Act supported his contention; and
- an extension in the absence of an already-commenced proceeding would be an impermissible delegation of power to Staff by leaving Staff in control of when the Second Extension Order would expire.

[28] There is no basis for Felgate's interpretation of s. 33(4) of the Act.

1. Purpose of Section 33

[29] The purpose of s. 33 of the Act is to allow a panel to impose orders if Staff are able to prove, on a *prima facie* basis, that the Act has been contravened and that there is a significant risk that those against whom the order is sought could cause prejudice to the public interest before any hearing process is completed (at which point, if Staff succeed in proving their allegations, sanctions could be ordered). As stated by an ASC panel in *Re Cohodes*, 2018 ABASC 161 at paras. 30-31:

> Section 33 of the Act gives the ASC the authority to respond promptly to threats to the integrity of the Alberta capital market, including by making temporary orders that implement the preventative and protective measures available under s. 198. We must be satisfied that such orders are in the

> public interest, and that the length of time necessary to conduct a full enforcement proceeding and render a decision could be prejudicial to that interest (*Re York-Rio Resources Inc.*, 2009 ABASC 112 at para. 11; see also *Re Omega Securities Inc.*, 2017 LNONOSC 677 at paras. 18-19). The latter element presupposes that Staff are in the process of investigating the respondent.
>
> The panel in *York-Rio* also said the following with respect to the ASC's authority under s. 33 of the Act (at para. 11):
>
> > This authority enables the [ASC] to move swiftly to protect Alberta investors and the Alberta capital market where circumstances warrant. It is an important – indeed, vital – tool in the [ASC's] public-interest arsenal. Orders so made, however, are merely interim protective measures; they are not sanctions for misconduct in the same sense as orders that might be made after an investigation is completed, a hearing held, and actual misconduct found on the basis of the evidence and argument presented at the hearing.

[30] Protective interim orders under s. 33 of the Act may be made "at any time". That introductory wording to s. 33 does not restrict the duration of an interim order based on whether a proceeding has been commenced, nor would that be a logical interpretation in light of the purpose of s. 33 and of the Act as a whole. Section 33 contains only one restriction on the duration of an interim order – subsection (2) dictates that an interim order made without conducting a hearing on notice expires 15 days after it takes effect.

[31] As s. 33(1)(b) of the Act is the starting point of the process for making interim orders, we conclude that s. 33(4) must be read in harmony with s. 33(1)(b). In this case, a proceeding has not been commenced pursuant to the Act, although charges have apparently been laid under the *Criminal Code* (Canada). It remains open to Staff to commence an administrative proceeding before the ASC or a quasi-criminal proceeding before a court, and it is still appropriate for protective measures to be in place until any such proceeding is commenced and concluded (unless, as discussed below, Staff or Felgate were to apply to the ASC to revoke or vary the Interim Order and a panel were to order such a revocation or variation). Had Felgate considered, at any time before engaging in the transactions at issue in this Hearing, that circumstances warranted revocation or variation of the Interim Order, he could have made an application under s. 214(1).

[32] Our interpretation is reinforced by further considering the elements of s. 33(4) of the Act. It sets out three conditions which must be satisfied before a panel can extend an interim order to a specific date or until any proceeding initiated under the Act is concluded. First, the interim order must have not yet expired. Second, the respondent must be given an opportunity to be heard. Third, the panel hearing the application to extend the interim order must be satisfied that the length of time required to conduct a hearing or a trial, and to render a decision, could be prejudicial to the public interest. There is no additional condition in s. 33(4) that such a hearing or trial must have already been initiated before a panel can extend an interim order until any proceeding initiated under the Act is concluded. The legislature deliberately provided for those three preconditions, and we conclude that it would be inappropriate to add a fourth by reading into the provision that which the legislature did not enact. We also note that under s. 33(4), the conditions or jurisdiction for making an order expiring on a certain date are the same as those for making an order expiring on the conclusion of a proceeding. The legislature could have included the additional condition put forward by Felgate – or could have otherwise established a different process or different

requirements for extensions to expire after the conclusion of a hearing or a trial – but did not do so.

2. Delegation

[33] Turning to Felgate's sub-delegation argument, we are satisfied that there was no delegation of power to Staff by the ASC panel making the Second Extension Order or in any other manner. Thus, there was no improper delegation.

[34] As noted by Staff and discussed above, s. 214(1) of the Act allows an ASC panel to revoke or vary any decisions made by the ASC, if the panel "considers that it would not be prejudicial to the public interest to do so". This would encompass an initial or extended interim order, including the Second Extension Order. Therefore, an ASC panel could revoke or vary the Second Extension Order at any time before or after a proceeding is commenced, meaning that the expiration of that order was never within Staff's control.

[35] The same s. 214(1) process would be used should Staff decide not to commence proceedings at the ASC or before a court. In that situation, Staff (or one who is subject to the interim order) would apply to the ASC for a revocation order under s. 214(1). Once again, the outcome is within a panel's discretion, not within Staff's control.

[36] Even though Staff do control when a proceeding is commenced, they do not control the timing of that proceeding after it is commenced. That timing – including scheduling preliminary steps, setting dates for hearing the matter, the daily schedule of the proceeding, and issuing a decision on the matter – is all within the control of the decision-maker (a panel or a court).

3. Automatic Termination Provision

[37] Felgate argued that if Staff's interpretation were correct, there would be a provision in the Act that any interim order extended until the determination of any proceeding initiated under the Act would automatically terminate if the Executive Director decided not to initiate any proceedings. Felgate contended that the lack of such a provision supported his view.

[38] Felgate's premise and conclusion are incorrect. Staff's interpretation does not require an automatic termination provision in the Act because there is already a process to have an interim order revoked or varied, regardless of whether it is set to expire on a certain date or at the conclusion of any proceeding. In our view, the fact that there is a single mechanism to deal with revoking or varying interim orders (i.e., s. 214 of the Act) – regardless of the expiry provision – undermines Felgate's position.

4. History of Section 33

[39] As noted, Felgate argued that the history of s. 33 of the Act also supported his contention. It can be helpful to look at the history of a provision, but considering the broader context is more helpful than examining one amendment in isolation as Felgate did (and, as discussed below, we did not agree with Felgate's interpretation on that limited point). Accordingly, we examine the history of this provision from January 1, 2002, the date the Revised Statutes of Alberta, 2000 were proclaimed in force.

(a) Prior Versions of Section 33 of the Act

[40] The version of s. 33 that was in force between January 1, 2002 and December 16, 2014 (the **2002 Provision**), stated:

> 33(1) Notwithstanding anything in this Act, where
>
> (a) this Act permits the Commission or the Executive Director to conduct a hearing or to make a decision after conducting a hearing or after giving a person or company an opportunity to have a hearing, and
>
> (b) the Commission or the Executive Director before whom the hearing is to be held considers that the length of time required to conduct a hearing and render a decision could be prejudicial to the public interest,
>
> the Commission or the Executive Director, as the case may be, may make an interim order at any time without conducting a hearing.
>
> (2) An interim order,
>
> (a) unless the order otherwise provides, takes effect immediately on being made, and
>
> (b) expires 15 days from the day that it is made.
>
> (3) The Commission or the Executive Director may extend the period of time that an interim order remains in effect
>
> (a) for such period as the Commission or the Executive Director considers necessary, or
>
> (b) for such period until the hearing is concluded and a decision is rendered.
>
> (4) Where the Commission or the Executive Director makes an interim order, the Commission or the Executive Director, as the case may be, shall send
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> (a) a copy of the interim order, and
>
> (b) an accompanying notice of hearing,
>
> to any person or company that, in the opinion of the Commission or the Executive Director, is directly affected by the order.

[41] Effective December 17, 2014, the 2002 Provision was repealed and replaced. The version of s. 33 that was in force between December 17, 2014 and March 29, 2015 (the **2014 Provision**), stated:

> 33(1) Notwithstanding anything in this Act, where
>
> (a) this Act
>
> (i) permits the Commission or the Executive Director to make a decision after conducting a hearing or after giving a person or company an opportunity to have a hearing, or
>
> (ii) creates an offence,

and

(b) the Commission or the Executive Director considers that the length of time required to conduct a hearing, or a trial in respect of an offence, and to render a decision could be prejudicial to the public interest,

the Commission or the Executive Director may make an interim order at any time with or without conducting a hearing on notice to a person or company against whom the order is sought.

(2) If the Commission or the Executive Director makes an interim order under subsection (1) without conducting a hearing on notice to a person or company against whom the order is sought,

(a) unless the order otherwise provides, the order takes effect immediately on being made,

(b) the order expires 15 days from the day that it takes effect, and

(c) the Commission or the Executive Director, as the case may be, shall send to each person named in the interim order

(i) a copy of the interim order,

(ii) an accompanying notice of hearing in respect of the extension of the interim order pursuant to subsection (3), and

(iii) any evidence tendered in support of the interim order.

(3) If, after conducting a hearing prior to the expiry of any interim order pursuant to subsection (2), the Commission or the Executive Director considers that the length of time required to conduct a hearing, or a trial in respect of an offence, and to render a decision could be prejudicial to the public interest, the Commission or the Executive Director may make an order extending the interim order for a specified period of time or until any proceeding initiated pursuant to this Act is finally determined or otherwise concluded.

(4) If the Commission or the Executive Director conducts a hearing in respect of an order under subsection (1) on notice to a person or company against whom the order is sought, the Commission or the Executive Director may make an interim order against that person or company that will remain in effect for a specified period of time or until any proceeding initiated pursuant to this Act is finally determined or otherwise concluded.

[42] The 2014 Provision was repealed and replaced effective March 30, 2015, resulting in the Current Provision we earlier set out in these reasons.

(b) Analysis of the History of Section 33 of the Act

[43] After considering the legislative history of s. 33 of the Act, we disagree with Felgate that comparing former wording in a subsection of the 2002 Provision to the corresponding wording in the Current Provision supports his interpretation that an interim order can be extended to the conclusion of a hearing only if a notice of hearing setting out allegations (or charges in Provincial Court) had already been issued before the date the interim order was extended.

[44] Felgate pointed to only one change – s. 33(3) of the 2002 Provision as compared to s. 33(4) of the Current Provision. However, his argument ignored all other amendments to s. 33 made as a result of the enactment of the 2014 Provision and the subsequent enactment of the Current Provision. When considering the history of a provision, it is important to take into account the necessary context, not merely one selected amendment out of many.

(i) The 2002 Provision

[45] Section 33(1) of the 2002 Provision provided that an interim order could be made if the ASC or the Executive Director "considers that the length of time required to conduct a hearing and render a decision could be prejudicial to the public interest". Those interim orders "may [be made] at any time without conducting a hearing". Under s. 33(2), an interim order would expire 15 days after it was made, although it could be extended using s. 33(3). Section 33(3) stated that the extension could be "for such period as the Commission or the Executive Director considers necessary" or "for such period until the hearing is concluded and a decision rendered". "[T]he hearing" in the latter subsection referred to "hearing" in ss. 33(1)(a) and (b) as they were at the time.

[46] Section 33(1) did not explicitly provide a process for an initial interim order to be granted after a hearing (only without a hearing – *ex parte*). Even assuming an initial interim order could be granted after a hearing, all initial interim orders would expire after 15 days. A hearing was required for any extension, based on s. 33(4) which provided that once an interim order was made, it and "an accompanying notice of hearing" were to be sent to any "directly affected" person or company.

(ii) The 2014 Provision

[47] The 2002 Provision was repealed and replaced with the 2014 Provision. Section 33(1) of the 2014 Provision allowed for interim orders to be made when an offence was created (under the Act) and a trial in respect of that offence could be conducted, in addition to situations in which allegations would lead to a hearing at the ASC. Adding offences to s. 33 filled a gap in the 2002 Provision.

[48] Section 33(1) also provided that initial interim orders could be made "at any time with or without conducting a hearing on notice". We note that the term "hearing on notice" was used in certain parts of the 2014 Provision. This differentiated the "hearing on notice" (or the lack thereof) for an interim order from "a hearing" of allegations or "a trial in respect of an offence". If Staff brought an application for an initial interim order on an *ex parte* basis, that would be governed by s. 33(2), with an extension request for such an order governed by s. 33(3). If Staff brought an application for an initial interim order on notice, both the initial interim order and any extension requests for such an order would be governed by s. 33(4).

[49] The version of s. 33(4) in the 2002 Provision required "an accompanying notice of hearing" to be sent to persons directly affected once an interim order was made (this presumably applied to both orders made *ex parte* or on notice and to both initial or extended interim orders). There was no indication there as to what the "accompanying notice of hearing" referred to – a notice of hearing commencing an administrative proceeding or a notice of hearing for seeking an extension of the interim order. However, s. 33(2) of the 2014 Provision made clear that the notice of hearing

to be provided after an interim order had been issued *ex parte* was a notice of hearing relating to the extension of that interim order.

[50] New expiry wording was used in ss. 33(3) and (4) of the 2014 Provision. Those stated that interim orders – other than *ex parte* initial interim orders which expired in 15 days – could be made "for a specified period of time or until any proceeding initiated pursuant to this Act is finally determined or otherwise concluded". Under those provisions, an interim order with either expiry option could be used if the ASC or the Executive Director "consider[ed] that the length of time required to conduct a hearing, or a trial in respect of an offence, and to render a decision could be prejudicial to the public interest".

[51] The version of s. 33(3) in the 2002 Provision referred to a period "until the hearing is concluded and a decision is rendered", while, as noted, ss. 33(3) and (4) of the 2014 Provision referred to a period "until any proceeding initiated pursuant to this Act is finally determined or otherwise concluded". If Felgate is correct that the history of s. 33 of the Act is relevant to our determination of the Nullity Application, the change from "the hearing" (using the definite article "the") to "any proceeding" (using the indefinite article "any") would indicate to us that it was clear at least by December 17, 2014 that no proceeding needed to be commenced before a panel could make or extend an interim order until the conclusion of any proceeding – otherwise the Legislature could have chosen to keep the definite article and to make an explicit provision to that effect.

(iii) The Current Provision

[52] The repeal of the 2014 Provision and replacement with the Current Provision resulted in no change to s. 33(1). Section 33(2) of the Current Provision continues to set out the procedure when an initial interim order has been made without a hearing on notice. Two elements in s. 33(2) changed with the enactment of the Current Provision: the evidence to be sent to a respondent to the initial interim order is evidence admitted rather than evidence tendered; and the notice of hearing in respect of the extension of an interim order referred to the extension process now located in s. 33(4), which effectively replaced s. 33(3) of the 2014 Provision.

[53] Section 33(3) of the Current Provision is similar to s. 33(4) of the 2014 Provision, with some minor changes. It sets out the procedure when an initial interim order is made after a hearing on notice. As s. 33(3) does not apply to extensions of interim orders, it is irrelevant here.

[54] As of March 30, 2015, s. 33(4) became the provision dealing with the extension of any interim order, regardless of whether initially ordered with or without a hearing on notice and regardless of whether previously extended or not. This is when the operative wording upon which the Nullity Application is based came into force. As in s. 33(3) of the 2014 Provision, the wording used in s. 33(4) of the Current Provision is "any proceeding".

(iv) Conclusion on the History of Section 33

[55] Based on the above summary and analysis, we are satisfied that none of the amendments to s. 33 resulting from the enactment of either the 2014 Provision or the Current Provision supported Felgate's interpretation of the interim order extension language.

D. Conclusion on Nullity Application

[56] For the reasons given, no proceeding needed to be initiated before the expiry wording in the Second Extension Order could be used. Therefore, we dismiss the Nullity Application and affirm that the Second Extension Order is valid.

[57] Our decision on the merits of Staff's allegation proceeded on the basis that the Interim Order was in effect at the time of the alleged breach.

III. BACKGROUND

[58] Staff called three witnesses at the Hearing. Two of Staff's witnesses were **RVL** and **DVL** (Alberta residents who entered agreements with Felgate; identified here by initials to protect their privacy interests). Staff also called as a witness Staff investigator Shawn Taylor (**Taylor**).

[59] Felgate's former counsel cross-examined Staff's witnesses, but did not call any witnesses or otherwise tender any evidence.

IV. PRELIMINARY MATTERS

A. Standard of Proof

[60] As stated in *Re Aitkens*, 2018 ABASC 27 at paras. 48-49:

> The applicable standard of proof in ASC enforcement hearings is proof on a balance of probabilities. We must "be satisfied that there is sufficiently clear, convincing and cogent evidence that the existence or occurrence of any alleged fact required to be proved is more likely than its non-existence or non-occurrence" ([*Re Arbour Energy Inc.*, 2012 ABASC 131] at para. 38; see also *F.H. v. McDougall*, 2008 SCC 53 at paras. 46 and 49).
>
> We are also "entitled to draw inferences from the evidence as a whole" (*Arbour* at para. 39), including circumstantial evidence. We are mindful of the comments of the Alberta Court of Appeal in *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 (at paras. 26-28) to ensure that inferences are supported by evidence and are not based on speculation.

B. Relevance and Use of Hearsay Evidence

[61] During an enforcement hearing, all relevant evidence (including hearsay evidence) is admissible, provided that the rules of natural justice and procedural fairness are followed (see *Aitkens* at para. 50).

[62] We do, however, retain discretion as to the relevant evidence we admit, and we consider indicators of reliability (such as corroboration by other evidence) in determining what weight to give to the evidence we admit (see *Aitkens* at paras. 50-51).

V. EVIDENCE

[63] RVL and his father, DVL, entered agreements (the **Agreements**) with Felgate on May 29, 2019. We found them and Taylor to be credible witnesses. As Felgate neither called witnesses nor testified himself, we do not have the benefit of weighing the evidence from Staff in the context of evidence from Felgate. However, we did assess all evidence before us for consistency and corroboration with all other evidence.

[64] In these reasons, when quoting from the documents in evidence that were drafted or used by Felgate, we reproduce the wording and emphasis verbatim, including the original errors in grammar, spelling, punctuation and syntax.

A. RVL and DVL

1. Relationship with Felgate

[65] RVL and DVL met with Felgate on May 29, 2019, the day they signed the Agreements.

[66] That was the first time DVL met Felgate. RVL had met Felgate just over a month earlier, on Easter Day, when introduced by Felgate's brother. RVL had known Felgate's brother since about the beginning of 2019, although RVL and the brother had had the same circle of friends for a few years.

[67] According to DVL, RVL told him, in about early May 2019, "that this opportunity could be available to friends and close family members [of Felgate]". RVL confirmed during cross-examination that he understood Felgate would not borrow from anyone he did not have a relationship with. He also confirmed that Felgate asked RVL if DVL was interested "probably because [Felgate] usually doesn't do deals in smaller amounts", and Felgate did not have DVL's contact information.

[68] RVL testified that Felgate offered "his friends and family loan agreements through his Facebook and whatnot, and it was basically brought up one day that me and my dad could do a deal with him". RVL and Felgate were Facebook friends at that time. RVL stated that during a conversation he had with Felgate in late May 2019, Felgate "was talking about doing a deal with one of my friends as a possibility. And so then he also extended the possibility of doing a deal with myself and my father and my family". RVL testified that Felgate said he was entering agreements like this with Felgate's friends and family.

[69] DVL confirmed during cross-examination that he considered this to be a loan to a friend, although he acknowledged during questioning from the panel that Felgate was not his friend. DVL stated that RVL had told him about Felgate entering agreements with other people, but DVL had not discussed this with Felgate.

2. Specifics of Agreements

[70] Each Agreement was headed "LENDER/LOAN PERSONAL NON SECURITIES RELATED AGREEMENT" and "PROMISSORY NOTE", and was referred to within the document as a "LOAN AGREEMENT".

[71] The two Agreements were identical, apart from:

- the name on each Agreement – RVL's name as "Lender" on one Agreement (the **RVL Agreement**) and DVL's name as "Lender" on the other Agreement (the **DVL Agreement**);

- the "Loan Amount" of each Agreement – the RVL Agreement for $35,000 and the DVL Agreement for $250,000 (DVL testified the DVL Agreement was intended to be for $265,000); and

- the term of each Agreement – both had a "36 month term" indicated in a number of places, although the RVL Agreement had two instances of that being changed by hand to a "12 month term" (the remaining references in the RVL Agreement were still to 36 months).

[72] The Agreements used language clearly intended to convey that the Agreements were not securities and were not subject to the Act. Examples of such language included:

- "In no way shape or form is this principal or gifted fee paid accumulating monthly linked, attached to any form of securities loan, account, form of investing, real estate or any other item of money growth outside of offered collateral. Use of funds in any manner are full discretion of Nicholas Felgate and Lender is not bound or impacted by use of funds."

- "This is not a Securities Contract or Agreement: A **security**, in a **financial** context, is a certificate or other **financial** instrument that has monetary value and can be traded. **Securities** are generally classified as either equity **securities**, such as stocks and debt **securities**, such as bonds and debentures."

- "**Securities lending is the act of loaning a stock, derivative or other security** to an investor or firm. Securities lending requires the borrower to put up collateral, whether cash, security or letter of credit. When a security is loaned, the title and the ownership are also transferred to the borrower."

- "This Agreement will be construed in accordance with and governed by the laws of Canada and the Lender/Loan agreement provision. In no way shape or form is this related to a securities agreement and does not fall under securities exemption as it in now way shape or form needs exemption. This is a lender/loan agreement and not an investment contract."

- "This is private and personal between two citizens of Country of Canada."

3. Amounts of Agreements

[73] The documentary evidence confirmed RVL's testimony that he paid $35,000 to Felgate on May 29, 2019.

[74] RVL understood that a higher loan amount would mean that Felgate would pay a higher fee, and RVL introduced DVL to Felgate so RVL and DVL could combine their money and get a higher fee from Felgate. RVL testified regarding the fee: ". . . we loan [Felgate] a certain amount of money and he offers to pay a fee, which is a percentage of what the principal was per annum, and that compounds per annum".

[75] DVL testified that the DVL Agreement was to be for $265,000 (despite the $250,000 on the face of the DVL Agreement), with that money coming from a shareholder loan from DVL's personal company and from a line of credit. The DVL Agreement provided for a "loan fee of 18.5% annual loan fee based on full 36 month term". Though not reflected in either Agreement, DVL testified that the return was to be 20%, due to the combined amounts of RVL and DVL totalling $300,000.

[76] DVL paid his money to Felgate's wife, based on Felgate's instructions. DVL did not know the reason for this, but thought it was to facilitate the transfer. In evidence were receipts for payments of $250,000 and $15,000 by DVL, dated May 29 and May 30, 2019, respectively. From this, we are satisfied that the DVL Agreement was for $265,000, although the difference from the face value on the document was irrelevant to our decision.

4. Testimony as to Nature of Agreements

[77] RVL testified that the RVL Agreement wording was set in advance, and he did not ask for any changes (other than the term). He said that Felgate told him the transaction had no risk because it was not tied to a particular investment and Felgate had "financial backing to guarantee a return, and . . . enough financial worth to ensure that he can absorb losses if he had personal losses".

[78] RVL further testified that Felgate told him the money under the RVL Agreement was not being tied to any particular use. RVL confirmed that Felgate would pay RVL the fee regardless of what Felgate did with the money (even if Felgate lost money), and that the transaction was personal, not through a corporation.

[79] DVL testified that Felgate said "this was not a prospectus type of investment" and did not mention risks, "other than he was very wealthy and said, I could cover off your investment amount if it ever needed to be". DVL agreed that the DVL Agreement and discussions with Felgate indicated that the money was not tied to any investment in particular and that Felgate could use the funds as he wished. DVL did not think that he needed government protection for the transaction. During cross-examination, DVL confirmed that the DVL Agreement was between himself and Felgate personally, with no corporation being involved.

[80] DVL received several emails from Felgate on May 28, 2019, the day before signing the DVL Agreement.

[81] In one of those emails, Felgate made various statements, including:

- "If you want your money to make money it's worth it.";
- "Not tied to an Investment or to Markets, & is Guaranteed Fee";
- "It's your money. Grow it.";
- "I offer people on a private personal 'lender/loan' agreement. They pay me nothing, rather I pay you a taxable fee to use your money for 36 months.";

- "Fee's collected may be taxable upon withdrawal as Capital gains";

- "The fee paid is Not attached to a company, account number, specific form of investing , investment portfolio or market changes. This is a Lender/Loan format with guaranteed fee's";

- The specified "Annual fee" ranged from "16% on $50,000.00 to $249,999.99" and "18% $250,000.00 To $499,999.99" to "45% $2,000,000.00 & over".

[82] DVL testified that the promised rate of return "was definitely a factor" in signing the DVL Agreement.

[83] In a second May 28 email to DVL containing the subject line, "How can we offer such high annual fee", Felgate provided several pages showing "11 months of trading & the trader only wins 42.5% of the trades". The 11 months of trading were reflected in separate spreadsheets, the first reflecting an opening balance of $2,000,000. Each spreadsheet included a reference to 33.77% under the heading "% Growth Month". Included under the heading "% Growth from Starting Balance" on the final spreadsheet was the figure 2353.88%, corresponding to a final balance of $49,077,656.55. DVL testified that he interpreted the spreadsheet as there being "a means to receive the money I lent him or the return on the money I lent him", even though Felgate had said he was no longer trading. DVL testified that "[b]etween this spreadsheet and seeing the assets he owned, I was confident that he would be good to give me the investment I made".

[84] A third May 28 email to DVL attached what Felgate described in the subject line as "Agreement Template. Numbers and rate adjust". DVL testified that the attachment was a template of the DVL Agreement.

5. Felgate's Vehicles and Other Items

[85] RVL and Felgate first met in Airdrie (at Easter 2019) at a location which RVL described as an industrial shop in which Felgate stored cars and motorcycles – RVL estimated there were 60 motorcycles and 10 cars, which he said were "Harley Davidson and exotic cars, Lamborghini, stuff like that". DVL testified that the May 29, 2019 meeting took place at a warehouse that contained "motorcycles, super cars, some muscle cars, different pictures of presidents that had significant memorabilia value, just collectible type of items". DVL estimated that there were 50 cars and 70 motorcycles.

[86] RVL's opinion that Felgate had enough financial backing for the Agreements was based in part on seeing that collection of vehicles and in part on RVL's understanding that Felgate had sufficient personal wealth to "guarantee the fee". When asked about collateral or security for the Agreements, RVL testified that he had not discussed that with Felgate or Felgate's brother. Contrary to this, DVL testified that RVL told DVL that Felgate offered security if requested, but that DVL did not request it. Clause 6 of the Agreements referred to "offered collateral". We consider it likely that Felgate did at some point discuss collateral with one or both of RVL and DVL. However, that is not relevant to our determination of whether the Agreements are securities under the Act.

[87] DVL stated that the expensive cars, classic motorcycles and memorabilia that he saw when he and RVL met with Felgate on May 29, 2019 were a factor in DVL's thinking that Felgate would pay the agreed return. DVL acknowledged that he did not see evidence of ownership for any of those assets, but he understood the vehicles belonged to Felgate.

6. Interim Order

[88] RVL stated that Felgate told him about being subject to a cease trade order (presumably the Interim Order), but also told RVL that the RVL Agreement was "not a trade agreement or doesn't fall underneath the cease trade order by the ASC", and explained that the Interim Order "prevents someone from doing securities trading [and] what [Felgate] was saying was this was not securities trading". RVL confirmed during cross-examination that he did not think the Interim Order applied to his agreement and that he did not think he needed the government's protection.

[89] DVL testified that he knew about the Interim Order and discussed it with RVL (not with Felgate), and was unconcerned because he did not consider the DVL Agreement to be "a trade as per se because [DVL] would think of a trade as a stock or option or maybe a bond contract".

B. Other Activities of Felgate

[90] Taylor testified about other activities of Felgate, some of which formed part of the background for the Interim Order and some of which Staff contended supported their allegation that Felgate had traded securities in contravention of the Interim Order. Taylor started investigating Felgate in late 2017. In approximately February 2018, Taylor began receiving "unsolicited voicemails and emails" from Felgate, and spoke with him on the telephone on March 1, 2018.

[91] Staff tendered materials that had also been evidence before the panels which issued and extended the Interim Order.

[92] A February 16, 2018 email from Felgate to ATB Financial (**ATB**) appeared to relate to money an elderly client of ATB (**LB**) had transferred to Felgate:

> What I do.
>
> Not tied to Markets, portfolio or companies. Guaranteed paid fee & guaranteed principal
>
> You collect (compound)a predetermined yearly fee for 36 months at a time
> 16%,22%,24% annual Fee paid
>
> I offer people on a private asset agreement investment. They pay me nothing, rather I pay them a taxable fee to invest their money for 36 months. They can collect fee monthly or leave to grow.
>
> . . .
>
> The fee rates I pay are guaranteed & compound annually if left to compound or paid monthly.
>
> Fee's are capped at the stated amounts.
>
> Fee's are taxable as Capital gains on T5[.]

[93] On March 1, 2018, Taylor received an email (the **March 1 Email**) from Felgate attaching a form of promissory note between Felgate and LB (the **LB Agreement**), apparently signed by Felgate and LB on February 17, 2018. Provisions in the LB Agreement included:

- Felgate as the "Asset Holder" and LB as the "Asset Owner";
- a "Principal Amount" of $822,000 "Target", with $379,719.51 "Funded" as of February 16, 2018;
- ". . . The Asset Holder promises to pay to the Asset Owner . . . the principal sum of CAD plus the Holding fee of 26% full annual rate at $822,000.00 deposit level without any withdraw. . . .";
- "This Note is secured by the following security (the 'Security'): This is an Asset Agreement. Principal Amount is Security. The Security is the Principal amount of $822,000.00 plus fee equalling 26% annual adjusts each month or with each addition or subtraction. Once over $1,000,000.00 moves to 30%".
- ". . . The Asset Owner will be listed as Asset Owner on the title of the Security whether or not the elects to perfect the security interest in the Security. Holding of asset is not linked to any investment account, form of investing, portfolio, mutual fund, or commodity. The fee paid and principal is 100% guaranteed on the 36 month term."

[94] Another attachment (apparently connected to the LB Agreement) to the March 1 Email stated: "**To add value in Security for [LB] on $822,000.00+ Asset Agreement started February 16th 2018**" and listed the following "**7 items from personal collection**":

> 1913 Harley 9G only one remaining in world ($393,700.00 museum value)
>
> 1955 Ford Show truck ($67,000.00 appraisal value)
>
> 1971 Chevy Show trick ($74,000.00 appraisal value)
>
> 1929 Model A Hot Rod ($70,000.00 appraisal value).
>
> 2000 Venom Hennessey 650R ($70,000.00 low market value)
>
> 1947 Harley Knucklehead ($100,000.00 medium market value)
>
> 2016 Mercedes Benz E63 745HP Euro-charge Edition ($165,000.00 replace value)[.]

[95] Taylor testified that he thought this was proposed or included security for the loan agreement with LB.

[96] Soon after Felgate sent the March 1 Email, he had a telephone conversation with Taylor and another ASC employee. During that conversation, which was recorded, Felgate stated:

> Yeah. So a few years ago I started looking into how I could help friends and family see their money grow, and it was clear to me that in Canada -- and it has been supported by lawyers and chartered accountants -- that an asset agreement or holder owner or lender borrower could be set up. In regards to fees or interest paid on these agreements, the only time rate fee becomes an issue is if it's in demand by the lender or owner of the money. If that is the case, they are allowed to demand up to 60 percent before it's considered loansharking, which shocked me. In none of my situations have there been any request of a certain amount of fee paid, rather I have offered a fee.
>
> What I offer in terms of an asset agreement or lender loan agreement, promissory note, is that I offer a guaranteed fee that I will pay somebody to be able to hold their money and use it, grow it, and this fee is not based on any investment, not based on any portfolio, not based on any commodity. There is no account number attached to this, and there is no statement sent out with an account number or where your money is or where it's growing. The growth is simply based on a fee that I pay.
>
> I collect no fees, so in theory -- and this could be a definition that may vary -- I have no client. However, in saying that, as when I was talking to [J], if I was given quality reasons to supply individual names that wish to be private, because most of them are fed up with -- with their money getting .06 percent in a TSFA at ATB or getting 4.49 percent before fees are disclosed. I am fully willing, with their approval -- and I'm sure everyone would approve -- to either an in-person meeting as a group or with each individual. Also I am willing to provide, if it satisfies you, [Taylor], a copy of every agreement, and I can also obtain a letter, individual letter from each person that I set these up with that will give you the clear reason of why they are doing it, perhaps what their concerns are. Everything I do is based on trust and relationship.
>
> . . . this is not simply about money. This is about who I am and who other people are. So at no time does anything I do have anything to do with securities trading. I may trade funds, trade stocks, trade ETFs, but none of which is attached to the agreement. In the agreement, I'm accountable for a certain amount of money in 36 months. I'm going to point out, [Taylor], not all my agreements are 36 months, and the 36-month term, unlike what you find at institutions, is not locked in. I have a strong view that if an individual is concerned, does not want to be a part of, then there's no point in me forcing them to -- that I hold their money.
>
> . . .

[97] The *Ex Parte* Order was issued on March 2, 2018. The panel that made the order reviewed evidence, including the LB Agreement. Felgate left a voicemail message for Taylor that day, apparently after becoming aware of the *Ex Parte* Order:

> . . . I had a letter that completely shocked me today. I'm absolutely livid. You guys have not acknowledged that in Alberta a legal lender borrower that paid the fee is legal, and you guys will be liable for this. I will -- I will go to court for the next 20 years on this . . . when you find the time for someone you're trying to fear tactic . . . please call me back. . . . I am absolutely baffled that I don't get an in-person anything before you make decisions like this. And I need from you, [Taylor], to tell me that lender borrower, promissory note, asset agreement not based on an account, a portfolio, type of investment or anything -- I need you to explain in what way that is not legal in -- in the province of Alberta, if not actually all of North America, I believe.

[98] Felgate sent Taylor another email, dated March 7, 2018 (the **First March 7 Email**). The First March 7 Email attached a different and unsigned form of agreement, titled "LOAN AGREEMENT", apparently with LB (but with a different spelling of LB's first name) and dated March 7, 2018 (the **Second LB Agreement**).

[99] Statements in the First March 7 Email included:

- "All current agreements are updating to this agreement [presumably the Second LB Agreement attached to the First March 7 Email]. No previous agreement had anything to do with securities".

- "Below is a copy of [LB], [JB] and [MD]". Documents titled "LOAN AGREEMENT" for each of JB and MD were also attached to the First March 7 Email. These documents were not signed.

- "No agreement ever has had to do with securities. Interest Fee I pay is my liability and I have no liability how or what the money is used for, how deep of land it's buried or anything."

- ". . . All emails I have received headed by [Taylor] have no legal grounds under Canadian law. Statements of 'it is my belief. . .' that to not find grounds in actual agreement do not even need to be recognized. That's like saying to me in a sworn anything that a person believes that gravity isn't real. I DON'T NEED TO RESPOND".

- "FEEL FREE TO CALL [TAYLOR]. YOUR A MAD DOG WHEN IN COMES TO ACKOWLEDING YOUR ERROR AND HARASSMENT OF A LIVING BRIETHING CITIZEN IN THIS COUNTRY WHOM HAS FULL AUTHORITY IN CHRIST TO FOLLOW THE LAWS OF THIS LAND".

[100] Provisions in the Second LB Agreement included:

- "The Lender [LB] promises to loan $444,814.68 CAD to the Borrower [Felgate] and the Borrower promises to repay this principal amount to the Lender, with interest payable on the unpaid principal at the rate of 1.40 percent per annum, calculated monthly not in advance, beginning on February 16, 2018."

- "If the Borrower defaults in payment as required under this Agreement or after demand for ten (10) days, the Security will be immediately provided to the Lender and the Lender is granted all rights of repossession as a secured party."

- "In no way shape or form is this guaranteed principal or interest fee paid accumulating monthly linked, attached to any form of securities, account, form of investing, real estate or any other item of money growth outside of offered collateral."

- "This is a carry over from previous signed agreement [presumably the LB Agreement] that failed to meet loan levels due to ATB. [LB] has lost gains . . . due to ATB soft hold on her investments and the [Taylor] not know laws regarding person loan agreements and security based agreements."

- "Further amounts can be loaned immediately by [LB] as not part of agreement has been or ever will be linked to shape or form is this guaranteed principal or interest fee paid accumulating monthly linked, attached to any form of securities, account, form of investing, real estate or any other item of money growth outside of offered collateral."

- A provision listed five items of "Security" securing the Second LB Agreement, which were similar to five of the seven items listed and apparently acting as security for the LB Agreement.

[101] The loan agreements for JB and MD (referred to by Felgate in the First March 7 Email) were similar in some respects to the Second LB Agreement, although with different principal amounts ($459,563 and $379,987.41, respectively), terms, interest and security (six specified items for JB and "$400,000.00 Movie, Sport, and political Antiquities and Memorabilia. Approximate 70 items" for MD). The agreement for MD had the following clause as in the Second LB Agreement, but the one for JB did not: "In no way shape or form is this guaranteed principal or interest fee paid accumulating monthly linked, attached to any form of securities, account, form of investing, real estate or any other item of money growth outside of offered collateral."

[102] In another email sent by Felgate on March 7, 2018 (to LB, Taylor and others) as a response to an email earlier that day from an ASC employee sending Felgate the *Ex Parte* Order and a notice of an application to extend the *Ex Parte* Order, Felgate stated:

> My agreements are not attached or done using any form of investing of any kind attached to agreement
>
> Lender/Borrower that I pay a fee not attached to any form of investing to hold & use funds
>
> . . .
>
> Which you will find personal private lender/borrow not attached to a fee based on returns or securities means you are 100% wrong[.]
>
> . . .
>
> Nothing in this email you sent concerns me 1 bit[.]

[103] An email from Felgate a few minutes later (also to LB, Taylor and others) stated:

> Nothing in [LB's] Document has a thing to do with securities investing. It is a lender borrower agreement with collateral
>
> Unless personal lender/borrow agreements based on interest fee paid is illegal then stop this what is then illegal harassment
>
> So stop harassing me.

[104] A few hours later, Felgate sent another email, with the subject line "On notice to follow Canadian Law [Taylor]", stating:

> I expect removal of securities suspension tomorrow. Defamation of character based on "I believe " when 100% wrong, false & against Canadian law in belief will he removed
>
> I expect formal letter of apology ASAP from You . . . . "don't know the law in Canada"Taylor
>
> . . .
>
> & yes I can buy, invest, move money legally as I wish in all agreements as long as I meet all commitments. My 36 month due Sept 1,2019 just re upped 36 months[.]

[105] Felgate continued in that email by setting out what he called "a summary of key Canadian interest rate rules and their practical implications".

VI. ANALYSIS

A. The Allegation and the Law

[106] Staff alleged that Felgate failed to comply with the Interim Order and thereby breached s. 93.1 of the Act, which states: "A person . . . shall comply with decisions of the Commission . . . made under Alberta securities laws."

[107] Section 1(n) of the Act defines "decision" to include an "order" made by the ASC "under a power or right conferred by this Act". Section 33 confers on the ASC the authority to make and later extend an interim order – orders that may be made pursuant to that power under s. 33 are set out in s. 198.

[108] The Interim Order (as originally made and subsequently extended) was a decision of the ASC within the meaning of the Act. Accordingly, Staff's allegation will be upheld if Staff prove that Felgate failed to comply with the Interim Order.

B. Terms of the Interim Order

[109] The Interim Order directed that Felgate "cease trading in all securities" and that "all exemptions contained in Alberta securities laws do not apply to Felgate".

C. Parties' Positions

1. Staff

[110] Staff alleged that the Agreements were "securities" under the Act and that Felgate traded in those securities after the Interim Order was made, thus breaching the Interim Order and contravening s. 93.1 of the Act.

[111] Staff submitted that one or more of the branches of the definition of "security" applied to the Agreements, specifically "evidence of indebtedness" or an "investment contract" (respectively, ss. 1(ggg)(v) and (xiv) of the Act), and clarified in reply submissions that they also contended the Agreements were "notes" under s. 1(ggg)(v):

> (v) any bond, debenture, note or other evidence of indebtedness, share, stock, unit, unit certificate, participation certificate, certificate of share or interest, preorganization certificate or subscription other than
>
> (A) a contract of insurance issued by an insurance company, or

> (B) an evidence of deposit issued by a financial institution;
>
> . . .
>
> (xiv) any investment contract[.]

[112] In making their argument regarding s. 1(ggg)(v) of the Act, Staff relied on previous ASC panel decisions and on *R. v. Stevenson*, 2017 ABCA 420 – ***Stevenson*** (all references herein to *Stevenson* are to the Alberta Court of Appeal decision, unless otherwise noted). Staff argued that the "family resemblance test" (discussed below) should not be applied in Alberta.

[113] Staff also pointed to the language in the various documents drafted or used by Felgate as showing that Felgate knew his activities were banned by the Interim Order "and made deliberate attempts to escape [its] ambit".

2. Felgate

[114] Felgate (through his counsel at that time, Jordan Bierkos) argued that the Agreements were not securities under any branch of the definition in s. 1(ggg) of the Act, but were a single loan between Felgate, RVL and DVL. He posited this construction based on "a purposive analysis" of the Act and of the Agreements. Stated broadly, his argument was that:

> It is therefore of central importance to consider both the purposes of the [Act], and the purposes of the impugned transaction or transactions, to determine whether there is overlap, such that the transaction falls within the confines of the [Act's] statutory objective.

[115] From that starting point, Felgate submitted that the types of promissory notes at issue here (the Agreements), would only be securities if they had a "commercial and investment purpose". He relied on the "family resemblance test" as a suitable framework for what he suggested was a necessary "explicit mechanism of analysis" to restrain an unprincipled overreach of the Act.

D. Discussion and Conclusion on Non-compliance with Interim Order

1. Impugned Activities Involved Securities

(a) Notes or Other Evidence of Indebtedness

[116] We agree with Staff that the Court of Appeal decision in *Stevenson* is determinative here. The Agreements are securities under the Act. Even had we not considered ourselves bound to follow the reasoning in *Stevenson*, we would have reached the same conclusion.

(i) Principles from *Stevenson* and *Tiffin*

[117] The law set out in *Stevenson* is reinforced by the Ontario Court of Appeal decision in *Tiffin*. We set out here some excerpts from both decisions.

[118] Stevenson had been acquitted when the Provincial Court trial judge held that certain loan agreements were contracts (personal loans) and not "securities" within the meaning of the Act (*R. v. Stevenson*, 2015 ABPC 96). On appeal to the Court of Queen's Bench of Alberta, Stevenson was convicted when that judge held that the loan agreements were securities (*R. v. Stevenson*, 2015 ABQB 740). That conviction was upheld by the Court of Appeal of Alberta. We set out here the background of that case, as well as some of the arguments and analysis from that court:

- Lenders would lend money through "loan agreements" to finance the costs of a project to access certain assets of an estate. Stevenson and OCI Q Corp. would share their portion of the estate proceeds with the lenders as set out in their respective loan agreements (at para. 2).

- The loan agreements stated: "This investment is in the form of a loan, and is not subject to any securities law, regulation, rules or forms of conduct. This investment and the loan of moneys does not constitute the transaction of any form of securities, stocks, bonds, or other financial instrument subject to regulation by Government under securities law" (at para. 3).

- "The raising of funds from the public is one of the most highly regulated activities in Canada. The [Act] regulates virtually every aspect of such transactions, and all the persons and institutions that engage in them: *Reference re Securities Act (Canada)*, 2011 ABCA 77 (Alta. C.A.) at para. 3, . . . affm'd 2011 SCC 66 (S.C.C.) at paras. 100-101, . . ." (at para. 6).

- "There are numerous exemptions for particular transactions, particular participants in the industry, particular issuers, and particular purchasers of securities. It was conceded that no exemptions were available here" (at para. 6).

- "The appellant [had] argued [that the loan agreements] were not securities, because they were 'simply contracts between the parties and should be enforced in accordance with the intention of the parties and the normal rules of contract law'. A 'distribution' or sale of securities is, however, always a contract if viewed in isolation. . . . Declaring or observing that a particular transaction is a 'private contract' provides no answer to the scope of the [Act]" (at para. 7).

- "The [Act] is very broadly worded legislation, designed to cover virtually every method by which money could be raised from the public. It is contradictory to argue that money 'raised from the general public' is nevertheless merely a series of 'private transactions'; that is exactly what the [Act] is designed to regulate. That characterization could be placed on any method of raising money from the public. Every sale of shares by a corporation to a member of the public is, at one level, a 'private transaction'. The entire process of raising money from the general public is, however, regulated under [Act]" (at para. 9).

- "[Also] irrelevant is whether the lenders are happy with their investment, feel that they were fairly dealt with, or believe that full disclosure was made to them. . . . The [Act] regulates all raising of money from the public, not just situations where the outcome of the investment is negative or the purchasers of the securities are unhappy" (at para. 11).

- ". . . the opinions of individual lenders and investors as to whether they were dealing in such an instrument [a security] is irrelevant" (at para. 12).

- "The appellant argues that a more realistic interpretation of the [Act] was needed, or else all sorts of routine transactions would be caught by it. The [Act] and its related subordinate regulations, however, have numerous provisions designed to deal with overbreadth" (at para. 13).

- The appellant relied on US case law including *Reves v. Ernst & Young*, 494 U.S. 56 (U.S. Ark. S.C. 1990), which considered the "family resemblance test", often referred to as the *Reves* test. The court in *Stevenson* discussed *Reves* as follows: "The American courts have restricted the term [notes] to notes that have an 'investment' character to them, on the theory that Congress did not intend the statute to reach other 'commercial' notes. All notes are presumed to be securities unless the opposite is shown. The presumption can be rebutted by considering several factors" (at para. 15). We discuss those factors below.

- After noting that *Reves* did not create a general exemption for "private transactions" and that the notes in *Reves* were found to be "securities", the court stated: "Given the comprehensive and complex regulation of securities in Alberta, there is no apparent need for any judicially created exemptions to the securities regime. There are numerous conditions and exemptions built into the Alberta securities regulation system that are designed to deal with the issues raised in *Reves*" (at para. 16).

- The court held that the loan agreements "would meet the test in *Reves* for securities". The court further held that the loan agreements would fall under other branches of the definition of "security" in the Act (at paras. 17, 18).

- The court distinguished the Ontario Court of Justice decision in *Tiffin* (since reversed, as noted), stating that decision "appear[ed] to suggest that a particular instrument would be a 'security' if used to raise funds from the general public, but not a 'security' if used to raise funds from friends". However, the Act "does not recognize a distinction in the characterisation of an instrument as a 'security' depending on the identity of the purchaser or investor. The test is functional: Is the issuer raising funds from the public for investment purposes?" (at para. 20).

[119] The Ontario Court of Appeal decision in *Tiffin* is also instructive here. Tiffin had been acquitted of allegations involving trading and distributing securities when the Ontario Court of Justice trial judge held that certain promissory notes between Tiffin and his clients and friends were not securities within the meaning of the Ontario *Securities Act* (*Ontario (Securities Commission) v. Tiffin*, 2016 ONCJ 543). At the time he entered the promissory notes, Tiffin was subject to a cease trade order issued by the Ontario Securities Commission. He was convicted on appeal to the Ontario Superior Court of Justice when the court held that the promissory notes were securities (*Ontario Securities Commission v. Tiffin*, 2018 ONSC 3047). That conviction was upheld by the Ontario Court of Appeal. We set out here the background of that case, as well as some of the arguments and analysis from that court:

- "In brief, the definition of security in the [Ontario *Securities Act*] is sufficiently broad to capture the promissory notes at issue here. While American law is a useful

source of persuasive precedent in the securities context, the family resemblance test applied by the trial judge does not assist in the interpretation of the [Ontario *Securities Act*]. The definition of security adopted by the appeal judge is supported both by the plain text of the [Ontario *Securities Act*] and the logic of the regulatory scheme" (at para. 4).

- "In particular, the [Ontario *Securities Act*] contains broad definitions coupled with equally broad exemptions which relieve vast numbers of transactions involving securities from compliance with its requirements. The appellants ask us to import the family resemblance test, not because of an absence of applicable exemptions to the transaction at issue, but rather because pursuant to an administrative order (that is, the cease trade order) they could not rely on these exemptions. That quarrel is properly directed at the order, not the definition of security in the [Ontario *Securities Act*], and, in the absence of any legislative intent for the kind of test developed in the United States, I decline to impose such a test so that the appellants can escape liability under the securities regime in this province" (at para. 5).

- The promissory notes issued by Tiffin were said to be "secured against a 'toy soldier collection'" owned by Tiffin's company (at para. 10).

- The trial judge had adopted the family resemblance test as set out in *Reves*, concluding that characterizing the promissory notes as "securities" would be too broad an interpretation of the definition, thus inconsistent with the purposes of the Ontario *Securities Act* (at para. 12). On that point, the Ontario Court of Appeal accepted the "catch and exclude" characterization of the Ontario *Securities Act*, meaning that key terms such as "security" are defined broadly, with exemptions provided to limit the regulatory scope (at para. 28). The branch of the definition of security at issue in *Tiffin* was the same as in the present case: a "bond, debenture, note or other evidence of indebtedness" (at para. 29).

- The US legislation "was only intended to regulate investments", leading US courts to distinguish "between investment instruments, which are subject to the regime, and commercial instruments, which are not. The family resemblance test applied in *Reves* is the manner in which that court chose to draw this distinction" (at para. 40; emphasis in *Tiffin*).

- The Ontario Court of Appeal in *Tiffin* (at paras. 47-49) explicitly agreed with the Alberta Court of Appeal in *Stevenson*. The former summarized its conclusion by stating: ". . . the scheme of the [Ontario *Securities Act*] is such that the broad definition of security is consistent with its object and the intention of the legislator. Accordingly, the purposive reading does not assist the appellants" (at para. 49).

(ii) Felgate's Arguments for Deviating from *Stevenson*

[120] Felgate's rationales for deviating from *Stevenson* were all part of his overarching contention that the Agreements were loans between individuals and, therefore, should not be subject to securities regulation. We address each of Felgate's rationales separately.

(A) Statutory Interpretation and Purposive Approach

[121] Felgate characterized the central point in this Hearing as the proper statutory interpretation of the definition of security in s. 1(ggg) of the Act. He pointed to sources discussing statutory interpretation, including *Rizzo*, which stated that words in legislation "are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the [legislation], the object of the [legislation], and the intention of Parliament" (citing Driedger at 87; the same passage referred to by Staff in response to the Nullity Application). Felgate also referred to *Pacific Coast Coin Exchange v. O.S.C.*, [1978] 2 S.C.R 112, which interpreted the term "investment contract" in the definition of security in the Ontario *Securities Act*. The majority in *Pacific Coast* stated (at 127) that remedial legislation such as securities legislation "must be construed broadly, and it must be read in the context of the economic realities to which it is addressed. Substance, not form, is the governing factor." Felgate also referred to the purposes of securities regulation – protecting investors and fostering efficient capital markets.

[122] These points raised by Felgate are essentially correct. However, as discussed below, Felgate then took his argument in an untenable direction.

[123] Regarding the phrase "note or other evidence of indebtedness" in s. 1(ggg)(v) of the Act, Felgate referred to the discussion of an equivalent phrase in British Columbia. In *Re FS Financial Strategies*, 2017 BCSECCOM 238 at paras. 27-28, a panel of the BC Securities Commission stated:

> However, not all debtor/creditor arrangements have been found to give rise to "securities" under the [BC *Securities Act*] (or under similar securities legislation in other jurisdictions in North America). Loan arrangements (whether called notes, loan agreements, etc.) can arise in a wide spectrum of transactions, from arrangements that are principally investments in nature (which transaction would fall within the definition of a "security") to those which serve a specific commercial purpose or support a specific commercial transaction (which transaction is less likely to fall within the jurisdiction of the [BC *Securities Act*]).
>
> The question of when a loan arrangement, whatever it is called, is a "security" under the [BC *Securities Act*] and when it is not requires a purposive analysis of the definition of "security". It also requires an analysis of the factual context in which the individual loan arrangement occurs and the context in which the issuer, more broadly, is raising capital.

[124] Felgate relied on those statements in *FS Financial* as authority for his contention that this panel should undertake a purposive analysis of the definition of security and analyze the factual context. In his view, such analysis would also encompass constitutional considerations (regulation of promissory notes would be under federal jurisdiction unless those promissory notes are securities) and the shared "contextual and purposive commonalities to bonds, debentures, shares, and units" (other items listed in s. 1(ggg)(v) of the Act).

(B) Commercial and Investment Purpose

[125] Felgate contended that a promissory note can only be a security if the transaction had a commercial and investment purpose, although his argument was inconsistent regarding the significance of the commercial aspects of a transaction (discussed below). He argued that the ASC decisions cited by Staff – in which promissory notes were found to be securities – "made it clear

that the transactions [considered in those decisions] were commercial investment operations, soliciting and obtaining investments from a broad segment of the public". Further, he stated that they each showed an intent to provide capital for speculative investments.

[126] Felgate contended that those ASC decisions mostly involved:

(a) corporate entities;

(b) pursuing commercial activities;

(c) obtaining funds via promissory notes to be used explicitly for investment purposes; and

(d) notes being offered and sold to broad segments of the public, for substantial sums of money.

[127] In contrast here, according to Felgate:

- ". . . two individuals joined together to pool their funds to provide a loan of $300,000. Including the LB [Agreement], there are a total of *3* lenders. The next closest analogous case provided by Staff in terms of a limited distribution is [*Re Cloutier*, 2014 ABASC 2,] in which promissory notes were entered with *25* lenders" (emphasis in original); and

- ". . . these loans were provided to [Felgate], personally, without any representation that the funds would be used for a further investment. Repayment under the [Agreements is] not premised, explicitly or implicitly, upon the realization from any further investment opportunities. The [Agreements] were not solicited as part of an investment opportunity. These elements all distinguish this case from [*Cloutier* and *Re Harris operating as Harris Agencies*, 2011 ABASC 138], the only cases [referred to by Felgate in this portion of his submissions] where loans were made between individuals."

(C) Single Loan Between Private Individuals

[128] Felgate characterized the Agreements as a single loan between private individuals, which none of the participants considered to be related to securities regulation or to the Alberta capital market.

[129] Felgate also argued that RVL's, DVL's and Felgate's views and intentions should be considered as part of the context in determining if the Agreements were securities under s. 1(ggg)(v) of the Act. He stated that DVL viewed this as a private loan rather than an investment, and that RVL and DVL "each satisfied themselves upon personal attendance at [Felgate's] shop that there were sufficient assets to satisfy the debt".

(D) Felgate's Knowledge

[130] Felgate argued that he could not have known that the Agreements were "securities" because the similar LB Agreement had only been declared *prima facie* to be a security in the course of an ASC panel making the Interim Order. In other words, there had never been a finding on a balance of probabilities that the LB Agreement was a security, so Felgate could not know that the

Agreements would be considered securities. That argument continued that Felgate was focused on "what he was doing with the capital once he received it, not on the transaction leading to the notes themselves".

[131] A related argument was that Felgate did not attempt to contract out of securities law. He explained the wording he used in various documents as declaring his understanding of the law rather than attempting to change it.

(iii) Alternative Framework Proposed by Felgate

[132] Based on his interpretations of the applicable law outlined above – a purposive and contextual approach combined with a recognition of the difference between investment and commercial purposes – Felgate argued that an alternative analytical framework is needed. His underlying basis for this proposal seemed to be that the Agreements should not be treated as securities, therefore the panel should apply a framework which would lead to that result. For this, as mentioned, Felgate suggested the "family resemblance" test or *Reves* test. Felgate also contended that if this panel were to apply his suggested analytical framework, it would provide needed guidance for others in the future.

(A) Family Resemblance Test

[133] The family resemblance test developed in US case law was discussed extensively in *Reves*.

[134] The documents at issue in *Reves* were promissory notes payable on demand. The court stated that "common stock is the quintessence of a security", but "the same simply cannot be said of notes, which are used in a variety of settings, not all of which involve investments" (at 62-63).

[135] *Reves* set out the factors to be considered in an analysis. As summarized in *Stevenson* (at para. 15):

> *Reves* involved the interpretation of the term "any note" in the definition of "security" in the *Securities Exchange Act of 1934*. The American courts have restricted the term to notes that have an "investment" character to them, on the theory that Congress did not intend the statute to reach other "commercial" notes. All notes are presumed to be securities unless the opposite is shown. The presumption can be rebutted by considering several factors: a) if the motivation is an investment with a view to a profit, it is likely a security. If it is to finance an asset purchase or to meet short term funding needs, it may not be; b) if there is a "plan of distribution" and "common trading for speculation or investment" it is likely a security; c) if there is a public expectation that the notes are securities, they will be dealt with as such; and d) if some factor such as the existence of another regulatory scheme significantly reduces the risk of the instrument, the application of the *Securities Acts* may be unnecessary.

[136] Felgate also argued that the conclusion in *Stevenson* that the *Reves* test should not be used was *obiter dicta* and thus "not meant to foreclose the possible application of the family resemblance test".

(B) Intentions of Parties to the Notes

[137] In what was either a separate argument or part of the arguments already discussed, Felgate pointed to wording in the Agreements stating that they were not securities. He also referred us to

the testimony of RVL and DVL indicating that they did not consider the RVL Agreement and DVL Agreement, respectively, to be securities.

[138] Felgate also referred to his own intentions, specifically that he had engaged in single loans, not a plan to distribute securities to a broad segment of the public. He stated that the evidence showed only three notes over an 18-month period (the LB Agreement, the RVL Agreement and the DVL Agreement), and that the latter two were effectively a single transaction. Felgate submitted that it would be improper for the panel to rely on the scarce evidence before it to draw an inference that Felgate was offering securities to other individuals.

(C) Unavailability of Exemptions

[139] The court in *Stevenson* (at para. 16) stated that, "[g]iven the comprehensive and complex regulation of securities in Alberta, there is no apparent need for any judicially created exemptions to the securities regime. There are numerous conditions and exemptions built into the Alberta securities regulation system that are designed to deal with the issues raised in *Reves*."

[140] Felgate argued, however, that he could not use any of the built-in exemptions in the Act because the Interim Order denied him the use of such exemptions. He submitted, therefore, that:

> . . . the tools that the Court of Appeal in *Stevenson* suggested should be relied upon to prevent the unprincipled overreach of the [Act] have been removed. Absent a principled approach to the definition of what constitutes a security, there would be no mechanism to restrain the overreach of the [Act], and its application to situations and circumstances for which the purposes and objects of the [Act] would not be achieved.

(iv) Conclusion on "Note or Other Evidence of Indebtedness"

[141] Despite Felgate's arguments and his urging that we apply authority such as *FS Financial*, we agree with and are bound by the decision of our Court of Appeal in *Stevenson*. That reasoning in the Canadian context is supported by the Ontario Court of Appeal in *Tiffin*. Important statements from both of those cases are set out earlier in this decision.

[142] Specifically addressing Felgate's contentions:

- We need not engage in Felgate's suggested purposive approach to statutory interpretation as the court in *Stevenson* has already examined and rejected such arguments. The Act is deliberately broad and inclusive, particularly in the definition of "security" in s. 1(ggg).

- As noted, Felgate's arguments appeared to be inconsistent regarding corporate or commercial involvement signalling a security. For example, he referred to a "commercial purpose" leading to a finding that a transaction involves a security, yet pointed to *Reves* as stating that a motivation of advancing a "commercial or consumer purpose" indicates that a note is less likely to be a security and to *FS Financial* as stating that a transaction with a specific commercial purpose is less likely to involve a security. Felgate contended that an investment in a corporation puts investors at risk because of limited corporate liability – meaning that investors stand to lose their money if the corporation were to become insolvent and, therefore,

they need the protection of securities laws – but there is no such risk with a personal loan and no consequent need for the protection of securities laws. Overall, Felgate seemed to be arguing that a loan involving a corporation or made for a broad commercial purpose would be a security, but a loan to an individual who may or may not use that money for a specific commercial purpose would not be a security. There is no such limitation in the Act and no reason to import such a limitation here.

- As stated in *Stevenson* at para. 12 (and set out above), the parties' intentions and beliefs are irrelevant. It also is not possible to contract out of securities laws by purporting to make "a declaration of understanding of the law" (as Felgate characterized it). We note *Re Dobler*, 2004 ABASC 927 at para. 113, in which a panel stated that an order, such as a cease trade order, "bars a type of activity not a state of mind". One who engages in the prohibited activity contravenes that order regardless of motivation or knowledge.

- As stated in *Stevenson* at para. 20, an agreement must have an investment purpose to be a "security" under the Act. Felgate maintained that the Agreements had no investment purpose because he did not invest the money he borrowed from RVL and DVL in the market or in a specified project. We disagree. Even though Felgate did not articulate a specific use of funds borrowed from RVL and DVL, we are of the view that the display of Felgate's automobile, motorcycle and memorabilia collections, together with the contents of the email he sent to DVL with the subject line "How can we offer such high annual fee", were intended to convey that Felgate was capable of generating the promised returns. RVL and DVL would have reasonably believed that Felgate would be using their money for an intended gain in order to repay the principal and pay the "fee". We therefore conclude that there was an investment purpose behind the Agreements.

- We reject Felgate's alternative framework based on *Reves* and the family resemblance test. The court in *Stevenson* made clear that the family resemblance test is unnecessary and inapplicable. *Stevenson* stated that, if the *Reves* test were to be applied, the result would have been the same in those circumstances – these remarks do not import the *Reves* test into Alberta law, nor would it be appropriate for us to do so here.

- It is not necessary for us to make an inference as to whether Felgate was offering securities to individuals other than RVL and DVL. Contravention of the Act is proved by the trades in securities to RVL and DVL.

- We found nonsensical Felgate's argument that the reasoning in *Stevenson* (that the definition of "security" is not overbroad because of the exemptions built into the Act) should not apply to him because he cannot use the exemptions in the Act. The reason he cannot use those exemptions is because of the Interim Order made against him – an order he did not seek to revoke or vary (until its validity was challenged in the Nullity Application, long after the Agreements with RVL and DVL).

> Participation in the Alberta capital market is a privilege, not a right, and Felgate lost an aspect of that privilege as a result of the Interim Order. Having lost the ability to rely on exemptions, he cannot now claim that restriction should result in the law being applied differently to him than to those not subject to such a restriction. The Interim Order did not lead to an "unprincipled overreach" of the Act. A similar argument was rejected in *Tiffin* (at paras. 32-35). The scheme of the Act is not overbroad, rather Felgate mistakenly took the approach that securities laws should not apply to him if he did not want them to.

[143] We are satisfied that the Agreements were "note[s] or other evidence of indebtedness" and thus were securities under s. 1(ggg)(v) of the Act.

(b) Investment Contract

[144] In light of our conclusion regarding s. 1(ggg)(v) of the Act, we need not consider the submissions relating to s. 1(ggg)(xiv).

2. Trading in Securities

[145] As a result of our finding that the Agreements were securities, sales of the Agreements for valuable consideration and acts in furtherance of such sales are trades under s. 1(jjj) of the Act. Felgate's argument was based on the Agreements not being securities; he did not argue that if the Agreements were found to be securities that he had not engaged in trading such securities.

[146] We conclude that Felgate solicited, directly and indirectly, the sale of securities (the Agreements) and he sold those securities (the Agreements) to RVL and DVL, respectively, for money. Therefore Felgate engaged both in actual sales of securities and in acts in furtherance of those sales of securities. These activities were thus "trades" within the meaning of s. 1(jjj) of the Act.

3. Non-compliance with Interim Order

[147] The Interim Order barred Felgate from trading in securities as of March 2, 2018. It was in effect on May 29, 2019 when the Agreements were entered, and it was in effect on the days preceding May 29 when Felgate was engaging in acts in furtherance of entering the Agreements. As we have found that the Agreements were securities and that Felgate traded in those securities while subject to the Interim Order, we conclude that Felgate failed to comply with the Interim Order, a decision of the ASC.

VII. CONCLUSION

[148] For the reasons given, we have found that Felgate breached s. 93.1 of the Act.

[149] This proceeding will now move to a second phase, for the determination of what, if any, orders for sanctions and costs ought to be made against Felgate in light of our findings. By its terms, the Interim Order remains in effect.

[150] Staff and Felgate are each directed to inform one another and the Registrar, in writing, not later than 4:00 p.m. on Friday, October 16, 2020, of the following: (i) whether they propose to adduce new evidence on the sole issue of appropriate orders; and (ii) if so, their expected timing

requirements and suggested dates in 2020 for the hearing of evidence, if necessary. After the panel has received and considered the responses to this direction (or after the date specified for such responses has passed), the Registrar will inform the parties of the timing of next steps in this proceeding. If neither party proposes to adduce new evidence, a timetable will be set for the delivery of written submissions and a date will be scheduled for the hearing of oral submissions, if any, and any questions from the panel.

October 6, 2020

For the Commission:

"original signed by"
Kari Horn

"original signed by"
Tom Cotter

"original signed by"
Gail Harding