Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF THE *SECURITIES ACT*
R.S.O. 1990, c. S.5, AS AMENDED

BETWEEN:

ONTARIO SECURITIES COMMISSION

Applicant

- and -

CRYSTAL WEALTH MANAGEMENT SYSTEM LIMITED, CLAYTON SMITH, CLJ EVEREST LTD., 1150752 ONTARIO LIMITED, CRYSTAL WEALTH MEDIA STRATEGY, CRYSTAL WEALTH MORTGAGE STRATEGY, CRYSTAL ENLIGHTENED RESOURCE & PRECIOUS METALS FUND, CRYSTAL WEALTH MEDICAL STRATEGY, CRYSTAL WEALTH ENLIGHTENED FACTORING STRATEGY, ACM GROWTH FUND, ACM INCOME FUND, CRYSTAL WEALTH HIGH YIELD MORTGAGE STRATEGY, CRYSTAL ENLIGHTENED BULLION FUND, ABSOLUTE SUSTAINABLE DIVIDEND FUND, ABSOLUTE SUSTAINABLE PROPERTY FUND, CRYSTAL WEALTH ENLIGHTENED HEDGE FUND, CRYSTAL WEALTH INFRASTRUCTURE STRATEGY, CRYSTAL WEALTH CONSCIOUS CAPITAL STRATEGY, CRYSTAL WEALTH RETIREMENT ONE FUND, AND CHRYSALIS YOGA INC.

Respondents

APPLICATION UNDER SECTION 129 OF THE *SECURITIES ACT*
R.S.O. 1990, c. S.5, AS AMENDED

BRIEF OF AUTHORITIES OF THE APPLICANT, ONTARIO SECURITIES COMMISSION

Date: April 25, 2017

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3 *Ontario (Securities Commission) v Portus Alternative Asset Management Inc*., [2006] O.J. No. 1121 (S.C.J. [Comm. List]

4 *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.)

5 *Ontario Securities Commission v. Sbaraglia* (23 December 2010), Toronto, Ont., Court File No. CV-10-883-00CL (unreported) (S.C.J. [Comm. List])

6 *Sextant Capital Management Inc (Re)* (2011), 34 O.S.C.B. 5863 (Ont. Sec. Comm.)

TAB 1

Paras. 41-48

2007 CarswellOnt 7515
Ontario Superior Court of Justice

Ontario (Securities Commission) v. Factorcorp Inc.

2007 CarswellOnt 7515, [2007] O.J. No. 4496, 161 A.C.W.S. (3d) 841

Ontario Securities Commission (Applicant) and Factorcorp Inc. and Factorcorp Financial Inc. (Respondents)

Morawetz J.

Heard: October 17, 2007
Judgment: October 26, 2007
Docket: 07-CL-7124

Counsel: Melissa J. MacKewn, Cullen Price for Ontario Securities Commission
Arthur Hamilton for Factorcorp Inc., Factorcorp Financial Inc.
Rachelle Moncur for KPMG Inc.

Subject: Corporate and Commercial; Securities

Headnote

Securities --- Commissions and exchanges — Orders — Miscellaneous

Corporation was registered as limited dealer under securities legislation — Related corporation was not registered as dealer — Director was controlling shareholder and sole officer of both corporations — Corporation raised significant funds through issuance of debentures — Corporation reached point where it could not redeem debentures to creditors — Commission made temporary order which required that status quo be maintained through imposition of cease trade order — Commission made further order that corporations retain monitor selected by commission staff — Commission brought application to have receiver appointed to administer corporations' assets — Application granted — Receiver was in much better position to look after interests of creditors than director — Refinancing plan of corporations had to be viewed with serious degree of skepticism — Corporations had already breached representations made to investors — Healthy cash flow of corporations was at serious risk — Small percentage of loans issued by corporations were secured.

Table of Authorities

Statutes considered:

Securities Act, R.S.O. 1990, c. S.5

s. 53 — referred to

s. 127 — referred to

s. 127(5) — referred to

s. 129 — referred to

s. 129(2) — referred to

s. 129(2)(a) — considered

APPLICATION by commission for appointment of receiver.

Morawetz J.:

1 On October 17, 2007 the motion of the Ontario Securities Commission ("OSC") pursuant to section 129 of the *Ontario Securities Act* (the "Act") to appoint KPMG Inc. as Receiver and Manager of Factorcorp Inc. and Factorcorp Financial Inc. (collectively "Factorcorp") was granted, with written reasons to follow. These are those reasons.

2 Factorcorp Inc. is an Ontario corporation registered under securities law as a Limited Market Dealer ("LMD"). Factorcorp Financial Inc. is an Ontario corporation that is not a reporting issuer and is not registered with the OSC. Mr. Mark Twerdun is the controlling shareholder and sole director and officer of both Factorcorp Inc. and Factorcorp Financial Inc.

3 During the last three to four years Factorcorp, through the sale of debentures, raised approximately $50 million from approximately 700 Ontario investors. The debentures have maturity dates of 1, 2 or 3 years and interest rates of 6, 7 or 8% per annum. The terms of the debentures are such that an automatic reinvestment occurs unless a redemption request is received 120 days prior to the end of the term of the debenture.

4 Factorcorp pooled the funds raised through the issuance of debentures and loaned them to approximately 12 sub-lenders (the "Customers") who, in turn, loaned them to various small to mid-sized businesses (the "End Borrowers").

5 Factorcorp was formed for the purpose of providing funding for factoring, leasing and similar short term secured asset-backed financing services to commercial clients. The offering memoranda alleges that the loans between Factorcorp and its Customers are secured.

6 In distributing its debentures, Factorcorp relied on the Accredited Investor ("AI") exemption to the prospectus requirement contained in section 53 of the Act.

7 The bulk of Factorcorp's debentures were sold by a single dealer, Farm Mutual Financial Services Inc. ("Farm Mutual"). Beginning in November 2006, Farm Mutual conducted an internal review of the files of investors to whom Factorcorp debentures were sold.

8 The affidavit of Mr. Moniz, a representative of the OSC, refers to communications that he had with a Farm Mutual compliance consultant who estimated that approximately 80% of the investors to whom Factorcorp debentures were sold, did not qualify for the AI exemption.

9 Farm Mutual has submitted repayment requests on behalf of clients who may not qualify as AIs under Ontario securities law. These requests comprise approximately 50% of the total principal amount advanced to Factorcorp. Mr. Twerdun has acknowledged that Factorcorp cannot satisfy all such requests for reasons of liquidity and in May 2007, redemptions were suspended. Mr. Twerdun has also acknowledged that he is considering various refinancing and/or restructuring alternatives in order to be in a position to satisfy redemption requests.

10 On July 6, 2007, pursuant to section 127(5) of the Act, the OSC made a temporary order which required: a) that the status quo be maintained through the imposition of a cease trade order and a preclusion of redemptions in relation to the debentures; and b) that a monitor be engaged by Factorcorp on terms established by the OSC.

11 On July 27, 2007, the OSC made a further order that Mr. Twerdun and Factorcorp retain a monitor selected by OSC staff by August 1, 2007 on terms to be established by the OSC. The monitor's mandate was to review the business, operations and affairs of Factorcorp and any company controlled directly or indirectly by Mr. Twerdun or Factorcorp involved with the issuance of securities and related proceeds. KPMG Inc. was subsequently retained as monitor (the "Monitor").

12 On August 3, 2007, the within application was issued and was adjourned on terms.

13 Since that time Factorcorp has provided information to the Monitor relating to asset valuation, security interest analysis, expenses and its ongoing refinancing arrangements.

14 The Monitor required this information to assess (i) the reasonableness of Factorcorp Financial Inc.'s budget including whether Factorcorp Financial Inc. can pay, out of receipts from Customers, essential expenses and interest payments due under the debentures; (ii) the value and recoverability of Factorcorp Financial Inc.'s loans (and investments) made to Customers and by Customers to End Borrowers; and, (iii) the likelihood of the Companies achieving some satisfactory form of refinancing in the near term.

15 The most recent Monitor's report is dated October 15, 2007 (the "Seventh Report"). The Monitor comments on the efforts of Factorcorp and Mr. Twerdun to obtain overall refinancing for Factorcorp. The Seventh Report also comments on the various investments made by Customers.

16 With respect to refinancing efforts, Mr. Twerdun advised the Monitor that he continues to talk with four potential parties who he says are considering providing refinancing for Factorcorp. However, Mr. Twerdun does not have permission from such potential investors to reveal their identity. The Monitor has not received any information that enables it to assess the likelihood of any new financing transactions closing, or their timing.

17 With respect to the investments of Factorcorp, the Monitor provided details in its Fifth Report, on the debt and security documents contained in the copies of Factorcorp's Customer files as provided to the Monitor. The Fifth Report contained a summary of the investments with Customers. A number of deficiencies were noted. The total amount of Factorcorp investments which are secured is approximately $13 million. Factorcorp holds approximately $19.7 million in preferred shares and has made loans totaling approximately $18.1 million for which the files do not contain satisfactory evidence of valid security.

18 The Seventh Report which updates the Fifth Report does not alter the previous report with respect to the amount of the investments in preferred shares or the loans for which there is inadequate security documentation. A summary of Factorcorp's investments is included in the Seventh Report at Appendix B.

19 The Monitor commented extensively on Factorcorp's investment in $19.7 million of preferred shares of one Customer. The unaudited financial statements of this Customer for the fiscal year ended September 30, 2006 indicate that the Customer had assets of $19.4 million and liabilities of $22.6 million, which leads to an additional concern, namely that this Customer is not in a financial position whereby it could redeem the shares. The Monitor comments that Factorcorp has provided a signed term sheet dated October 9, 2007 in respect to the conversion of preferred shares to conventional secured debt, but the Monitor notes that the customer may not be in the legal position to convert the preferred shares to secured debt.

20 The Monitor also commented on the cash flow forecast of Factorcorp. Based on the limited information available, the Monitor concluded that it appears that Factorcorp's operating costs on a monthly basis exceed its cash interest payments received. The Monitor observed that not all customers are current and that without cash inflows over and above the amount of interest payments currently being received from customers, Factorcorp will not be able to continue to service the interest to debenture holders and pay other operating costs.

21 The position of Factorcorp was put forth in the affidavit of Mr. Twerdun sworn October 16, 2007. Not surprisingly, the affidavit attempts to paint a different story from that provided in the affidavit of Mr. Moniz and in the Monitor's reports. Mr. Twerdun stated that Factorcorp only accepted subscriptions for debentures from persons who represented to Factorcorp that they were AIs. Mr. Twerdun stated that the issue of investments being made by non-AIs only came to his attention as a result of an inquiry made by the Mutual Fund Dealers' Association into the operations of Farm Mutual and that this issue came as a surprise to Factorcorp. The problem was compounded when Farm Mutual required

many of its clients to request payment of their debentures. Mr. Twerdun states that it was as a result of Farm Mutual's actions and breach of its duties that Factorcorp received repayment requests in the amount of approximately 50% of its portfolio and given the illiquidity of Factorcorp's portfolio, Factorcorp could not repay such a significant portion of its portfolio resulting in its suspension of payments to all debenture holders in May 2007.

22 Mr. Twerdun states that neither Factorcorp nor Factorcorp Financial is insolvent. This statement is made on the basis that the debenture holders who have issued repayment requests through Farm Mutual are not AIs and as such Factorcorp believes it has a right of set off as a result of their misrepresentations.

23 With respect to Factorcorp's investment in the preferred shares of its Customer, Mr. Twerdun states that Factorcorp Financial has negotiated to convert the preference shares into two one year loans aggregating $20 million, but it is noted that the term sheet is dated October 9, 2007 and is non-binding.

24 Mr. Twerdun also explained that he has had discussions with other borrowers and that these borrowers have agreed in certain cases to accelerate repayment of their obligations and in still other situations he anticipates receiving term sheets which will lead to repayment of outstanding loans within a relatively brief period of time. Documentation to support Mr. Twerdun's statements is lacking.

25 Based on discussions that Mr. Twerdun has had with borrowers, he stated that approximately 75% of all loans made by Factorcorp Financial will be repaid within one year.

26 Mr. Twerdun is concerned that if a receiver is appointed, the customers and potential financiers at Factorcorp will likely renege on repayment schedules or agreements in the belief that the receiver will be willing to accept a lower return of principle provided that the loan is repaid over a short period.

27 With respect to refinancing efforts, Mr. Twerdun states that a certain refinancing transaction could not be pursued as the potential financier withdrew as it was not interested in providing financing to a company whose business was under review by a monitor. He is also of the view that the presence of the monitor is detrimentally affecting four current refinancing proposals.

28 Mr. Twerdun concludes that, if a receiver is not appointed, negotiations will result in the successful refinancing of Factorcorp Financial by January 31, 2008. However, if a receiver is appointed, he is of the view that the potential financiers will no doubt terminate discussions about refinancing. Mr. Twerdun also states that Factorcorp Financial has not defaulted on any interest payments and has not received any communications from debenture holders expressing dissatisfaction with the current arrangements. Counsel submits that the debenture holders are not currently prejudiced by the status quo.

Should a Receiver by Appointed

29 A receiver may be appointed under section 129(2) of the Act. However, no order shall be made unless the Court is satisfied that the appointment of a receiver is in the best interests of the creditors, or it is appropriate for the due administration of Ontario securities law.

30 The OSC submits that both parts of the test have been satisfied. Counsel submits that there is a broad discretion provided to the court and that the enforcement decisions of the OSC should be taken into consideration.

31 Redemptions have been suspended. Interest continues to be paid but the cash flow forecast casts doubt on the ability of Factorcorp to maintain interest payments. The security in support of the loans made by Factorcorp to its Customers is, in many situations, deficient or non-existent. A significant investment is not even evidenced by a debt obligation. It is a holding of preferred shares.

32 Counsel to the OSC submits that the solution is for a sale of the portfolio and the question then becomes who is the best party to effect a sale of the portfolio. The OSC submits that it needs to be conducted by a receiver.

33 Counsel concentrates on three areas. Firstly, whether the loans are secured. Secondly, what are the refinancing possibilities. Thirdly, what is the state of the cash flow forecast.

34 As previously noted, and notwithstanding that Factorcorp's investment were to be secured, only $13 million out of $50 million of loans made by Factorcorp are secured. The preference share investment represents $19.7 million and $18 million is made up of loans for which there is no evidence of valid and enforceable security.

35 With respect to refinancing proposals, counsel to the OSC submits that there is no tangible refinancing plan. I agree. Any credible investor will need confirmation of the validity and enforceability of security. Any credible investor will identify the shortcomings of the portfolio when it conducts due diligence.

36 The cash flow forecast also indicates that the operating costs are going to be greater than the amount of interest received. Cash flow remains positive to date on account of a return of capital of approximately $1.2 million, but the source of such funding cannot be identified.

37 The Monitor is not aware of any information which would indicate that for September and October, receipts will substantially exceed the Factorcorps' estimates including amounts related to the return of capital, as a result of Factorcorps' refinancing efforts, repayments from Customers or from any other source. Based on current information, the Monitor concluded that Factorcorp would not be able to satisfy its current redemption obligations.

38 Finally, counsel submits that there is no compelling evidence to indicate that Mr. Twerdun could do a better job to protect the interests of creditors than a receiver.

39 Counsel to Factorcorp submits that the debenture holders would be best protected if the receiver is not appointed. He stressed that, to date, full interest has been paid and there are no portfolio performance defaults. Further, Mr. Twerdun is actively seeking refinancing and is also working with both Customers and End Borrowers in an effort to improve the portfolio. Counsel submits that debenture holders would be better off if a receivership is avoided and that a refinancing or workout would be substantially complete by the end of 2007 or early in 2008.

40 Mr. Hamilton also submitted that an unwinding of the portfolio would be a disaster for the debenture holders and that the best opportunity for the debenture holders is through a workout and that the workout can be best implemented by Mr. Twerdun through his relationships with both Customers and End Borrowers. A receiver, counsel submits, does not have such relationships and the focus of a receiver is different from than that of management in that the receiver would not embark on a full scale workout. In addition, he raises the question of whether the receiver would pursue Farm Mutual. Litigation has now been instituted by Factorcorp as against Farm Mutual. At the very least, counsel submits that the commissions received by Farm Mutual of $2.2 million should be pursued by Factorcorp as well as the action based on Farm Mutual's role in permitting non-AIs to purchase the debentures.

41 Notwithstanding the submissions of counsel to Factorcorp, I am of the view that the interest of the creditors of Factorcorp would be best served if a receiver was appointed. One cannot ignore certain fundamental points.

42 Firstly, Factorcorp's Offering Memorandum provides that the investments were to have been made on a secured basis. Clearly, this did not happen. The reports of the Monitor indicate that only $13 million out of the approximately $50 million of the investments are secured. An investment of $19.7 million is not even made by way of loan but is in preferred shares in a company whose financial state is questionable. The remainder of the investments of approximately $18 million are either unsecured loans or have deficient security. Mr. Twerdun was the directing mind of Factorcorp and he must take responsibility for making investment decisions. The decision to invest in preferred shares and in neglecting to obtain security for a number of other investments, cannot be said to be decisions that were made in the best interests of the creditors of Factorcorp. Regardless of whether the investors were AI or non-AI, it does not alter the fact that the investment decisions made by Factorcorp and Mr. Twerdun breached the terms of the offering memoranda, to the

detriment of the creditors. In all likelihood, the only question remaining is to determine the extent of the loss facing the investors.

43 Secondly, the refinancing efforts undertaken by Factorcorp have not demonstrated tangible results. There are no commitments. The proposals referenced by Mr. Twerdun are preliminary in nature. The recent timing of the proposals appears to suggest that these investors have not done any serious due diligence. One party, who had been identified as a potential refinancier as early as November 2006, has not put forth any binding proposal. No party has stepped forward to refinance Factorcorp. There are four mystery parties and one chartered bank, the identity of which remains unknown. Factorcorp has, in my view, had ample time to put forward a solution. None has been forthcoming.

44 Thirdly, redemptions were suspended in May 2007 and the cash flow forecasts are not encouraging. In my view, Factorcorp's creditors are at risk.

45 Simply put, these investments made by Factorcorp are in breach of the representations made in the Offering Memorandum and Factorcorp has not, in my view, been able to remedy the problem. Factorcorp and its principal have only offered promises for a better tomorrow. However, Mr. Twerdun's and Factorcorp's plan on how to fix the problem, must be greeted with a large degree of skepticism. In my view, there is nothing on the record, that would persuade me that the creditors would be best served with the status quo.

46 The Monitor was engaged in early August. The Monitor noted in its reports that information that it requested from Mr. Twerdun was often delayed due to apparent concerns about confidentiality. When information was provided it was lacking in detail. The refinancing proposals are, in my view, not proposals. They are expressions of interest, in many cases dated but a few days before the Seventh Report. The Monitor has had no time to consider the *bona fides* of any such proposals. In this regard Factorcorp and Mr. Twerdun have to take full responsibility for the current situation. There is nothing before the Court to support their position that a refinancing is imminent, or, indeed, feasible and there is nothing to support Mr. Twerdun's contention that the debenture holders would be best protected if the receiver is not appointed.

47 In my view, the time has come to appoint a receiver. The receiver is, in my view, in a much better position to protect the interest of the creditors, than is Mr. Twerdun or Factorcorp.

48 The receiver is also in a position to protect the interests of all stakeholders, including Factorcorp. In this regard, part of the Receiver's mandate will be to evaluate and report on the merits of Factorcorp's position vis-à-vis Farm Mutual.

49 Having been satisfied under the first branch of the test under section 129(2)(a), it is not necessary to consider the second aspect of the test, namely whether it is appropriate for the due administration of Ontario securities law. However, having reviewed the temporary orders granted under section 127 of the Act, and having considered the issues raised in the Fifth and the Seventh Report, I am also of the view that it would be appropriate for the due administration of Ontario securities law to appoint a receiver.

50 An order shall issue, in the form submitted, appointing KPMG as receiver and manager of Factorcorp.

51 The parties previously indicated the need to maintain confidentiality over certain portions of the documents. Redacted versions of the Seventh Report and the Responding Motion Record are in the Court File. The unredacted materials will be sealed until November 5, 2007, pending further order.

Application granted.

End of Document

TAB 2

2009 CarswellOnt 4241
Ontario Superior Court of Justice [Commercial List]

Ontario (Securities Commission) v. Sextant Strategic Opportunities Hedge Fund L.P.

2009 CarswellOnt 4241, 179 A.C.W.S. (3d) 345

IN THE MATTER OF THE SECURITIES ACT, R.S.O. 1990, c. S.5 AS AMENDED

ONTARIO SECURITIES COMMISSION (Applicant) v. SEXTANT STRATEGIC OPPORTUNITIES HEDGE FUND L.P., SEXTANT CAPITAL MANAGEMENT INC. AND SEXTANT CAPITAL GP INC. (Respondents)

Morawetz J.

Heard: April 30, 2009
Judgment: July 17, 2009
Docket: CV-09-8053-CL

Counsel: Susan Kushneryk for Ontario Securities Commission
Robert Brush, Anna K. Markiewicz for Respondents, Sextant Capital Management Inc., Sextant Capital GP Inc.
David Bish for PricewaterhouseCoopers Inc.

Subject: Corporate and Commercial; Securities

Headnote

Securities --- Commissions and exchanges — Orders — Miscellaneous

Securities --- Trading in securities — Miscellaneous

Table of Authorities

Cases considered by *Morawetz J.*:

British Columbia (Securities Commission) v. DiCimbriani (1996), 11 C.C.L.S. 181, 138 D.L.R. (4th) 263, 81 B.C.A.C. 34, 132 W.A.C. 34, 1996 CarswellBC 1932 (B.C. C.A.) — referred to

Ontario (Securities Commission) v. C & M Financial Consultants Ltd. (1979), 1979 CarswellOnt 764, 23 O.R. (2d) 378 (Ont. H.C.) — referred to

Ontario Securities Commission v. Factorcorp Inc. (2007), 2007 CarswellOnt 7515 (Ont. S.C.J.) — referred to

Statutes considered:

Securities Act, R.S.O. 1990, c. S.5
Generally — referred to

s. 111 — referred to

s. 116 — referred to

s. 129 — pursuant to

Morawetz J.:

Introduction

1 The Ontario Securities Commission (the "OSC" or the "Commission") moves for the appointment of a receiver and/or receiver and manager (collectively "receiver") over the assets and undertaking of Sextant Strategic Opportunities Hedge Fund L.P. ("Sextant Canadian Fund"), Sextant Capital Management Inc. ("SCMI") and Sextant Capital GP Inc. ("Sextant GP") (collectively, the "Sextant Canadian Entities") pursuant to s. 129 of the *Ontario Securities Act* (the "Act").

2 The OSC takes the position that the Sextant Canadian Fund is a mutual fund in Ontario, managed by SCMI and Sextant GP. The OSC submits that nearly 250 Canadians have together invested just under $30 million in the Sextant Canadian Fund since 2006.

3 The OSC submits that it has become aware of issues giving rise to what it considers to be significant concerns with respect to the Sextant Canadian Fund and its management, SCMI and Sextant GP. The OSC submits that these problems include potential fraud, potential misappropriation of investor money, misrepresentations, self-dealing by the fund managers, and numerous and significant recordkeeping inaccuracies and apparent record manipulation.

4 The OSC further submits that any one of the foregoing list of concerns would be sufficient to cause risk to investors' interests in the Sextant Canadian Fund and, taken together, these issues and the course of conduct which created them, have placed investors' interests at significant risk. The OSC submits that the only way to safeguard those interests and to adequately address the numerous deficiencies and irregularities associated the Sextant Canadian Fund and its management is to introduce an independent, third party to undertake a verifiable review and analysis of the fund and its management. They submit that the investors are entitled to a process that is reliable and that they can trust.

5 Accordingly, the OSC seeks the appointment of a receiver pursuant to s. 129 of the Act, for the interests of the investors and for the due administration of Ontario securities law.

6 The OSC submits that the respondents chose not file any responding material in this application, such that the evidence proffered by the OSC in the affidavit of Mr. Raymond Daubney sworn March 5, 2009 is uncontroverted.

7 No party appeared on behalf of the Sextant Canadian Fund.

8 SCMI and Sextant GP oppose the appointment of a receiver on the basis that:

(i) there are serious flaws in the evidentiary record underlying this application;

(ii) it is unnecessary to appoint a receiver for SCMI and Sextant GP for the due administration of Ontario securities law or to protect the interests of creditors and security holders; and

(iii) the appointment of a single receiver for all three of the respondents will create an irreconcilable conflict of interest for that receiver.

9 SCMI and Sextant GP take the position that limiting the receiver's appointment to the Sextant Canadian Fund, but on terms requiring SCMI and Sextant GP to cooperate with the receiver, will avoid this conflict of interest while, at the same time, ensure that the interests of stakeholders will be protected and Ontario securities law will be duly administered.

Motion of SCMI and Sextant GP

10 SCMI and Sextant GP brought a separate motion to address what they consider to be serious flaws in the evidentiary record underlying the application. They sought an order striking out certain paragraphs of the affidavit of Mr. Daubney, in particular, paragraphs 78, 82, 88, 90, 121, 161, 175, 188 and 189 on the basis that all of these paragraphs contain either opinions or conclusions or legal argument. The moving parties also take the position that on April 9, 2009 they attempted to cross-examine Mr. Daubney on his affidavit but during the course of the examination, Mr. Daubney refused to answer or took under advisement questions respecting the basis for his opinions and legal conclusions and the factual underpinnings of those opinions and conclusions. They further suggest that, as a result of Mr. Daubney's refusal to answer, they were unable to test what they consider to be the improper and highly prejudicial paragraphs of the affidavit of Mr. Daubney in defence of the application and, as a result, they were unable to make full answer and defence.

11 In my view, the motion brought by SCMI and Sextant GP has no merit. To the extent that the moving parties complain about the refusal of Mr. Daubney to answer certain questions or to take certain questions under advisement, they should have challenged his response as opposed to bringing a motion to strike. Any complaints with respect to the conduct of the cross-examination were, in this respect, within the control of SCMI and Sextant. The moving parties made the decision not to challenge the refusals or taking questions under advisement.

12 Counsel to SCMI and Sextant GP also challenge Mr. Daubney's evidence with respect to his statements on valuation on the basis that he is not a qualified expert valuator. Mr. Daubney is not an expert and his concluding opinion on valuation has not been considered. However, certain of his comments on the issue of value are factual in nature and go to the reasonableness of the factors that are considered in a valuation. These statements have been considered. The concerns of SCMI and Sextant GP go to weight.

13 Certain of Mr. Daubney's statements are in the form of legal argument, and have been either disregarded or discounted to the point where they have been given, little or no weight.

Facts and Concerns

14 A summary of the factual background to this application has been set out in the factum of the OSC and the factum of SCMI and Sextant Capital.

15 At paragraph 72 of the OSC factum, counsel submits that there are a number of reasons why the appointment of a receiver is in the best interests of the Sextant Canadian Fund security holders and for the due administration of Ontario securities law. These reasons include:

(a) SCMI and Sextant GP have caused the Sextant Canadian Fund to pay each of them significant fees, including fees in excess of $3.5 million in 2008 alone, as a result of manipulation of the value of the fund - which purportedly increased by approximately 172% from the end of 2007 to the end of 2008 notwithstanding that the underlying assets are principally shares of companies that are not operating:

(b) there is a capital shortfall in the Sextant Canadian Fund based on outstanding redemption requests and the value of the Sextant RBC Accounts and the Sextant Canadian Fund New Edge account;

(c) the value of the assets held by the Sextant Canadian Fund is uncertain, such that the accurate net asset value per unit held by investors held in the Sextant Canadian Fund is not known;

(d) record keeping inaccuracies have to be investigated to determine the accurate shareholdings held in the Sextant Canadian Fund and to confirm the accuracy and propriety of the flow of money out of the fund;

(e) there is a history of mismanagement of the investments in the Sextant Canadian Fund;

(f) there has been significant regulatory non-compliance;

(g) investors' interests are not served by the status quo whereby SCMI and Sextant GP continue to manage the Sextant Canadian Fund;

(h) there is no evidence that SCMI or Sextant GP are in any better position than a receiver to protect investors' interests;

(i) there is no evidence of a tangible alternative to appointing a third party to step in and manage the Sextant Canadian Entities; and

(j) in light of the recordkeeping inconsistencies, questionable value of the assets of the Sextant Canadian Fund, evidence of forgery and other fraudulent activity, investors are entitled to an independent and verifiable claims process.

16 The above list of reasons has been drawn from paragraph 188 of the affidavit of Mr. Daubney, which was one of the paragraphs challenged by SCMI and Sextant GP. It is, in my view, appropriate, to review the basis for some of these statements.

17 Earlier in his affidavit, Mr. Daubney states that the Sextant Canadian Fund is structured as a limited partnership pursuant to a Limited Partnership Agreement between Sextant GP and the investors in the Sextant Canadian Fund dated February 17, 2006. There is also an Amended and Restated Limited Partnership Agreement dated July 28, 2008 which introduced a new class of units in the Fund but otherwise retained identical governance provisions. The initial and subsequent agreements together are referred to as the "LP Agreement".

18 The LP Agreement includes, among others, the following provisions:

(i) the Sextant Canadian Fund will make investments in accordance with the disclosure in its offering document;

(ii) the Sextant Canadian Fund may not invest more than 20% of its portfolio, based on the net asset value at the most recent calculation date, in any single class of securities of an issuer as calculated at cost;

(iii) the Sextant Canadian Fund will not purchase securities from, or sell securities to SCMI or any of its affiliates or any firm in which any principle of SCMI may have a direct or indirect material interest; and

(iv) the Sextant Canadian Fund will pay a 2% advisory fee to SCMI and a 20% performance fee or "management allocation" to Sextant GP.

19 The affidavit of Mr. Daubney at paragraph 21 also references a confidential offering memorandum which describes investment restrictions applicable to the Fund, including that Sextant Canadian Fund may not invest more than 20% of its portfolio in any single class of securities of an issuer and that it will not purchase securities from, or sell securities to SCMI or any of its affiliates or any firm which a principal of SCMI may have a direct or indirect material interest.

20 At paragraph 22, Mr. Daubney addresses the relationship between Mr. Otto Spork and the Sextant Canadian Entities. Mr. Daubney states that Mr. Spork is the directing mind behind these three entities and various related entities, including those invested in by the Sextant Canadian Fund. Mr. Daubney states that Mr. Spork created an elaborate structure with three main components:

(a) the investment component which solicits investors and includes three investment funds, one in Canada (i.e. the Sextant Canadian Fund) and two in the Cayman Islands;

(b) the management component including SCMI and Sextant GP in Toronto and Sextant Capital Management, an Islandi ehf ("Sextant Iceland"), which manages the investment funds in exchange for fees paid by the funds from investors' money; and

(c) the glacier company component, consisting of two private Luxembourg companies and their Icelandic subsidiaries which were the primary investments for the three investment funds.

21 Mr. Daubney goes on to state that through this structure, Mr. Spork was able to take investors' monies in at least two ways. First, he could take investors' money through management fees, in the management component and, second, through direct investment in his own Luxembourg companies. Further, Mr. Spork has significant ownership and management roles in the various entities relevant to this matter, including SCMI, Sextant GP, Sextant Iceland, the Sextant Strategic Hybrid 2 Hedge Resource Fund Offshore Ltd. ("Sextant Hybrid Fund"), the Sextant Strategic Global Water Fund Offshore Ltd. ("Sextant Water Fund"), Iceland Glacier Products S.A. ("IGP") and Iceland Global Water 2 S.A. ("IGW").

22 Mr. Daubney goes on to state that in addition to the Sextant Canadian Fund, the Sextant investment structure includes the Sextant Hybrid Fund and the Sextant Water Fund (together, the "Sextant Offshore Funds") two investments funds incorporated under the laws of the Cayman Islands. Further, although the Sextant Offshore Funds are incorporated in the Cayman Islands, their custodial accounts are held at New Edge in Canada and IAS is the net asset calculation agent for the Funds.

23 Mr. Daubney further states that the net asset value of the Sextant Offshore Funds in December 2008, as stated on the IAS Portfolio Valuation Statement for those funds, was just over U.S. $100 million. Those statements also indicate that their respective investment holdings essentially mirrored the investments held by the Sextant Canadian Fund for the same month, in that the portfolios of all three funds were just over 90% invested IGP and just over 2.5% invested in IGW, as calculated by IAS.

24 Mr. Daubney also states that the Sextant Offshore Funds were not isolated but rather were an integral part of the structure created by Mr. Spork.

25 With respect to Sextant funds management, SCMI was incorporated in Ontario in August 2005. It is registered under the Act as an investment counsel, portfolio manager and limited market dealer and is the principle distributor of the Sextant Canadian Fund.

26 Sextant GP was incorporated in Ontario in December 2005.

27 Mr. Daubney is of the view that the only purpose for SCMI and Sextant GP apparent in the records available to staff of the OSC, is to manage the Sextant Canadian Fund.

28 Mr. Daubney further states that the management of the Sextant Canadian Fund and the Sextant Offshore Funds, in addition to SCMI and Sextant GP, includes Sextant Iceland.

29 Mr. Daubney goes on to describe the third component of the investment structure created by Mr. Spork which is comprised of two limited Luxembourg companies, IGP and IGW, and their Icelandic subsidiaries. Mr. Daubney states that Mr. Spork has ownership interests and management roles in each of IGP and IGW. IGP and IGW are limited Luxembourg companies. IGP has a wholly-owned subsidiary called Iceland Glacier Products ehf ("IGP Iceland") and IGW has a wholly-owned subsidiary called Iceland Global Water EHF ("IGW Iceland").

30 Mr. Daubney further states that IGP Iceland is intended to operate, in the future, as a bottled water business that extracts and bottles glacier water, as set out in its business plan. Mr. Daubney states that OSC staff have not been able to confirm the details of any glacier rights held by IGP, although there is some indication that IGP does have some rights to at least one glacier in Iceland. A plant is being constructed in the town in connection with the lease but the plant is not yet operating.

31 The relationship of the Sextant Canadian Entities to Mr. Spork to IGP and IGW raises concerns in the areas outlined in the LP Agreement referenced at [18] above. It also raises concerns in respect of the mandated prohibition against self dealing by mutual funds (Section 111); and the standard of care of investment funds (Section 116).

32 Section 2 of the factum is entitled *Misconduct: Manipulation of Value, Mismanagement of Investments and Manipulation of Records*. In my view, the submissions in this section raise very serious issues.

33 At paragraph 78 of his affidavit, Mr. Daubney states that there is no evidence supporting the purported value of IGP and, to the contrary, it appears that the value of those shares has been fraudulently manipulated by or to the knowledge of SCMI and Sextant GP, for purposes including allowing SCMI and Sextant GP to collect significant management and performance fees that they did not earn. This paragraph was also the subject of challenge by counsel to SCMI and Sextant GP. Again, it is appropriate to review the basis for these statements.

34 At paragraph 79, Mr. Daubney states that the value of the Sextant Canadian Fund is tied almost exclusively to the value of its shares in IGP and with over 90% of the market value of the Sextant Canadian Fund held in shares of IGP, the fund's holdings are materially over concentrated in IGP.

35 Mr. Daubney also states that IGP shares held by the Sextant Canadian Fund are over concentrated even on the basis of the initial cost of the shares. He states that even at the cost or book value recorded on the IAS portfolio valuation statement, at $6,131,347 out of a total portfolio book value of $10,516,509.06, the Sextant Canadian Fund holds 58.3% of its assets in shares of IGP. The IAS portfolio valuation statement for July 2007 lists the book value for those shares of $1,758,405 out of a total portfolio book value of $3,002,841.65, or 59% of the total portfolio book value. Mr. Daubney states that, even on a cost-base calculation, the IGP shares represent more than half the value of the Fund. This evidence is objective in nature and it can properly be considered.

36 Mr. Daubney goes on to question the stated value of IGP as not being reliable or supportable. He states that the IGP shares purportedly increased in value from their initial cost of 0.163 in July 2007 to a market value of 2.450 in January 2009. He states that this a 1400% increase from the purchase price to the stated market value a year and one-half later, notwithstanding that this is a non-operating business and there have been no material developments that would explain the surging value of these shares. The calculations were challenged by Mr. Brush on Mr. Daubney's cross-examination, and using different variables, the percentage of the fund's total portfolio that was invested in a single security in July 2007 was 31.5%, which I note is still more than 50% greater than the permitted maximum of 20%. Mr. Daubney also stated that the purported increase in value over time resulted in millions of dollars in management fees being paid from investors' money. He also states that there is no evidence that neither of the mandated valuation procedures was followed by Sextant GP in respect of the value of IGP for the purpose of the Sextant Canadian Fund. Rather, he states that the value of IGP shares was set from time to time by the Board of Directors of Sextant Iceland, which consists of Mr. Spork and two other individuals.

37 Mr. Daubney went on to state that in determining the value of IGP, the directors of Sextant Iceland relied on purported independent valuations of IGP Iceland at December 31, 2007, as prepared by companies called Hempstead and Spardata (together, the "Purported Valuations"). Mr. Daubney is of the view that the Purported Valuations do not constitute independent or reliable valuations and cannot be reasonably relied upon to support the value assigned by Sextant Iceland Board of Directors.

38 Mr. Daubney further refers to a letter dated September 29, 2008 from Canacord Capital Corporation ("Canacord") to Mr. Spork (the "Canacord Letter"). The Canacord Letter indicates that it is a financing proposal, not a valuation.

39 Mr. Daubney states that among the materials that Mr. Spork provided to Canacord in connection with the Canacord Letter were purported letters of intent for the purchase of water (the "LOIs"). He states that at least three of those LOIs are fraudulent insofar that three of the LOIs purport to be agreements with, respectively, the Los Angeles Department of Water and Power, the San Diego County Water Authority and Division 4, Orange County Water District. Mr. Daubney

states that the purported counter parties to each of these LOIs has confirmed that they did not, in fact, execute these agreements; moreover, none of them had any previous dealings with Sextant, IGP or their related entities, or had so much as heard of Sextant, IGP or Mr. Spork. The statements of Mr. Daubney are corroborated by the affidavits of Mr. Philip Anthony of the Orange County Water District, Mr. Wally Knox of the Board of the Los Angeles Department of Water and Power and Mr. Barry Martin of the San Diego Water Authority.

40 Mr. Daubney went on to state that there was no basis for the claimed market value in excess of $160 million in December 2008. Similarly, he stated that without operations, there was no basis for the claimed returns on their shares from July 2007 to November 2008.

41 Mr. Daubney also made the point that OSC staff had written to counsel for the Sextant Canadian Fund, SCMI and Sextant GP and counsel for Mr. Spork and Sextant Iceland, inviting them to provide some explanation or basis for the extraordinary value and purported rate of return for IGP. No substantive response has been received.

42 A number of the statements made by Mr. Daubney raise issues that comment on the value of the IGP, but they are not, in my view, valuations. Obvious examples would be the three LOIs with Los Angeles, San Diego and Orange County. The remarkable sworn responses from these municipal officials casts considerable doubt on the *bona fides* and operations of Mr. Spork and by extension, the Sextant Canadian Entities.

43 Mr. Daubney also comments about recordkeeping inaccuracies or manipulation. He states that records for the Sextant Canadian Fund and related entities contain a number of material inaccuracies and there is evidence that those records have been manipulated. As a result, he states that the records relating to the fund are unreliable. Further, as the general partner and investment advisor, Sextant GP and SCMI are responsible for the records of the Sextant Canadian Fund.

44 According to Mr. Daubney, the material of recordkeeping inaccuracies include the following:

(a) the number of IGP shares held by the Sextant Canadian Fund does not reconcile between the IGP share register book and the IAS records for the Fund;

(b) based on the IGP share register book, the IAS portfolio valuation statements have overstated the Sextant Canadian Fund's ownership of IGP shares and, therefore, the Fund's value by an amount between 3,080,463.40 and 6,755,463.40;

(c) the cost of IGP shares as reported on the IAS portfolio valuation statements or the Sextant Canadian Fund is inconsistent, in that the IAS portfolio valuation statements and portfolio valuation detailed statements show variances over time among the number of shares held, the average cost of those shares and the total cost of those shares, without the valuations correlating consistently;

(d) the value of the initial investment in IGP shares by the Sextant Canadian Fund and the Sextant Offshore Funds is recorded on the IAS portfolio valuation statements does not match the value of the shareholders' investment in IGP as recorded in the annual accounts for IGP as at December 31, 2007;

(e) there appears to have been a transfer of US $1.2 million to Riambel, a holding company owned by Mr. Spork, out of funds paid by the Sextant Canadian Fund and the Sextant Offshore Funds for IGP shares and there is no apparent basis or justification for this transfer; and

(f) there are no share certificates and there is no share register for IGW, such that those shares held in the Sextant Canadian Fund and the Sextant Offshore Funds are not evidenced anywhere.

45 At paragraphs 46 - 53 of the factum, the section is entitled, *Investments not in Accordance with Offering Memoranda or LP Agreement.* The submissions in this section raise very serious issues with respect to the role of the investment advisor, SCMI and the basis on which the advisory and performance fees were calculated.

46 At paragraph 54 of the factum, the submission is made that the manipulation of value, manipulation of records and mismanagement of investments by SCMI and Sextant GP, as managers of the Sextant Canadian Fund, have cost investors millions in invalid fees, caused the net asset value of the Sextant Canadian Fund to be unreliable, created a capital shortfall in the fund and otherwise compromised the value of the fund and that the actions of SCMI and Sextant GP have thereby materially compromised and diminished the value of investors' investments in the Sextant Canadian Fund.

47 The above submission is based on statements in the affidavit of Mr. Daubney at paragraphs 156 - 174.

48 It is noted that in excess of $3.5 million was charged to the Sextant Canadian Fund in 2008 in respect of the advisory and performance fees, combined. The statement is made that these fees are based almost entirely on the purported value of the fund's IGP shares.

49 Serious questions are raised as to whether the shares hold anything more than a nominal value, and certainly not the purported value in the tens of millions of dollars as listed on the IAS portfolio valuation statements. In my view, the statement of Mr. Daubney again raises very serious questions about the operation of the fund.

50 It is not surprising that the submission is made that the recordkeeping inaccuracies and manipulations, as described in Mr. Daubney's affidavit, have caused the net asset value of the Sextant Canadian Fund, therefore the value of the individual investor's investments, to be uncertain.

51 Counsel to SCMI and Sextant GP at paragraphs 30 - 85 of their factum raise what they consider to be serious flaws in the evidentiary foundation for the application. I cannot give effect to this submission. In my view, there is ample objective evidence to establish that serious issues have been raised and that there are serious areas of concern with respect to all three respondents. These areas of concern relate not only to the protection of the position of the investors but also with respect to the due administration of securities law in Ontario. In my view, the basis for the application of the OSC has, beyond any doubt, been established.

Law

52 Section 129 of the Act permits the Commission to apply to court for an order appointing a receiver. Such an order shall be made if the court is satisfied that such an appointment is:

> (i) in the best interests of the company's creditors or the security holders or of subscribers to the company; or
>
> (ii) it is appropriate for the due administration of Ontario securities law.

53 I am in agreement with the submissions set out at paragraphs 89 - 98 of the factum submitted by counsel to the OSC which address the criteria to be considered on a s. 129 application.

54 The criteria for determining what is in the best interests of creditors, security holders or subscribers for the purpose of the appointment of a receiver under the Act is broader than a solvency trust. The criteria should taken into consideration all the circumstances and whether, in the context of those circumstances, it is in the best interest of creditors that a receiver be appointed. The criteria should also take into account the interests of all stakeholders. See *British Columbia (Securities Commission) v. DiCimbriani* (1996), 138 D.L.R. (4th) 263 (B.C. C.A.) and *Ontario Securities Commission v. Factorcorp Inc.*, [2007] O.J. No. 4496 (Ont. S.C.J.).

55 Further, where there is a history of mismanagement, no evidence of a tangible alternative resolution, evidence that investors' interests will not be served by maintaining *status quo* and evidence that the company is not in a better position than a receiver to protect investors' interests, it is appropriate to appoint a receiver. See *Factorcorp*, *supra*, and *Ontario (Securities Commission) v. C & M Financial Consultants Ltd.* (1979), 23 O.R. (2d) 378 (Ont. H.C.).

56 In addition, where there is evidence of regulatory breaches and evidence that the value and integrity of assets purchased with investor funds has been compromised, it is in investors' best interests, that a receiver be appointed so that such investors are provided with an independent and verifiable review and analysis. Investors deserve treatment they can rely upon. See *Factorcorp*, *supra*, and *Ontario (Securities Commission) v. ASL Direct* (November 14, 2008),Toronto (CV-08-7793-00CL).

Conclusion

57 The evidence of Mr. Daubney and others raises many serious and troubling concerns. I am satisfied that the investors' interest will not be served by maintaining the *status quo*. There are also a number of troubling concerns that have been raised relating to regulatory non-compliance that justify the appointment of a receiver on the basis of it being appropriate for the due administration of Ontario securities law.

58 I accept the submission at paragraph 72 of the factum which is referenced at [15]. The situation, in my view, justifies the appointment of a receiver for SCMI, Sextant GP and the Sextant Canadian Fund as being in the best interests of the Sextant Canadian Fund security holders (its investors) and it is also appropriate for the due administration of Ontario securities law.

59 I have been satisfied that the requirements for the appointment of a receiver under both parts of s. 129 have been met.

60 In my view, in order to protect investors, the appointment of a receiver is necessary for each of the Sextant Canadian Entities. A receiver is necessary for SCMI and Sextant GP because, among other things:

(i) these are the entities to which fees were paid from the Sextant Canadian Fund and these payments should be reviewed;

(ii) SCMI and Sextant GP are responsible for certain conduct as outlined in the affidavit of Mr. Daubney and, in my view, cannot be entrusted with the continuing responsibility for investors' interests; and

(iii) as the managers of the Sextant Canadian Fund, SCMI and Sextant GP are responsible for the books and records of the fund to which the receiver will require access.

61 Further, a receiver is necessary for the Sextant Canadian Fund to ensure that investors' assets in the fund are managed, and potentially distributed, in an orderly fashion.

62 The records are such that investors' funds are not completely accounted for and identified shortcomings in the operations of SCMI and Sextant GP require an independent review. In these circumstances, investors are entitled to an independent and verifiable reporting process and to treatment on which they can rely more generally.

63 It seems to me that anything less than the appointment of a receiver would not permit the overview or control of the financial affairs of the company.

64 I note that counsel to SCMI and Sextant GP submitted that the Sextant Canadian Fund is not a mutual fund and therefore not in breach of s. 111 of the Act. No submission was made by the Sextant Canadian Fund.

65 To the extent that this is an issue, the OSC, in my view, has provided a full response to this position at paragraphs 107 and 108 of its factum.

66 Counsel to SCMI and Sextant GP also raised the issue that the appointment of a single receiver for all three of the respondents will create an irreconcilable conflict of interest for that receiver. In my view, it is premature to consider this issue. The interests of the investors can be best served, it seems to me, if there is one receiver who coordinates the

mandated activities of the receiver. To the extent that the receiver identifies issues of conflict, these can be addressed at a future time.

Disposition

67 In the result, the application is granted. PricewaterhouseCoopers Inc. ("PwC") is appointed as Receiver and Manager over the property, assets and undertakings of each of SCMI, Sextant GP and the Sextant Canadian Fund. The consent of PwC has been filed.

68 An order shall issue in the form of the draft order presented.

End of Document

TAB 3

Paras. 57-58

2006 CarswellOnt 1724
Ontario Superior Court of Justice [Commercial List]

Ontario (Securities Commission) v. Portus Alternative Asset Management Inc.

2006 CarswellOnt 1724, [2006] O.J. No. 1121, 19 C.B.R. (5th) 17

Ontario Securities Commission (Applicant) and Portus Alternative Asset Management Inc., Portus Asset Management Inc. and Bancnote Corp. (Respondents)

C. Campbell J.

Heard: March 2, 2006
Judgment: March 21, 2006
Docket: 05-CL-5792

Counsel: Gregory Azeff for Receiver
Melissa MacKewn for OSC
D. Knowles, S. Kukulowicz for MNPF Class
Harry Fogul for himself
Jefrey Glatt for himself
Jeffrey S. Leon, David A. Hausman for Managed Accounts Investors
Larry Ritchie, Jeremy Dacks for RBC, RBC OS
Susan Kushneryk for Berkshire Capital

Subject: Insolvency; Corporate and Commercial; Securities

Headnote

Bankruptcy and insolvency --- Priorities of claims — Secured claims — Forms of secured interests — Miscellaneous securities

Receiver was appointed to administer bankrupt investment company's property, assets and undertakings — Assets subject to receivership were derived from investment funds that flowed through two distinct investment structures — Market neutral structure held assets of investor group — Receiver located assets of market neutral group segregated from other funds in bank account — Only material role played by bankrupt management in market neutral structure was as investment adviser and trustee under related trust — Bankrupt management was not seller of units in structure or manager of funds — Investor group claimed entitlement to identifiable assets of structure, even in bankruptcy — Court ordered that all funds held by various entities of bankrupt, including investors group, were property of bankrupt management free and clear of all claims — Investor group brought motion for declaration of entitlement to segregation of assets of structure — Motion granted — Investor group's retention of entitlement to funds was not incompatible with public purpose of bankruptcy legislation — Fact that bankrupt management was securities firm only incidentally triggered legislative oversight and receivership coverage — Bankrupt management's actions in relation to structure were not those typically undertaken by securities firm — Bankrupt management was not necessary party to carrying out of objectives of structure and trustee duties could have easily been carried out by non-securities firm — Investor group was beneficiary under specific contract and was entitled to return of specific trust assets — Investor group was able to trace assets of structure directly to specific, segregated bank account.

Table of Authorities

Cases considered by *C. Campbell J.*:

Ashley v. Marlow Group Private Portfolio Management Inc. (January 17, 2006), Doc. 05-CL-005797 (Ont. S.C.J.) — followed

Edmonton Pipe Industry Pension Plan Trust Fund (Trustees of) v. 350914 Alberta Ltd. (2000), 2000 CarswellAlta 484, 187 D.L.R. (4th) 23, 80 Alta. L.R. (3d) 225, [2000] 8 W.W.R. 459, 18 C.B.R. (4th) 15, 24 C.C.P.B. 212, (sub nom. *350914 Alberta Ltd. (Bankrupt), Re)* 261 A.R. 96, (sub nom. *350914 Alberta Ltd. (Bankrupt), Re)* 225 W.A.C. 96, 2000 ABCA 146 (Alta. C.A.) — referred to

Eron Mortgage Corp., Re (1999), 1999 CarswellBC 307, 10 C.B.R. (4th) 257, 70 B.C.L.R. (3d) 381 (B.C. S.C.) — referred to

Eu v. Rosedale Realty Corp. (Trustee of) (1997), 33 O.R. (3d) 666, 1997 CarswellOnt 2519, 47 C.B.R. (3d) 218, 18 E.T.R. (2d) 288 (Ont. Bktcy.) — followed

General Chemical Canada Ltd., Re (2005), 2005 CarswellOnt 7306, C.E.B. & P.G.R. 8179 (Ont. S.C.J.) — distinguished

Ivaco Inc., Re (2005), 2005 CarswellOnt 3445, 47 C.C.P.B. 62, 12 C.B.R. (5th) 213 (Ont. S.C.J. [Commercial List]) — distinguished

Ontario (Securities Commission) v. Consortium Construction Inc. (1993), 1 C.C.L.S. 117, 1993 CarswellOnt 908 (Ont. Gen. Div. [Commercial List]) — referred to

Vantage Securities Inc., Re (1998), 1998 CarswellBC 2187, 9 C.B.R. (4th) 317 (B.C. S.C.) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

Pt. XII — referred to

s. 67(1) — referred to

s. 253 "customer name securities" — referred to

s. 253 "securities firm" — referred to

s. 255 — referred to

s. 261 — considered

s. 261(1) — referred to

s. 261(2)(a)(ii) — referred to

Pension Benefits Act, R.S.O. 1990, c. P.8
Generally — referred to

Securities Act, R.S.O. 1990, c. S.5
s. 129(1) — referred to

s. 129(2)(a) — referred to

MOTION by investor group for declaration of entitlement to segregation of assets of investment structure.

C. Campbell J.:

1 The collapse of the Portus Group ("Portus") has resulted in several complex issues, both factual and legal, the decisions of which will adversely affect one group of investors to the benefit of another group.

2 The issue on this motion is whether one group of investors, the Market Neutral Preservation Fund Investors ("MNPF Investors"), is entitled to segregation of the assets of the MNPF for their benefit or whether those assets should be a part of the bankruptcy of Portus Alternative Asset Management ("PAAM.") If the assets form part of the bankruptcy of PAMM, then the MNPF Investors would be treated in the same fashion as other investors, who are known as the Managed Account Investors ("MAI.")

3 The affairs of Portus are extremely complex and obscure. The Court is indebted to the Receiver and its counsel and to both sets of representative counsel for their diligence in pursuing the facts from a morass of incomplete records and presenting them in as coherent a fashion as possible.

4 As this decision will affect all Portus investors, particularly those of the MNPF, I strove to make this decision understandable by all investors. To that end, the reader is referred to Appendix A of these reasons, which is a Glossary of Terms prepared and agreed to by counsel, who have largely by their efforts been able to agree on the facts essential for the determination of this motion.

The MNPF Trust and Its Assets

5 The Receiver was appointed in respect of all of the property, assets and undertaking of Portus Alternative Asset Management Inc. ("PAAM"), Portus Asset Management Inc. ("PAM"), BancNote Corp. and related entities (collectively the "Portus Group") pursuant to the Orders of this Court, including, without limitation, the Order dated March 4, 2005 as amended and restated from time to time.

6 The assets subject to the receivership are derived from investment funds that flowed through two distinct investment structures:

(a) the MNPF Structure; and

(b) the Managed Accounts Structure (which includes the BNT Structures, the BLT Structures and the US Dollar Structure, as those terms are more specifically defined in Appendix A.)

7 As at the initial date of the receivership, the Ontario Bond Proceeds and the SGP Call Options (collectively "MNPF Assets"), as well as the majority of the other assets subject to the receivership, were located in an account with RBC Dominion Securities Inc. ("RBC DS") in the name of MNPF (the "MNPF Account.")

8 MNPF is an open-end unit trust that was originally established in February 2003. The trustee of MNPF was Computershare Trust Company of Canada ("Computershare") and the manager was Portus Asset Management ("PAM.") The sole role initially of PAAM was to be the "investment advisor."

9 The units in the MNPF Trust were sold to accredited investors through various registered market intermediaries without a prospectus, in reliance on prospectus exemptions available under Ontario securities law. The MNPF Investors

subscribed approximately $19.2 million. The Subscription Application for units of the MNPF Trust was sent to Unisen Inc., the subscription price was paid to PAM in trust and the subscription was to be confirmed by PAM on behalf of "the Fund" [*sic*] - that is, on behalf of the trustee of the MNPF Trust (Computershare.)

10 The MNPF Investors are entitled, on redemption of their units, to receive from the trustee of the MNPF Trust (Computershare) amounts equal to their proportionate shares of the liquidated value of the property of the MNPF Trust.

11 The following are the material elements of the MNPF Structure:

(a) MNPF Investors bought units in the MNPF trust through PAM, the manager of MNPF;

(b) MNPF used the $19.2 million in proceeds that it received from the sale of its units to purchase the Canadian Basket, a basket of non-dividend paying Canadian securities listed on The Toronto Stock Exchange. The Canadian Basket was pledged as security to RBC for the obligations of MNPF under the Forward Contract (as defined in Appendix A) and is held in a collateral account at RBC DS.

(c) The MNB Trust is an open-end trust established with PAM as investment manager and PAAM as trustee. RBC is the sole unitholder of the MNB Trust and owns all outstanding 1,900,165 units.

(d) MNPF entered into the Forward Contract with RBC. Under the terms of the agreement, RBC agreed to pay to MNPF on maturity an amount equal to the redemption proceeds of units in the MNB Trust in exchange for the delivery of the Canadian Basket to RBC by MNPF. In other words, RBC would receive the Canadian Basket and MNPF would receive the value of the assets of the MNB Trust.

(e) RBC executed a short sale of securities equivalent to those in the Canadian Basket. To effect the short sale, RBC borrowed the equivalent securities from its affiliated broker dealer, RBC DS, and funded and delivered collateral to RBC DS in the form of fixed income securities. RBC used the proceeds of the short sale to acquire units of the MNB Trust for $19.2 million.

(f) Based upon the foregoing, in order for MNPF to realize value, the MNB Trust was required to dispose of its assets for cash and then distribute its net asset value to RBC, as its sole unitholder. Pursuant to the Forward Contract, RBC was to deliver the net asset value of the MNB Trust units held by it to MNPF and MNPF would deliver the Canadian Basket to RBC. MNPF would then be in a position to distribute proceeds equal to the net asset value of the MNB Trust units to the MNPF Investors. In essence, RBC was to convert the assets of the MNB Trust into cash which would then be paid to MNPF for distribution to its investors.

12 MNPF and the MNB Trust were properly established in accordance with the disclosure contained in their respective offering memoranda.

13 The only material role played by PAAM in the MNPF Structure was as investment adviser to MNPF and trustee under the MNB Trust. It was not the "seller" of the units in MNPF nor was it the manager of the funds. PAAM does not hold any of the MNPF Assets.

14 The Court was advised and I accept that the complicated structure, particularly that involving the MNB Trust, was conceived to maximize investment return and at the same time to minimize the impact of tax (an essential component of the entire investment).

15 In the result, however, funds did not flow as intended under the various agreements. PAM received funds of approximately $19.2 million from MNPF Investors in respect of MNPF Series I between February 2003 and August 2003.

16 A total of $19.2 million was transferred into the MNPF Structure from the bank account used by PAM to receive funds from MNPF Investors. This $19.2 million was used to acquire the Canadian Basket. The Canadian Basket was then transferred to an account at RBC DS to act as collateral in respect of the MNPF Structure.

17 RBC subscribed to units in the MNB Trust and RBC made payment of $19.2 million to the MNB Trust, which was deposited in the MNB Trust account.

18 It is at this point in the cash flows that the transactions appear to depart from the stated MNPF Structure. Of the $19.2 million in the MNB Trust account, $16.3 million was transferred into the MNPF Account and $2.9 million was transferred to other Portus Group bank accounts. These latter funds were subsequently transferred out of said accounts but, at this time, the Receiver has not determined how these funds were used.

19 The $16.3 million transferred by the MNB Trust into the MNPF Account was used to acquire the SGC Call Options for $2.8 million (USD$2.1 million) and a Province of Ontario Zero Coupon bond (the "Ontario Bond") for $13.5 million. These MNPF Assets were not purchased with funds that originated from investments in the Managed Accounts Structure.

20 After the issuance of the OSC Cease Trade Orders on February 2, 2005 and February 10, 2005, the Ontario Bond (which was held in the MNPF Account) was sold and converted to cash of approximately $14.9 million on February 14, 2005, which remains in the MNPF Account (the "Ontario Bond Proceeds").

21 RBC is entitled, on redemption of its units, to receive from the trustee of the MNB Trust (PAAM) an amount equal to the liquidated value of the property of the MNB Trust.

22 The property of the MNB Trust was acquired using RBC's money. It consists of the approximately $14.9 million of Proceeds from the Government of Ontario bond, which bond was acquired by the trustee of the MNB Trust (PAAM) at a cost of approximately $13.5 million, and the SGP Call Options, which are contracts between Société Générale and the trustee of the MNB Trust that cost approximately $2.8 million.

23 The Proceeds were deposited to a custodial account at RBC DS that already contained approximately $91 million obtained from investors in the Managed Accounts Class. The Proceeds were the last money deposited to that custodial account prior to the receivership of the Portus Group. There were no withdrawals from that custodial account after the Proceeds were deposited.

24 When the SGP Call Options mature, Société Générale is required to make payments to the trustee of the MNB Trust (PAAM) in amounts calculated by reference to the performance of certain hedge funds.

25 The remaining approximately $2.9 million of the funds subscribed by RBC for its units of the MNB Trust never went into the MNB Trust. This sum was diverted, apparently via numerous payments of smaller sums, and has not been found.

26 The problem with the flow of funds that gives rise to this motion comes from the following as asserted by representative counsel for the MNPF Investors. The MNPF Account was opened as a prime brokerage account pursuant to the Settlement Services Agreement between Market Neutral Preservation Trust care of Paradigm Asset Management Inc. and RBC DS. The MNPF Account Statements, in the name of "Market Neutral Preservation Fund c/o Paradigm Asset Management Inc.," show that this account holds the MNPF Assets, as well as the majority of the assets from the Managed Accounts Structure. Paradigm Asset Management Inc. was the prior name of PAM. The MNPF Account is not in the name of PAAM, nor is it care of PAAM. In addition, the MNPF Account is with RBC DS which is designated as the Custodian/Prime Broker of the assets of MNPF. Accordingly, the assets in the MNPF Account are not assets of PAAM and PAAM is not contractually entitled to draw on the MNPF Account.

27 The MNPF Investors claim to be able to trace their $19.2 million deposit with PAM into units of MNPF. Such funds can then be traced into the Canadian Basket that was used by MNPF to acquire its rights under the Forward

Contract, by which RBC purchased units in the MNB Trust for $19.2 million, a portion of which was transferred to the MNPF Account and used to acquire the Ontario Bond and the SGP Call Options.

28 The MNPF Assets remain in the MNPF Account in the name of MNPF. While there are other assets in the MNPF Account that clearly originated from the Managed Accounts Structure, the MNPF Assets are identifiable and held within the MNPF Structure.

29 The MNPF Investors assert that, through MNPF, they are contractually entitled to seek the wind up of the Forward Contract and in doing so, recover the value of the MNPF Assets.

The Managed Account Structure

30 While PAM was conducting the MNPF offering, PAAM began a distinct business whereby it made its investment management services available to a less restrictive class of investors by offering to manage the assets of any clients of third party dealers on a discretionary basis rather than engaging in the direct sale of investment products, like MNPF, to "accredited investors." These become the Managed Account Investors.

31 Investors in the Managed Accounts Structure were required to execute an "account application" agreement with PAAM and to pay their investment monies to PAAM (the "Managed Accounts.") The Managed Accounts Structure had approximately 26,000 investors who invested approximately $730.6 million and USD $52.6 million.

32 The Managed Accounts Structure did not provide investors with actual units in a specific fund or trust, but rather the investment management agreements which were entered into between PAAM and the investors in respect of the Managed Accounts provided that:

> Until **[PAAM]** advises otherwise, **[PAAM]** initially intends to invest all of the assets in the Account in a structure intended to provide you with substantially the economic effect of an investment in BNT (the "Trust")...

33 Unlike the MNPF Structure, the Managed Accounts Structure was not properly established (for reasons not germane to this decision.) It directly received investor funds, was the counterparty to the Managed Accounts agreements and purportedly managed the accounts and invested the funds. The investments in the Managed Accounts Structure were commingled from receipt. Rather than ultimately depositing the assets derived from the Managed Accounts investor funds into BNT or BLT Trust Accounts, for some unknown reason the majority of such assets were deposited into the MNPF Account.

34 Of the total amount invested in the Managed Accounts Structure, $618.5 million was transferred into the MNPF Account. Funds placed into the MNPF Account were used to acquire the Notes connected with the various BNT/BLT Structures, however, not all of the funds from the Managed Accounts were used to purchase Notes and some of the $106 million remaining in the MNPF Account may be attributed to these 'un-invested' investor funds. The Notes were purchased using monies from the MNPF Account.

35 Counsel for MNPF Investors relies for their position on the differences between the MNPF and the Managed Accounts Structures, summarized as follows:

MNPF Structure	*Managed Accounts Structure*
• Investment pursuant to a Confidential Offering Memorandum to 'accredited investors'	• Investment of monies by a wide range of investors into managed accounts
• Investors paid monies to MNPF through PAM as manager	• Investors paid monies to PAAM as manager
• Investors received actual units in a trust	• Investors received the "economic effect" of certain investments
• Investors able to trace their investment funds into MNPF Assets	• Investors unable to trace their investment funds into any particular asset

• Trusts properly documented	• Incomplete or non-existent trust documentation
• Audited financial statements	• No audited financial statements
• MNPF Structure can easily be wound up with asset value being recovered by MNPF Investors	• Managed Accounts Structure is incomplete and therefore incapable of being wound up

Origin of the Issue

36 On November 9, 2005, by Order of this Court (the "Title Declaration Order"), it was declared that all of the assets held by various entities in the Portus Group were the property of PAAM free and clear of all claims and that all persons who invested funds with or through PAAM were customers of PAAM within the meaning of Part XII of the *Bankruptcy and Insolvency Act* (the "BIA.")

37 Pursuant to its provisions, the Title Declaration Order preserved the rights of the MNPF Investors in respect of the motion herein and delayed the filing of any assignment in bankruptcy in respect of PAAM or PAM until the determination of this motion.

38 The MNPF Investors assert a proprietary and tracing claim to the MNPF assets held in the name of PAAM and seek to have those assets turned over before the bankruptcy of PAAM occurs or alternatively in the bankruptcy.

39 The position asserted on behalf of the Managed Account Investors is that none of the MNPF Investors, the trustee of the MNPF Trust (Computershare) or the manager of the MNPF Trust (PAM) are unit holders of the MNB Trust, nor were the MNB Trust Assets acquired with money received from the MNPF Investors, and therefore none of those persons has a proprietary or tracing claim to either the Proceeds or the SGP Call Options.

40 The reasons for which it is so asserted that the MNPF Investors are unable to assert a proprietary and tracing claim to what are defined, are the following:

> (a) The trustee of the MNPF Trust (Computershare) has a proprietary claim to the Canadian Securities and the associated RBC Forward, which are the MNPF Trust Assets, and, if need be, Computershare can follow the Canadian Securities into the custodial account at RBC DS in which they are lodged;
>
> (b) The trustee of the MNB Trust (PAAM) has a proprietary claim to the Proceeds and the SGP Call Options, which are the MNB Trust Assets, and, if need be, PAAM can follow the Proceeds into the custodial account at RBC DS in which they are deposited.

41 Put at its most simplistic, the problem for the MNPF Investors is that for tax reasons, the MNPF Trust in which they are entitled to share is not the same trust as the MNB Trust, in which the assets now reside.

42 The events that followed the OSC Cease-Trade Orders on February 2 and 10, 2005, the subsequent Orders of this Court and the impending assignment into bankruptcy of PAM and PAAM have intervened to prevent what was intended as the course of that investment.

43 Indeed, it appears somewhat ironic that the account in which the funds at issue (the ultimate proceeds of the $19.2 million) is held is with RBC DS in the name of PAAM as trustee.

44 There appears to be no contractual reason for which PAAM had to be the trustee of the MNB Trust. It could have been any custodial agent. PAAM is, however, the Trustee, and PAAM is subject to Part XII of the BIA.

45 Succinctly put, the position of counsel for the Managed Account Investors is that the MNPF Investors are unable to establish any continuity between the money they invested and the MNB Trust Assets.

46 The position of the MNPF Investors is that while it is clear that the MNPF Account holds assets that originated from investment funds in the Managed Accounts Structure, the account was intended to hold only MNPF Assets and for some reason that has not been explained, the Managed Account Assets were added to it.

Law & Analysis

47 The central issue on this motion is whether the MNPF Assets are or should be the property of PAAM or its customers. MNPF Representative Counsel submits that MNPF is the party who is contractually entitled to call on RBC for the return of the MNPF Assets held in the MNPF Account. Such assets are properly located in an account in the name of MNPF for the benefit of the parties that are ultimately entitled to the benefit thereof, namely the MNPF Investors. The fact that PAAM is trustee of MNB Trust is in their view irrelevant.

48 The MNPF Assets, as well as the majority of the assets from the Managed Accounts Structure, are held in the MNPF Account. It is urged that the assets in the MNPF Account are not assets of PAAM and PAAM is not contractually entitled to draw on the MNPF Account. PAAM is contractually bound to see those funds turned over to MNPF Investors. It is submitted that the only party other than MNPF Investors who could assert a beneficiary claim to the MNPF Assets is RBC, as the beneficiary of the MNB Trust.

49 I accept the submission on behalf of MNPF Investors that they were and are contractually entitled to claim the balance in the account. The problem is there was no determination of entitlement made prior to the Receiving Order and now bankruptcy of PAAM is imminent. I accept that the MNPF Investors did not have any opportunity prior to the Cease Trade Order or indeed until to the Court Orders to know, much less do anything, about their contractual rights.

50 The MNPF Investors claim to be able to trace in equity entitlement to the MNB Assets held by RBC. Alternatively, they urge a determination that the provisions of Part XII of the BIA do not apply to the recovery of their investment.

The Tracing Claim

51 PAM, it is submitted, was simply an agent of its respective trustees: Computershare in the case of MNPF and PAAM in the case of MNB Trust, and their agency is immaterial to the rights of the MNPF Investors.

52 The custodial account at RBC into which the $14.9 million derived from the MNB Trust Units resides, also holds the $91 million from funds from investors in the Managed Accounts Class. The position of the MNPF Investors is that such assets are owned by the Trustees (Computershare or PAAM) and held by PAM as agent for either as appropriate to their contractual interest.

53 The MNPF Investors claim to be able to trace their proprietary interests either in law or in equity through any number of transactions so long as there is an unbroken continuity between transactions and the assets do not pass into the hands of a bona fide purchaser for value.

54 The MNPF Investors claim entitlement to their identifiable assets even in bankruptcy. This claim is disputed by counsel for the MAC Investors and will be dealt with below.

55 RBC is contractually bound under certain conditions to return the MNB Trust assets to Computershare as the trustee for the unitholders of the MNPF Fund.

56 I accept that but for the Receivership Order, the assets in the MNPF Account would not form part of the PAAM bankruptcy estate. The issue then becomes, can or should the Court intervene in effect on the eve of bankruptcy to accomplish what would have occurred had the MNPF Investors been entitled to pursue their contractual rights.

57 The Receiving Order in this matter as amended and restated appointed KPMG as Receiver on the application of the OSC pursuant to s. 129 of the *Securities Act*, R.S.O. 1990 c. S.5, which reads in part as follows:

(1) The Commission may apply to the Ontario Court (General Division) for an order appointing a receiver, receiver and manager, trustee or liquidator of all or any part of the property of any person or company. 1994, c. 11, s. 375.

(2) No order shall be made under subsection (1) unless the court is satisfied that,

(a) the appointment of a receiver, receiver and manager, trustee or liquidator of all or any part of the property of the person or company is in the best interests of the creditors of the person or company or of persons or companies any of whose property is in the possession or under the control of the person or company or the security holders of or subscribers to the person or company ...

58 It was apparent from the material filed with the Court at the time that there was significant regulatory non-compliance by the Portus Group, a failure of reporting both to the OSC and the investors, and likely financial impairment of assets. It was also apparent that significant investigation would be required to unravel various transactions and understand the true state of affairs of the Portus Group.

59 This uncertainty was recognized in various provisions of the Initial Order, including stay provisions that restrained proceedings against the Receiver in respect of property recovered or against the debtor entities except with leave ultimately of the Court.

60 The exception has been this motion, which was specifically provided for in the Order of November 9, 2005. It was recognized that the cash and securities in the MNPF Account held by PAAM to which the MNPF Investors could have no claim, would vest in the trustee of PAAM for the ultimate benefit of investors.

The Claim in Trust

61 The Court is asked to find that the contractual documents provide that the funds now in question are entitled to be held by PAAM as the MNB Trustee (under valid agreements of trust). To this limited degree there appears to be common ground between the MNPF Investors and the Managed Account Class Investors ("MAC Investors.")

62 The point of difference is that the MAC counsel submits that PAAM (or the Receiver holding its rights) obtains proprietary rights in and to the trust property (the MNB Assets), which in effect are frozen as of the date of the Receiving Order, since to do otherwise would impair the tax effectiveness of the entire structure.

63 MNPF counsel on behalf of their client Investors submit that the three certainties required to establish a trust by the MNB Trust Agreement and over the MNB Assets are met, namely (1) intention; (2) subject matter; and (3) objects. As a result, it is submitted the funds in question are and have always been intended to be the subject of the Trust and RBC and its sole beneficiary. (See Waters, Gilen and Smith, *Waters' Law of Trusts in Canada* 3rd ed. (Toronto: Thomson Carswell, 2005) at 132.)

64 Can the MNB Trustee then follow the claim to the MNB Trust Assets into the custodial account at RBC in which they are deposited and if so, do they form part of the assets of PAAM for the benefit of all entitled to share in the assets of PAAM or can the MNPF Investors follow those proceeds to recovery on their behalf?

65 The MNPF Assets are located in the MNPF Account. Accordingly, the only party ultimately beneficially entitled to such assets by contract is MNPF. The simple result is that, in absence of a Court order vesting such assets in another party, MNPF is entitled to such value subject only to settlement of its obligations to RBC under the Forward Contract (i.e. delivery of the Canadian Basket). The proprietary rights of the MNPF Investors in the MNPF Assets flow from their ownership of the units of MNPF trust.

66 I am satisfied that the trust certainties are met on the facts of this case and that the MNPF Assets are traceable back to the MNPF Investors, they are in an account in the name of MNPF and are appropriately and beneficially the entitlement of MNPF Investors

67 I am satisfied that the entire MNPF Structure (i.e. the MNPF Trust Agreement, the Forward Contract, the MNB Trust Agreement, and the pledge of the Canadian Basket) on the evidence evokes the intention of the parties that the ultimate beneficiaries of the value of the assets held by the MNB Trust are the MNPF Investors. It is the MNPF Investors who are to ultimately receive the benefit or accept the risk associated with the increase or decrease in value of the assets held in the MNB Trust. Therefore, they are in fact the parties for whose benefit the MNPF Assets are being held.

68 Thus, the certainty of intention is to be inferred from the contractual documents and all the circumstances surrounding the transactions. I agree with Cameron J., who said in *Eu v. Rosedale Realty Corp. (Trustee of)* (1997), 33 O.R. (3d) 666 (Ont. Bktcy.):

> The existence of a trust does not depend on the existence of the contract but on the intent of the settlor which must be determined from the surrounding circumstances. The use of the word "trust" or placing the money in a "trust account" is neither conclusive nor indispensable to determine the settlor's intent: *Re Kayford Ltd.*, [1975] 1 All E.R. 604 (Ch. D.); *Re Chelsea Cloisters Ltd.* (1980), 41 P. & C.R. 98 (C.A.) at p. 116; *Bullock v. Key Property Management Inc.* (1992), 46 E.T.R. 275 (Ont. Gen. Div.); *McEachren v. Royal Bank of Canada* (1990), 78 Alta. L.R. (2d) 158, [1991] 2 W.W.R. 702 (Q.B.).

69 Certainty of subject matter has in this case taken some considerable time and effort on the part both of the Receiver and other parties and counsel to ascertain. Certainty of subject matter requires that the subject matter of the trust be described with sufficient exactness to permit such matter to be ascertained at the time the trust was created. Further, certainty of subject matter may be found where the trust document creates "a formula or method for identifying" the subject matter of the trust. (See *Edmonton Pipe Industry Pension Plan Trust Fund (Trustees of) v. 350914 Alberta Ltd.* (2000), 187 D.L.R. (4th) 23 (Alta. C.A.) at para. 21)

70 The MNPF Trust Agreement, the Forward Contract and the MNB Trust Agreement, when read together, permit the assets held by the MNB Trust to be identified as those assets that are being held for the benefit of the MNPF Investors. There does not appear to be any dispute that it is both the SGP Call Options and the Ontario Bond Proceeds that would be the subject matter of the trust in these circumstances.

71 I am satisfied that the third test, namely certainty of objects, namely to benefit the holders of unit of the MNPF Trust, is met and those individuals are capable of identification. They can trace the funds they invested both to the account held on their behalf and to the assets of the MNB Trust.

72 Where trust assets can be traced, there must be an equitable reason to deprive the beneficiaries of the property of the trust. Once trust property can be traced and is ascertainable, it too will be trust property. [See *Eron Mortgage Corp., Re* (1999), 10 C.B.R. (4th) 257 (B.C. S.C.) per Tysoe J. of the British Columbia Supreme Court at paragraph 52 and *Ontario (Securities Commission) v. Consortium Construction Inc.* (1993), 1 C.C.L.S. 117 (Ont. Gen. Div. [Commercial List]) per Rosenberg J. of this Court at paragraph 64.]

73 I am satisfied that the trust assets can be traced and that the only equitable reason to deprive might be said to be the operation of s. 261 and related provisions of the *Bankruptcy and Insolvency Act*.

Part XII of the Bankruptcy and Insolvency Act

74 As a test as to whether it is just and equitable to segregate assets for the benefit of MNPF Investors prior to the bankruptcy of PAAM, regard should be made of what the rights of MNPF Investors would be within bankruptcy.

75 In my view, it is unlikely that a Court would find it just and equitable to give effect to priority entitlement within a receivership immediately prior to bankruptcy if the purpose for doing so is to affect the rights of parties that arise in the bankruptcy. This would tend to defeat the purpose of Part XII, given its history and judicial interpretation.

76 There are few decisions dealing with Part XII, which provisions were introduced into the BIA less than a decade ago to deal with the particular problems arising from the insolvency of securities firms.

77 The leading decision is that of Brenner J. (now Chief Justice) of the British Columbia Supreme Court in *Vantage Securities Inc., Re* (1998), 9 C.B.R. (4th) 317 (B.C. S.C.) in which it was held that s. 261 of the BIA vested all cash held by a securities firm at the date of bankruptcy in the trustee and not just cash beneficially owned by the securities firm.

78 In reaching that conclusion, Brenner J. reviewed the operative sections of the BIA, which follow and their legislative history:

> Section 261(1): Vesting of securities, etc., in trustee
>
> Where a securities firm becomes bankrupt, securities owned by the securities firm and securities and cash held by or for the account of the securities firm or a customer, other than customer name securities, vest in the trustee.
>
> Section 255: Conflicts
>
> All the provisions of this Act, in so far as they are applicable, apply in respect of bankruptcies under this Part, but if a conflict arises between the application of the provisions of this Part and the other provisions of this Act, the provisions of this Part prevail.
>
> Section 67(1)(a): Property of bankrupt
>
> The property of a bankrupt divisible among his creditors shall not comprise
>
> (a) property held by the bankrupt in trust for any other person,

79 The applicant in *Vantage Securities Inc., Re* submitted that s. 261 was intended to apply only to the cash owned by or for the account of the securities firm or its customers at the date of bankruptcy - not all cash, including trust cash, that the trustee urged vested in it at bankruptcy.

80 The decision recognized the background for the Part XII amendments, described in an article by B.D. Turcotte, "Securities Firm Bankruptcies" (1997) 17:3 *Insolvency Bulletin* 75:

> The bankruptcy of a securities firm seems to frustrate virtually all of the aforementioned goals and principles which the BIA seeks to promote. In many regards, this is due to the complexity of the securities industry. Presently, securities firm insolvencies are administered in receiverships and under the BIA, despite the absence of any specific reference in the Act to such entities or to any of the particular problems which trustees and lawyers confront in the administration of the affairs of a bankrupt securities firm. The legal issues involved in such insolvencies are complex and center around the ownership rights of customers with respect to specific securities.

81 At paragraphs 12 and 13 of *Vantage Securities Inc., Re, supra*, Brenner J. commented on the extent and application of the then new Part XII and its application:

> [12] By passing Part XII, Parliament decided to try to simplify securities firm bankruptcies by doing away with the myriad of competing trust claims and the associated legal costs and time delays in securities firm bankruptcies. Parliament recognized that securities firms deal in principally two assets: cash and securities, and so for those two asset classes, Parliament enacted the new rules in Part XII. Under s. 261, Parliament removed the entire concept of trust law for securities (except where those securities are "customer named securities") and cash. It is to be noted

> that Part XII does not change the existing trust principles in respect of any other real or personal property held by a securities firm at the date of bankruptcy.
>
> [13] In my view, when I consider the plain wording of s. 261(1) and when I consider the apparent legislative intent underpinning Part XII, I conclude that s. 261 vests all cash held by a securities firm at the date of bankruptcy in the trustee and not just the cash owned beneficially by the securities firm. Accordingly, I would dismiss Guardian Angel's appeal from the decision of the trustee, and confirm his decision to disallow its trust claim.

82 More recently, Mesbur J. in *Ashley v. Marlow Group Private Portfolio Management Inc.* (January 17, 2006), Doc. 05-CL-005797 (Ont. S.C.J.) said the following concerning Part XII:

> [29] In order to put the issues into context, it is important to consider Part XII of the *Bankruptcy and Insolvency Act*, and its purpose. It is a relatively new part of the *Act*, having come into force in 1997, in response to what were seen as undue complexities involved in the bankruptcies of securities firms.
>
> [30] Part XII of the *Bankruptcy and Insolvency Act* was enacted to simplify and streamline the administration of a bankrupt securities firm's estate. Before Part XII, administration of these estates was time-consuming, complex, uncertain, and costly to both investors and creditors. Customers of the bankrupt firm would raise trust and tracing concepts, which proved difficult to determine. Often, while waiting for adjudication of these trust claims, the Trustee would have to continue to hold potentially volatile securities, whose value could plummet, while customers battled over their entitlement to them.
>
> [31] What Part XII does is to create a particular class of securities that are to be returned to customers. These are called "customer name securities". All other securities and cash held by the bankrupt firm are to be pooled in a "customer pool fund", and distributed among all the customers of the firm on a *pro rata* basis. It is easy to see why some customers would like to avoid the application of Part XII altogether, or, alternatively, have their securities designated as customer name securities, in order to avoid pooling them with other customers.
>
> [32] It should be noted that the customer pool fund is paid out before any creditors are paid at all. If significant securities are returned to customers and do not fall into the pool, the pool will obviously be smaller. ...

83 The MNPF Investors urge that their claims should be considered as if they were specifically "customer name securities."

84 The sums standing in the MNPF account are not claimed in their entirety. Rather, the MNPF Investors claim only those sums that can be clearly traced on constructive trust principles. The remainder would therefore vest in the trustee of PAAM for the benefit of MAC Investors.

85 As to those assets of the MNB Trust to which RBC and ultimately the MNPF Investors are entitled, counsel submits there is no juristic reason to transfer those assets to PAAM simply because it is the trustee of the MNB Trust, since it has no beneficial interest in such assets.

86 The MNPF Investors' argument is that the MNB Trust assets consisting of the SGP Call Options and the Ontario Bond can fall within the class of "customer name securities" within s. 261 of the BIA and therefore do not automatically vest in the PAAM bankruptcy trustee.

87 MNPF counsel submits that pursuant to s. 253 of the BIA, the Ontario Bond and SGP Call Options would qualify as customer name securities, if they are (i) registered in the name of a customer and (ii) on the date of bankruptcy, held by or on behalf of the securities firm for the benefit of the customer. It is to be noted that there is no definition of "registered" under Part XII of the BIA.

88 In the present case, it is urged the SGP Call Options are in the name of MNB Trust and would therefore be customer named securities of MNB Trust. The Ontario Bond was always located in an account in the name of MNPF and would

be a customer named security in favour of MNPF. The result is that such assets would not vest in the trustee of PAAM (the same effect as segregating the MNPF Assets).

89 In addition, it is submitted s. 67(1) of the BIA exempts property held in trust by the bankrupt for another person. PAAM was not intended to be anything more than a trustee.

90 One issue is that the Ontario Bond was converted into cash in the MNPF Account on February 14, 2005, after the OSC had issued its cease trade order with the effect that it is no longer a security. The Ontario Bond was set to mature in 2012. However, when considering the equities of segregating the MNPF Assets, it is notable that but for the actions of Portus by converting the Ontario Bond prior to its maturity date and immediately prior to the receivership, the MNB Trust (and ultimately the MNPF Investors) would have been able to claim the Ontario Bond as a customer name security.

91 Unlike the situations in both *Vantage Securities Inc., Re* and *Marlow, supra*, the Ontario Bond was converted into cash in error and the cash account inadvertently mixed with funds of other investors.

92 In summary, at the time of the first Receiving Order in this matter in February 2005, the affairs of Portus were in such disarray that it was not practical to easily determine the entitlement of various investor classes.

93 By the time of the Title Declaration Order in November 2005, the Court was made aware that the MNPF Investors had contractual rights under the MNPF Trust and that the account in which MNPF assets were held also held, for some reason that is not clear and for which no business reason has been proffered, assets to which the MA Investors are entitled.

94 In addition, for no logical or particular business reason, PAAM became the Trustee of the MNB Trust and held the assets of the MNPF Investors. In doing so, it happened to be a securities firm subject to the provisions of the BIA but performed no functions as a securities firm in respect of such assets or fund.

95 Counsel for RBC supported the position of the MNPF Investors and confirmed that from the perspective of his client, the MNB Trust assets are readily identifiable, MNPF was properly structured and that the assets in question were never assets of PAAM and can be easily segregated.

96 The position of the MAC Investors is that both of the Proceeds and the SGP Call Options will vest in PAAM's bankruptcy trustee and be included in the customer pool fund upon a bankruptcy of PAAM under Part XII of the BIA. The reasons in support of this proposition are set out in the following extracts from the factum on behalf of the MAC Investors:

> (a) The Proceeds, being cash held by or for PAAM, will vest in PAAM's bankruptcy trustee and form part of the customer pool fund under s. 26.1(1) of the BIA.
>
> (b) If the SGP Call Options are eligible financial contracts they will vest in PAAM's bankruptcy trustee but not form part of the customer pool fund. However, that is immaterial because it is not those pieces of paper but, rather, the proceeds of those contracts that are of value.
>
> (c) The proceeds of the SGP Call Options, being cash held by PAAM (if paid before bankruptcy) or cash obtained by its bankruptcy trustee (if paid after the date of bankruptcy) will vest in PAAM's bankruptcy trustee and form part of the customer pool fund.
>
> (d) The foregoing will be so regardless that RBC can trace its invested money into the MNB Trust Assets.

97 The Proceeds clearly are "cash," as expansively defined in the BIA. The proceeds of the SGP Call Options clearly also will be cash, as so defined. BIA, section 261(2)(ii), counsel submits.

98 Mr. Leon for the MAC Investors urges that the Proceeds are held "by" PAAM - or held "for" PAAM, which comes to the same - within the meaning of the BIA. The proceeds of the SGP Call Options will be paid to and held by

PAAM (if paid before bankruptcy) or obtained by PAAM's bankruptcy trustee (if paid after the date of bankruptcy). All of this cash will vest in the bankruptcy trustee of PAAM and go into the customer pool fund pursuant to section 261(2)(ii) of the BIA, which applies to both cash on hand at the date of bankruptcy and cash obtained by the bankruptcy trustee thereafter.

99 This has been a difficult set of factual circumstances to rationalize within the context of the BIA regime.

100 I fully accept the general proposition as set out in *Vantage Securities Inc., Re, supra* and confirmed in *Marlow, supra* that the regime of s. 261 and related sections of the BIA went as far as possible to eliminate competing claims by vesting most assets of a bankrupt securities firm in the bankruptcy trustee.

101 The fact that this motion is made before, rather than during, bankruptcy should not be determinative. Whereas here there is a receiving order that places control of assets in a receiver, in circumstances where clearly bankruptcy is to be anticipated, regard should be had to the effect on the result assuming bankruptcy. The determination during a receivership that contemplates bankruptcy should not produce a substantially different result from what would occur in bankruptcy, given the public goals of Part XII of the BIA.

102 Unlike the situations in *Ivaco Inc., Re* (2005), 12 C.B.R. (5th) 213 (Ont. S.C.J. [Commercial List]) and *General Chemical Canada Ltd., Re*, [2005] O.J. No. 5436, 2005 CarswellOnt 7306 (Ont. S.C.J.), both decisions of this Court, the claims of the MNPF Investors do not arise in a deemed trust. They commenced with an actual trust.

103 In both *Ivaco Inc., Re* and *General Chemical Canada Ltd., Re*, the claims arose under the provisions of company pension plans and the operation of the *Pension Benefits Act* by which pension benefit claims sought entitlement to assets of petitioning creditors immediately before bankruptcy.

104 The MNPF Investors claim their entitlement through the contractual entitlement of the MNPF Trust, which is a specific trust pursuant to agreement between PAM and Computershare dated May 23, 2003 and of the MNB Trust, which is part of the contractual arrangement.

105 It was neither necessary to nor intended by the provision of those specific trusts that assets or entitlement would end up in PAAM and certainly not in circumstances where they would be commingled and subject to the claims of other creditors of PAAM.

106 I have concluded that while the provisions of s. 261 of the BIA and related sections were intended to bring clarification, certainty and expedition to claims against securities firms, they were not intended to operate to defeat claims arising from a specific trust where those assets have been improperly commingled and can be traced.

107 I accept that Part XII of the BIA was enacted to overcome issues that arose in the context of the bankruptcies of securities firms by ranking investors equally against the customer pool fund and ranking investors ahead of others with respect to the cash and securities in the customer pool fund.

108 The broad public purpose behind the regime of s. 261 for securities firm bankruptcies is evidenced by the override of Part XII to other sections of the BIA provided for in s. 255.

109 I accept that the avoidance of the time and cost associated with resolution of complicated claims to priorities involving securities firms is a mandate in clear language in the statute.

110 The question is, does s. 261(1) have such broad reach that it should catch all transactions to which the section might apply, no matter how incidental they may be.

111 Counsel for the MAC Investors says yes. PAAM is a securities firms and it is entitled to receive "cash," which then will vest in its bankruptcy trustee and be subject to the provisions of s. 261.

112 In my view, I can only be satisfied that it is not necessary to give effect to this argument if there is at least compelling reason that the Part XII regime need not apply.

113 I have concluded that the position advanced on behalf of the MNPF Investors is not incompatible with the public purpose behind Part XII for the following reasons:

(i) the MNPF Investors are beneficiaries under specific contract and are entitled to return of specific trust assets;

(ii) PAAM was not a necessary party to the carrying out of the objects of that trust. It could have been any entity;

(iii) the trustee duties of PAAM could have been carried out by a non-securities firm as trustee;

(iv) the MNPF Investors are able to trace the assets of the MNPF Trust directly to the account at RBC — in which it holds the MNPF Account as well as the MNB Trust;

(v) section 253 of the BIA defines "securities firm" as follows:

> "securities firm" means a person who carries on the business of buying and selling securities from, to or for a customer, whether or not as a member of an exchange, as principal, or agent or mandatary, and includes any person required to be registered to enter into securities transactions with the public, but does not include a corporate entity that is not a corporation within the meaning of section 2

In performing trustee functions in respect of MNPF Investors, PAAM was not acting as a securities firm.

114 The fact that PAAM happened to be a securities firm, and incidentally that is the basis that s. 261 is said to apply, should not be conclusive.

115 In my view, it is not inconsistent with the public purpose of Part XII to exclude investor claims to which there is a clear, traceable contractual entitlement caught only because there is said to be the incidental involvement of a securities firm, when the transactions could have been lawfully and properly carried out by a non-securities firm.

116 In other words, PAAM in acting as trustee of MNB Trust was not acting *qua* a securities firm.

117 While each case must stand on its own facts, I would hope that the circumstances in which a claim such as that of the MNPF Investors would arise would be infrequent. Otherwise, the very goal of Part XII would be impaired.

118 I am bolstered in my conclusion by the fact that absent the application of s. 261 to the MNPF Investors' claim, s. 67(1) of the BIA operates to preserve their trust claim in bankruptcy.

119 The position advanced ably by Mr. Leon would result in the triumph of form over substance. I do not think that it was the intention of Parliament to allow s. 261 to operate in a fashion with the effect that clearly ascertainable legal and equitable rights capable of being determined prior to bankruptcy be subsumed in bankruptcy.

120 For the above reasons, I have concluded that the MNPF Investors are entitled to the funds in the MNPF/Co PAM Account in the name of PAAM as trustee and to the proceeds of the MNB Trust at RBC that can be segregated as being for the account of MNPF Investors.

121 I wish to thank all counsel for their dedicated effort at simplifying issues from a complicated factual morass.

122 If further direction is required to give effect to this decision, I may be spoken to. I would not think that costs are appropriate, but if any party feels otherwise, submissions in writing within 10 days are to be made.

Motion granted.

APPENDIX — A to decision of C. Campbell J. in 05-CL-5792 dated March 21, 2006

MNPF MOTION
GLOSSARY OF TERMS
IN MNPF REPRESENTATIVE COUNSEL ("FMC")
- AND -
MANAGED ACCOUNTS CLASS REPRESENTATIVE COUNSEL
("FASKENS")

Facta

1. "*Balance*" means the balance of the cash and securities in the MNPF Account

2. "*BIA*" means the *Bankruptcy and Insolvency Act*

3. "*BLT Series I*" as defined in the Ninth Report means Series I of the BLT Structures

4. "*BLT Series II*" as defined in the Ninth Report means Series II of the BLT Structures

5. "*BLT/BNT Structure*" as defined in the Ninth Report means BancLife Trust Series and BancNote Trust Series investment structures

6. "*BNT Series*" as defined in the Ninth Report means BancNote Trust Series

7. "*BNT Series II*" as defined in the Ninth Report means Series II of the BNT Structures

8. "*BNT/BLT Managed Accounts*" as defined in the Ninth Report means accounts in the BNT Structures and the BLT Structures, in which Investors were required to execute an "account application" agreement with PAAM and to pay their investment monies to PAAM

9. "*BNT Trust Units*" as defined in the Ninth Report means units in the BancNote Trust investment structure

10. "*Canadian Basket*" means a basket of non-dividend-paying Canadian securities listed on the Toronto Stock Exchange purchased from the sale of units of the MNPF to "accredited investors" [a/k/a the Canadian Securities or Canadian Shares, when used by Faskens]

11. "*Canadian Securities*" as defined in the Ninth Report means the non-dividend paying Canadian securities that under the purported BNT and BLT structures, PAAM represented that it would purchase

12. "*Canadian Securities*" or "*Canadian Shares*", when used by Faskens, means the Canadian shares purchased by PAM as agent for the trustee of the MNPF Trust [a/k/a the Canadian Basket]

13. "*Computershare*" means Computershare Trust Company of Canada

14. "*Custodian/Prime Broker*" means RBC DS

15. "*Deposit Accounts*" means the two deposit accounts that initially received the Managed Account funds

16. "*February 10, 2005 Cease Trade Order*" means the Ontario Securities Commission Cease Trade Order with respect to PAAM and Boaz Manor made February 10, 2005

17. "*February 2, 2005 Cease Trade Order*" means the Ontario Securities Commission Cease Trade Order with respect to PAAM made February 2, 2005

18. "*Forward Contract*" as defined in the Ninth Report means the forward contract that has been entered into between RBC and MNPF pursuant to which RBC will pay to MNPF, on the maturity date or pre-settlement date, as applicable, an amount equal to the redemption proceeds of units of MNB Trust in exchange for the delivery by MNPF to RBC of the Canadian Basket [a/k/a the RBC Forward]

19. "*ISDA Master Agreement*" means the ISDA Master Agreement and Schedule dated June 23, 2003 between RBC and PAM as manager of MNPF together with related Letter of Representation dated July 18, 2003

20. "*iUnits*" means iUnits of a Government of Canada Five Year Bond Fund

21. "*JCD*" means the Joint Compendium of Documents of FMC and Faskens

22. "*Managed Account Representative Subscription Agreement*" means the PAAM RSP/Non-RSP Account Portfolio Management Agreement

23. "*Managed Accounts*" means accounts in the Managed Accounts Structure, in which Investors were required to execute an "account application" agreement with PAAM and to pay their investment monies to PAAM

24. "*Managed Account Class*" as defined in the October 14, 2005 Order means the persons who invested funds with or through PAAM in respect of its managed account structure

25. "*Managed Accounts Class Representative Counsel*" means Jeffrey S. Leon of Fasken Martineau DuMoulin LLP

26. "*Managed Accounts Investors*" as defined in the Ninth Report means Investors who invested in the Managed Account Structures

27. "*Managed Account Structures*" means the BancNote Trust Series investment structures, the BancLife Trust Series investment structures and the US Dollar investment structure

28. "*Master Trust Agreement*" as defined in the Ninth Report means the Master Trust Agreement dated September 17, 2004 pursuant to which the units of the BNT Series III to BNT Series XII(a) were to be issued

29. "*MNB Trust*" means an open-end trust established with PAM as investment manager and PAAM as trustee

30. "*MNB Trust Agreement*" means the MNB Trust Agreement between PAM as manager and PAAM as trustee dated June 20, 2003

31. "*MNB Trust Assets*" means the Ontario Bond Proceeds [a/k/a/ the Proceeds] and the SGP Call Options collectively

32. "*MNB Trust Financial Statements*" means MNB Trust Annual Audited Financial Statements as at December 31, 2003

33. "*MNB Trust OM*" means the Offering Memorandum of the MNB Trust

34. "*MNPF*" means Market Neutral Preservation Fund

35. "*MNPF Account*" means an account with RBC DS in the name of MNPF c/o PAM in which the MNPF Assets, as well as the majority of the other assets subject to the receivership, were located

36. "*MNPF Account Statements*" means RBC DS Account 475-80025-2-3 Statements for June 2003 and February 2005

37. "*MNPF Assets*" means collectively the Ontario Bond Proceeds [a/k/a the Proceeds] and the SGP Call Options

38. "*MNPF Class*" as defined in the October 14, 2005 Order means the persons who invested with or through PAAM in reference to the MNPF

39. "*MNPF Cash Flow*" means the Market Neutral Preservation Fund Series I Description of Cash Flow (from the Receiver) providing additional details following the Ninth Report

40. "*MNPF Financial Statements*" means the MNPF Annual Financial Statement and Auditors' Report for the term ended December 31, 2003

41. "*MNPF Investors*" as defined in the Ninth Report means all persons who made investments in the MNPF or, when used by Faskens, means the unit holders of the MNPF Trust

42. "*MNPF Offering Memorandum*" or "*MNPF OM*" means the Confidential Offering Memorandum for Class A and Class F Units of MNPF dated April 29, 2003

43. "*MNPF Representative Counsel*" means Douglas I. Knowles, Q.C. of Fraser Milner Casgrain LLP

44. "*MNPF Representative Counsel Order*" means the Order made by the Honourable Mr. Justice Campbell dated October 14, 2005

45. "*MNPF Structures*" means the MNPF, MNB Trust and Market Neutral Preservation Fund Series II and Series III investment structures

46. "*MNPF Subscription Application*" means the Market Neutral Preservation Fund Subscription Application [a/k/a the Subscription Application]

47. "*MNPF Trust Agreement*" means the Amended and Restated MNPF Trust Agreement between PAM and Computershare dated May 23, 2003

48. "*MNPF Trust*" means the unit trust governed by the MNPF Trust Agreement

49. "*MNPF Trust Assets*" means the Canadian Basket [a/k/a the Canadian Securities or Canadian Shares, when used by Faskens] and the Forward Contract [a/k/a the RBC Forward] collectively

50. "*Ninth Report*" means the Ninth Report of the Receiver dated September 19, 2005

51. "*Ontario Bond*" means the Province of Ontario Zero Coupon bond

52. "*Ontario Bond Proceeds*" means the proceeds of the Ontario Bond, which was sold and converted to cash of approximately $14.9 million on February 14, 2005 [a/k/a/ the Proceeds]

53. "*OSC Cease Trade Orders*" means the Ontario Securities Commission cease trade Orders issued on February 2, 2005 and February 10, 2005

54. "*PAAM*" means Portus Alternative Asset Management Inc.

55. "*PAM*" means Portus Asset Management Inc.

56. "*Portus Group*" means collectively PAAM, PAM, BancNote Corp. and related entities

57. "*Proceeds*" means the Ontario Bond Proceeds

58. "*RBC*" means Royal Bank of Canada

59. "*RBC DS*" means RBC Dominion Securities Inc.

60. "*RBC Forward*" means the Forward Contract

61. "*RBC Forward Confirmation*" means the Amended and Restated Confirmation of Share Basket Forward Transaction dated June 26, 2003 issued by RBC DS to PAM

62. "*Receiver*" means KPMG Inc. in its capacity as receiver of the Portus Group

63. "*Settlement Services Agreement*" means the Settlement Services Agreement dated January 14, 2003 between Market Neutral Preservation Trust and RBC DS

64. "*SGP Call Option Confirmation*" means Confirmation of Call Option Transaction between MNB Trust by its trustee Paradigm Alternative Asset Management Inc. and Société Générale dated June 25, 2003

65. "*SGP Call Options*" as defined in the Ninth Report means 140 cash-settled call options sold by Société Générale, the parent of Société Générale (Canada)

66. "*Subscription Application*" means the MNPF Subscription Application

67. "*Title Declaration Endorsement*" means the Endorsement of the Honourable Mr. Justice Campbell made November 9, 2005 and a correction thereto released November 30, 2005 in court file no. 05-CL-5792 [unreported]

68. "*Title Declaration Order*" means the Order of the Honourable Mr. Justice Campbell made on November 9, 2005

69. "*Trust Units*" as defined in the Ninth Report means units in one of the BNT or BLT Structures

End of Document

TAB 4

pp. 592 and 595

The Superintendent of Brokers *Appellant*

v.

Murray Pezim, Lawrence Page and John Ivany *Respondents*

and

The Attorney General of British Columbia, the Ontario Securities Commission, the Alberta Securities Commission and the Securities Dealers Society of Ontario *Interveners*

and between

The British Columbia Securities Commission *Appellant*

v.

Murray Pezim, Lawrence Page and John Ivany *Respondents*

and

The Attorney General of British Columbia, the Ontario Securities Commission, the Alberta Securities Commission and the Securities Dealers Society of Ontario *Interveners*

INDEXED AS: PEZIM *v.* BRITISH COLUMBIA (SUPERINTENDENT OF BROKERS)

File Nos.: 23107, 23113.

1994: February 24; 1994: June 23.

Present: Lamer C.J. and La Forest, Sopinka, Gonthier, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Administrative law — Judicial review — Securities Commission — Commission part of larger regulatory framework — No privative clause and right of appeal —

Superintendent of Brokers *Appelant*

c.

Murray Pezim, Lawrence Page et John Ivany *Intimés*

et

Procureur général de la Colombie-Britannique, Commission des valeurs mobilières de l'Ontario, Alberta Securities Commission et Securities Dealers Society of Ontario *Intervenants*

et entre

British Columbia Securities Commission *Appelante*

c.

Murray Pezim, Lawrence Page et John Ivany *Intimés*

et

Procureur général de la Colombie-Britannique, Commission des valeurs mobilières de l'Ontario, Alberta Securities Commission et Securities Dealers Society of Ontario *Intervenants*

RÉPERTORIÉ: PEZIM *c.* COLOMBIE-BRITANNIQUE (SUPERINTENDENT OF BROKERS)

Nos du greffe: 23107, 23113.

1994: 24 février; 1994: 23 juin.

Présents: Le juge en chef Lamer et les juges La Forest, Sopinka, Gonthier, McLachlin, Iacobucci et Major.

EN APPEL DE LA COUR D'APPEL DE LA COLOMBIE-BRITANNIQUE

Droit administratif — Contrôle judiciaire — Commission des valeurs mobilières — Commission intégrée dans un régime de réglementation — Absence de clause

Appropriate standard of review of Commission's decisions — Whether standard properly applied — Securities Act, S.B.C. 1985, c. 83, ss. 1(1) "material change", "material fact", 14(1), (2), 44(1), 45(2), 49(1), 50(1), 67, 68, 144(1)(a), (b), (c), (d), 149(a), (b), (c), 154.2.

Securities — Securities Commission — Statutory duty on issuers of stock to disclose nature and substance of material change — Prohibition against insider trading — Series of transactions allegedly breaching duty to disclose — Whether transactions breaching duty to disclose and/or prohibition against insider trading.

Respondents were, respectively, the chair of the board, the vice president responsible for internal administration and the president of Prime, a company holding several wholly owned subsidiaries and controlling or managing about 50 public junior resource companies. Respondents were also directors of Calpine, a company controlled and managed by Prime. Both companies were reporting issuers listed on the Vancouver Stock Exchange and subject to the VSE's rules and policies concerning public disclosure of information and pricing of options. Both were subject to the continuing and timely disclosure requirements under s. 67 of the *Securities Act* and to the insider trading provisions under s. 68. The British Columbia Securities Commission administers the Act and ensures compliance with its requirements. It also regulates the VSE.

In the spring of 1990, the Superintendent of Brokers (the Commission's chief administrative officer) instituted proceedings against the respondents in connection with various types of transactions which occurred between July and October, 1989. The Superintendent alleged that the respondents had violated the timely disclosure provisions and insider trading provisions in three categories of impugned transactions: the drilling results and share options transactions, the private placement, and the ALC withdrawal. Respondents were prevented from having information relative to assay results by a "Chinese Wall".

In the first category, Prime or Calpine allegedly failed to disclose all material changes in four transactions in that assay results were publicly disclosed after the company had granted or repriced options. The fifth option transaction, although made after a detailed news release

privative et de droit d'appel — Norme de contrôle appropriée des décisions de la Commission — La norme appropriée a-t-elle été appliquée? — Securities Act, S.B.C. 1985, ch. 83, art. 1(1) «changement important», «fait important», 14(1), (2), 44(1), 45(2), 49(1), 50(1), 67, 68, 144(1)a), b), c), d), 149a), b), c), 154.2.

Valeurs mobilières — Commission des valeurs mobilières — Loi imposant aux émetteurs d'actions de divulguer la nature et la substance d'un changement important — Interdiction des opérations d'initiés — Série d'opérations qui auraient été effectuées en contravention de l'obligation de divulgation — Les opérations violent-elles l'obligation de divulgation ou l'interdiction des opérations d'initiés.

Les intimés étaient respectivement président du conseil d'administration, vice-président responsable de l'administration interne et président de Prime, société détenant plusieurs filiales en propriété exclusive et contrôlant ou gérant quelque 50 petites sociétés minières. Les intimés étaient aussi administrateurs de Calpine, société contrôlée et gérée par Prime. Les deux sociétés étaient des émetteurs assujettis cotés à la Bourse de Vancouver et étaient régies par les règles et politiques de la Bourse en matière de divulgation publique de renseignements et de fixation du prix des options. Elles devaient se conformer aux exigences d'information continue et occasionnelle énoncées à l'art. 67 de la *Securities Act* et aux dispositions sur les opérations d'initiés prévues à l'art. 68. La British Columbia Securities Commission applique la Loi et assure le respect de ses exigences. Elle réglemente aussi la Bourse.

Au printemps 1990, le Superintendent of Brokers (l'administrateur en chef de la Commission) a intenté des poursuites contre les intimés relativement à diverses opérations conclues entre les mois de juillet et d'octobre 1989. Le surintendant soutenait que les intimés avaient contrevenu aux exigences en matière d'information occasionnelle et aux dispositions relatives aux opérations d'initiés en ce qui concerne trois catégories d'opérations attaquées: les résultats de forage et les options d'achat d'actions, le placement privé, et le retrait d'ALC. La mise en place d'une «muraille de Chine» a empêché les intimés de connaître les résultats de forage.

Dans la première catégorie, Prime ou Calpine aurait omis de divulguer tous les changements importants dans quatre opérations en ce sens que les résultats de forage ont été divulgués après que la société eut accordé de nouvelles options d'achat d'actions ou fixé un nouveau prix d'exercice d'options antérieures. Dans le cas de la of assay results, allegedly violated a pricing formula under the VSE options policy.

The second series of impugned transactions involved the private placement of Calpine units. Calpine allegedly failed to disclose, contrary to s. 67, that Prime was the purchaser and that the sale significantly increased Prime's interest in Calpine. It was also alleged that Calpine had misled the VSE as to the firm brokering the private placement.

The third impugned transaction occurred when a broker disputed its contractual obligation either to find a purchaser or to buy a set number of Prime units on offer following the withdrawal of a firm (ALC) from a deal to purchase them. Prime was alleged to have violated s. 67 by not making timely and adequate disclosure of the dispute following ALC's withdrawal.

The Commission concluded that the respondents contravened s. 67 of the Act by failing to disclose material changes in their affairs. No insider trading contrary to s. 68 of the Act was found, however. The respondents were found responsible for these breaches as senior managers of the companies, were suspended from trading in shares for one year and were required to pay part of the costs incurred by the Commission and Superintendent. Respondents' appeal was limited to whether the Commission had erred as a matter of law in its conclusions on s. 67 (disclosure of material change), s. 144 (power of Commission to make orders) and s. 154.2 (power of Commission to make orders regarding costs) of the Act. The Court of Appeal allowed the appeal and set aside the Commission's orders. The Superintendent and the Commission now appeal from that decision.

These appeals dealt mainly with the appropriate standard of review for an appellate court reviewing a decision of a securities commission which is not protected by a privative clause when there exists a statutory right of appeal and where the case turns on a question of statutory interpretation. The appeals also raised issues of

cinquième opération concernant les options, quoique réalisée après un communiqué détaillé des résultats de titrage, il y aurait eu mauvaise utilisation de la formule de calcul du prix en vertu de la politique de la Bourse relative aux options.

La deuxième série d'opérations attaquées a trait au placement privé des unités de Calpine. Celle-ci aurait omis de divulguer, en contravention de l'art. 67, que Prime était l'acheteur et que la vente allait sensiblement accroître la participation de Prime dans Calpine. On a aussi soutenu que Calpine avait induit la Bourse en erreur relativement à la firme de courtage chargée d'effectuer le placement privé.

La troisième opération attaquée s'est produite lorsqu'un courtier a contesté qu'il était contractuellement tenu de trouver un acheteur ou d'acheter un certain nombre d'unités de Prime sur le marché à la suite du retrait d'une firme (ALC) qui s'était engagée à les acheter. On a soutenu que Prime aurait contrevenu à l'art. 67 en omettant de divulguer en temps opportun et de façon appropriée l'existence d'un différend à la suite du retrait d'ALC.

La Commission a conclu que les intimés avaient enfreint l'art. 67 de la Loi en omettant de divulguer des changements importants survenus dans leurs affaires. Cependant, à son avis, ils n'avaient pas enfreint l'art. 68 de la Loi, qui vise les opérations d'initiés. En tant que cadres supérieurs des sociétés, les intimés ont été jugés responsables de ces contraventions; la Commission leur a interdit de faire des opérations sur des actions pendant une période d'un an et elle leur a ordonné de payer une part des dépens de la Commission et du surintendant. L'appel des intimés devait seulement viser à déterminer si la Commission avait commis une erreur de droit dans ses conclusions relatives à l'art. 67 (divulgation d'un changement important), à l'art. 144 (pouvoir de la Commission de rendre des ordonnances) et à l'art. 154.2 (pouvoir de la Commission de rendre des ordonnances quant aux dépens) de la Loi. La Cour d'appel a accueilli l'appel et annulé les ordonnances de la Commission. Le surintendant et la Commission se pourvoient maintenant contre cette décision.

Les présents pourvois portent principalement sur la norme de contrôle applicable à une cour d'appel siégeant en révision d'une décision d'une commission des valeurs mobilières qui n'est pas protégée par une clause privative, lorsque la loi prévoit un droit d'appel et que le litige vise une question d'interprétation des lois. Les pourvois soulèvent aussi des questions de respect des compliance with the timely disclosure requirements under applicable securities legislation.

Held: The appeals should be allowed.

The *Securities Act* is part of a much larger framework which regulates the securities industry throughout Canada primarily for the protection of the investor but also for capital market efficiency and ensuring public confidence in the system.

The central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative tribunal. The analysis must consider the tribunal's role or function, whether the agency's decisions are protected by a privative clause, and whether the question goes to the tribunal's jurisdiction. The courts have developed a spectrum that ranges from the standard of patent unreasonableness (where deference is at its highest, for example, where a tribunal is protected by a privative clause in deciding a matter within its jurisdiction) to that of correctness (where deference is at its lowest, for example, where there is a statutory right of appeal or where the issue concerns the interpretation of a provision limiting the tribunal's jurisdiction). The case at bar falls between these two extremes. On one hand lies a statutory right of appeal pursuant to s. 149 of the *Securities Act*. On the other lies an appeal from a highly specialized tribunal on an issue which arguably goes to the core of its regulatory mandate and expertise. Even where there is no privative clause and where there is a statutory right of appeal, the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise.

The breadth of the Commission's expertise and specialisation is reflected in the provisions of the *Securities Act*. The Commission is responsible for the administration of the Act, has broad powers with respect to investigations, audits, hearings and orders, and any decision, when filed in the Supreme Court of British Columbia Registry, has the force and effect of a decision of that court. The Commission has the power to revoke or vary any of its decisions. It also has a very broad discretion to determine what is in the public's interest. The definitions in the Act exist in a factual or regulatory context and must be analysed in context, not in isola-

exigences en matière d'information occasionnelle en vertu des dispositions législatives applicables aux valeurs mobilières.

Arrêt: Les pourvois sont accueillis.

La *Securities Act* s'inscrit dans le cadre d'un régime de réglementation beaucoup plus vaste de l'industrie des valeurs mobilières au Canada, visant avant tout à protéger l'investisseur, mais aussi à assurer le rendement du marché des capitaux et la confiance du public dans le système.

Dans l'examen de la norme de contrôle applicable, il faut avant tout déterminer quelle était l'intention du législateur lorsqu'il a conféré compétence au tribunal administratif. Cette analyse doit porter sur le rôle ou la fonction du tribunal, viser à savoir si les décisions de l'organisme sont protégées par une clause privative et si la question touche la compétence du tribunal concerné. Les tribunaux ont élaboré toute une gamme de normes allant de celle de la décision manifestement déraisonnable (qui appelle la plus grande retenue, par exemple, dans les cas où un tribunal protégé par une clause privative rend une décision relevant de sa compétence), à celle de la décision correcte (où l'on est tenu à une moins grande retenue, par exemple, dans les cas où la question en litige porte sur l'interprétation d'une disposition limitant la compétence du tribunal). Le présent pourvoi se situe entre ces deux extrêmes. D'une part, il existe un droit d'appel conformément à l'art. 149 de la *Securities Act*. D'autre part, il s'agit d'un appel contre la décision d'un tribunal très spécialisé sur une question qui, peut-on soutenir, touche directement le mandat et l'expertise que lui confère le texte réglementaire. Même lorsqu'il n'existe pas de clause privative et que la loi prévoit un droit d'appel, le concept de la spécialisation des fonctions exige des cours de justice qu'elles fassent preuve de retenue envers l'opinion du tribunal spécialisé sur des questions qui relèvent directement de son champ d'expertise.

La *Securities Act* fait bien ressortir l'étendue de l'expertise et de la spécialisation de la Commission. Celle-ci est responsable de l'application de la Loi et possède de vastes pouvoirs en matière d'enquêtes, de vérifications, d'audiences et d'ordonnances; en outre, toute décision de la Commission déposée au greffe de la Cour suprême de la Colombie-Britannique est exécutoire comme décision de cette cour. La Commission a le pouvoir de révoquer ou de modifier ses décisions. Elle possède également un très vaste pouvoir discrétionnaire dans la détermination de ce qui constitue l'intérêt public. Les définitions dans la Loi sont présentées dans un contexte tion. This is yet another basis for curial deference. A higher degree of judicial deference is also warranted with respect to a tribunal's interpretation of the law where it plays a role in policy development. Here, the Commission's primary role is to administer and apply the Act. It also plays a policy development role but its policies are not to be treated as legal pronouncements absent statutory authority mandating such treatment. Thus, on precedent, principle and policy, those decisions of the Commission falling within its expertise generally warrant judicial deference.

Sections 67, 144 and 154.2 of Act were specifically considered with an eye to the tribunal's expertise and its need for deference. The decision to make an order and the precise nature of that order, under s. 144, as well as any decision obliging a person to pay the costs of a hearing necessitated by his or her conduct, pursuant to s. 154.2, are clearly within the jurisdiction and expertise of the Commission. The other provision at issue was s. 67 which involves an interpretation of the words "material change" and "as soon as practicable".

Both "material change" and "material fact" are defined in s. 1 of the Act. They are defined in terms of the significance of their impact on the market price or value of the securities of an issuer. The definition of "material fact" is broader than that of "material change"; it encompasses any fact that can "reasonably be expected to significantly affect" the market price or value of the securities of an issuer, and not only changes "in the business, operations, assets or ownership of the issuer" that would reasonably be expected to have such an effect.

This case turned partly on the definition of "material change". Three elements emerge from that definition: the change must be (a) "in relation to the affairs of an issuer", (b) "in the business, operations, assets or ownership of the issuer" and (c) material, i.e., would reasonably be expected to have a significant effect on the market price or value of the securities of the issuer. Not all changes are material changes; the latter are set in the context of making sure that issuers keep investors up to date. The determination of what information should be

de nature factuelle ou réglementaire et doivent être analysées en contexte et non pas séparément. C'est là un autre motif de faire preuve de retenue judiciaire. Lorsqu'un tribunal participe à l'établissement de politiques, il faut également faire preuve d'une plus grande retenue à l'égard de son interprétation de la loi. En l'espèce, la Commission a pour rôle principal d'appliquer la Loi. Elle participe aussi à l'établissement de politiques, mais ses politiques ne peuvent être considérées comme ayant le statut de loi, en l'absence d'un pouvoir à cet effet prévu dans la loi. Par conséquent, compte tenu des précédents, des principes et des politiques, il faut généralement faire preuve de retenue judiciaire à l'égard des décisions que la Commission rend à l'intérieur de sa sphère de compétence.

Les articles 67, 144 et 154.2 de la Loi ont été spécifiquement examinés en fonction de la compétence du tribunal et de la nécessité de faire preuve de retenue à l'égard de ses décisions. La Commission possède clairement toute la compétence et l'expertise nécessaires lorsqu'il s'agit de rendre une ordonnance et d'en préciser la nature, conformément à l'art. 144, et d'obliger une personne à payer, conformément à l'art. 154.2, les dépens d'une audience à laquelle sa conduite a donné lieu. L'autre disposition en cause est l'art. 67, qui soulève la question de l'interprétation des expressions «changement important» et «dès que possible».

L'article premier de la Loi définit les expressions «changement important» et «fait important». Ces expressions sont définies en fonction de l'importance de l'effet du changement ou du fait sur le cours ou la valeur des valeurs mobilières d'un émetteur. La définition de l'expression «fait important» est plus large que celle de «changement important»; un «fait important» s'entend de tout fait «dont il est raisonnable de s'attendre» qu'il aura «un effet appréciable» sur le cours ou la valeur des valeurs mobilières d'un émetteur, et non seulement des changements dans «[l]es activités commerciales, [l']exploitation, [l]es éléments d'actif ou [l]a propriété» de l'émetteur, dans les cas où il est raisonnable de s'attendre à ce que ce changement ait un tel effet.

Le présent pourvoi porte en partie sur la définition de l'expression «changement important». Trois éléments se dégagent de cette définition: le changement, a) «[d]ans le contexte des affaires d'un émetteur», b) «s'entend d'un changement dans ses activités commerciales, son exploitation, ses éléments d'actif ou sa propriété» et c) doit être important, c'est-à-dire qu'il doit être raisonnable de s'attendre à ce qu'il ait un effet appréciable sur le cours ou la valeur des valeurs mobilières de l'émetteur. Ce ne sont pas tous les changements qui sont des chandisclosed is an issue which goes to the heart of the regulatory expertise and mandate of the Commission, i.e., regulating the securities markets in the public's interest.

This case also turns on the meaning of the words "as soon as practicable", in s. 67 of the Act, as to when a material change should be disclosed to the public. The timeliness of disclosure also falls within the Commission's regulatory jurisdiction.

Given the nature of the securities industry, the Commission's specialization of duties and policy development role, and the nature of the problem before the court, considerable deference was warranted in the present case notwithstanding the facts that there was a statutory right of appeal and that there was no privative clause.

The determination of what constitutes a material change for the purposes of general disclosure under s. 67 of the Act falls squarely within the regulatory mandate and expertise of the Commission. New information relating to a mining property (which is an asset) bears significantly on the question of that property's value. A change in assay and drilling results can amount to a material change as was the case here.

The obligation to disclose "as soon as practicable" takes on a different meaning when an issuer is about to engage in a securities transaction. Although a duty to inquire is not expressly stated in s. 67, such an interpretation contextualizes the general obligation to disclose material changes and guarantees the fairness of the market, which is the underlying goal of the Act. The Commission had jurisdiction to interpret s. 67 in this manner and was entitled to the court's deference.

A duty to inquire under s. 67 is not incompatible with the Act's insider trading provision (s. 68). If an issuer wishes to engage in a securities transaction, its directors must inquire about all material changes in the issuer's affairs. Consequently, the directors will have, at one point in time, knowledge of undisclosed material facts and material changes which constitute inside information. As long as the material facts and material changes are adequately disclosed prior to the transaction, there

gements importants; la divulgation des changements importants a pour but de veiller à ce que les émetteurs tiennent les investisseurs au courant. La détermination des renseignements à divulguer est une question qui touche directement l'expertise et le mandat de la Commission, soit la réglementation du marché des valeurs mobilières dans l'intérêt public.

Le présent pourvoi porte aussi sur l'interprétation de l'expression «dès que possible» à l'art. 67 de la Loi, c'est-à-dire le moment où un changement important doit être divulgué au public. La détermination de cette question relève également de la compétence de la Commission en matière de réglementation.

Compte tenu de la nature de l'industrie des valeurs mobilières, des fonctions spécialisées de la Commission, de son rôle en matière d'établissement de politiques et de la nature du problème en cause, il y avait lieu de faire preuve en l'espèce d'une grande retenue malgré le droit d'appel prévu par la loi et l'absence d'une clause privative.

La détermination de ce qui constitue un changement important pour les fins de divulgation générale en vertu de l'art. 67 de la Loi est une question qui relève directement du mandat et de l'expertise de la Commission en matière de réglementation. Tout nouveau renseignement sur les propriétés minières (un élément d'actif) a une incidence importante sur la question de leur valeur. Un changement dans les résultats de titrage et de forage peut constituer un changement important, comme c'était le cas en l'espèce.

L'obligation de divulguer «dès que possible» prend un sens tout à fait différent si un émetteur est sur le point de conclure une opération sur valeurs mobilières. Bien que l'art. 67 ne précise pas explicitement une obligation de s'enquérir, une telle interprétation permet de placer dans son contexte l'obligation générale de divulgation de tout changement important et de garantir l'équité du marché, objet sous-jacent de la Loi. Il relevait de la compétence de la Commission d'interpréter l'art. 67 de cette façon et elle était en droit de s'attendre à une certaine retenue à cet égard.

L'obligation de s'enquérir en vertu de l'art. 67 n'est pas incompatible avec la disposition de la Loi sur les opérations d'initiés (art. 68). Si un émetteur souhaite participer à une opération sur valeurs mobilières, ses administrateurs doivent s'enquérir de tout changement important dans ses affaires. Par conséquent, les administrateurs seront, à un moment donné, au courant de faits importants non divulgués et de changements importants qui constituent des renseignements d'initiés. Dans la will be no possibility of insider trading. The directors' duty to inquire about material changes is not erased by the erection of a Chinese Wall because the disclosure requirements under s. 67 are on the issuer.

Each of the Commission's findings were supported by overwhelming evidence and should not be disturbed. The Commission concluded that information contained in drilling results can constitute a material change in a reporting issuer's affairs and that s. 67 imposes a duty on senior management to inquire as to the existence of material changes before causing a reporting issuer to engage in a securities transaction. It found that the respondents breached s. 67 by failing to disclose various material changes in the affairs of Prime and Calpine before causing these two companies to engage in securities transactions. The Commission also concluded that the non-disclosure of information concerning the private placement issue and the withdrawal of ALC constituted a failure to disclose a material change. Although the material change arising from the controversy surrounding the withdrawal of ALC was self-evident, not all material changes are self-evident.

Section 144 of the Act gives the Commission a broad discretion to make orders that it considers to be in the public interest. Thus, a reviewing court should not disturb an order of the Commission unless the Commission has made some error in principle in exercising its discretion or has exercised its discretion in a capricious or vexatious manner.

The Commission exercised its discretion in a judicial manner. Further, it could make the orders it did with respect to the respondents even though the duty to make timely disclosure under s. 67 of the Act applies to a "reporting issuer". Although responsibility for timely disclosure is vested in the reporting issuer, effective responsibility rests with the senior officers and the directors of the reporting issuer. In addition, s. 144 of the Act not only gives the Commission a broad power to make orders it considers to be in the public interest but also confers upon the Commission the authority to make orders with respect to "a person". The Commission's

mesure où les faits importants et les changements importants sont divulgués comme il se doit avant l'opération, il n'y a pas de risque d'opérations d'initiés. L'établissement d'une muraille de Chine n'élimine pas l'obligation qu'ont les administrateurs de s'enquérir des changements importants, puisque c'est l'émetteur qui, en vertu de l'art. 67, doit respecter les exigences en matière de divulgation.

Il existe de nombreux éléments de preuve à l'appui de chacune des conclusions de la Commission et il n'y a pas lieu de les modifier. La Commission a conclu que les renseignements contenus dans les résultats de forage peuvent constituer un changement important dans les affaires d'un émetteur assujetti et que l'art. 67 impose aux cadres supérieurs une obligation de s'enquérir de l'existence de changements importants avant qu'un émetteur assujetti puisse participer à une opération sur valeurs mobilières. Elle a conclu que les intimés avaient contrevenu à l'art. 67 en omettant de divulguer divers changements importants dans les affaires de Prime et de Calpine avant que celles-ci prennent part à des opérations sur valeurs mobilières. La Commission a aussi conclu que la non-divulgation de renseignements sur la question du placement privé et le retrait d'ALC constituaient une omission de divulguer un changement important. Bien que le changement important découlant de la controverse relative au retrait d'ALC ait été tout à fait évident, ce n'est pas le cas de tous les changements importants.

L'article 144 de la Loi donne à la Commission un vaste pouvoir discrétionnaire de rendre les ordonnances qu'elle estime dans l'intérêt public. En conséquence, un tribunal qui siège en révision ne devrait pas modifier une ordonnance rendue par la Commission, sauf si celle-ci a commis une erreur de principe dans l'exercice de son pouvoir discrétionnaire ou si elle l'a exercé d'une façon arbitraire ou vexatoire.

La Commission a exercé son pouvoir discrétionnaire d'une manière judiciaire. En outre, elle pouvait rendre les ordonnances en question contre les intimés même si l'obligation d'information occasionnelle prévue à l'art. 67 de la Loi est imposée à un «émetteur assujetti». Bien que l'obligation d'information occasionnelle soit imposée à l'émetteur assujetti, ce sont les cadres supérieurs et les administrateurs qui ont en fait cette responsabilité. Par ailleurs, l'art. 144 de la Loi confère à la Commission non seulement un vaste pouvoir de rendre les ordonnances qu'elle estime dans l'intérêt public mais aussi le pouvoir de rendre des ordonnances relativement à «une personne». La Commission avait toute la compétence order with respect to costs was well within its jurisdiction; considerable deference was in order.

Cases Cited

Referred to: *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756; *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554; *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353; *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722; *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316; *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301; *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324; *Pacific Coast Coin Exchange v. Ontario Securities Commission*, [1978] 2 S.C.R. 112; *Four Star Mgmt. Ltd. v. B.C. Securities Comm.* (1990), 46 B.C.L.R. (2d) 195, leave to appeal refused *sub nom. Williams (Byron Leslie) v. British Columbia Securities Comm.*, [1991] 1 S.C.R. xv; *Gordon Capital Corp. v. Ontario Securities Commission* (1991), 14 O.S.C.B. 2713; *Re the Securities Commission and Mitchell*, [1957] O.W.N. 595; *Bay Street West Securities (1983) Inc. v. Alberta Securities Commission* (1984), 56 A.R. 19.

Statutes and Regulations Cited

Company Act, R.S.B.C. 1979, c. 59, ss. 1, 255, 267, 272.

Securities Act, S.B.C. 1985, c. 83, ss. 1(1) "material change", "material fact", 14(1), (2), 44(1) [am. 1989, c. 78, s. 16], 45(2) [am. 1989, c. 78, s. 16], 47(1), (2), 48(1) [am. 1989, c. 58, s. 12], 49(1) [am. 1989, c. 78, s. 20], 50(1), 67, 68 [rep. & sub. 1989, c. 78, s. 25], 144(1)(a) [rep. & sub. 1989, c. 78, s. 39], (b) [rep. & sub. 1989, c. 78, s. 39], (c) [rep. & sub. 1989, c. 78, s. 39, am. 1990, c. 25, s. 49], (d) [rep. & sub. 1989, c. 78, s. 39], 149(a) [rep. & sub. 1989, c. 78, s. 43, am. 1992, c. 52, s. 27], (b) [rep. & sub. 1989, c. 78, s. 43], (c) [ad. 1992, c. 52, s. 27], 154.2 [ad. 1988, c. 58, s. 25].

requise pour rendre l'ordonnance quant aux dépens. C'est pourquoi il y avait lieu de faire preuve d'une grande retenue.

Jurisprudence

Arrêts mentionnés: *Le Syndicat canadien de la Fonction publique, section locale 963 c. La Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227; *U.E.S., local 298 c. Bibeault*, [1988] 2 R.C.S. 1048; *Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 R.C.S. 756; *Zurich Insurance Co. c. Ontario (Commission des droits de la personne)*, [1992] 2 R.C.S. 321; *Canada (Procureur général) c. Mossop*, [1993] 1 R.C.S. 554; *Université de la Colombie-Britannique c. Berg*, [1993] 2 R.C.S. 353; *Bell Canada c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722; *Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316; *Brosseau c. Alberta Securities Commission*, [1989] 1 R.C.S. 301; *National Corn Growers Assn. c. Canada (Tribunal des importations)*, [1990] 2 R.C.S. 1324; *Pacific Coast Coin Exchange c. Commission des valeurs mobilières de l'Ontario*, [1978] 2 R.C.S. 112; *Four Star Mgmt. Ltd. c. B.C. Securities Comm.* (1990), 46 B.C.L.R. (2d) 195, autorisation de pourvoi refusée *sub nom. Williams (Byron Leslie) c. British Columbia Securities Comm.*, [1991] 1 R.C.S. xv; *Gordon Capital Corp. c. Ontario Securities Commission* (1991), 14 O.S.C.B. 2713; *Re the Securities Commission and Mitchell*, [1957] O.W.N. 595; *Bay Street West Securities (1983) Inc. c. Alberta Securities Commission* (1984), 56 A.R. 19.

Lois et règlements cités

Company Act, R.S.B.C. 1979, ch. 59, art. 1, 255, 267, 272.

Securities Act, S.B.C. 1985, ch. 83, art. 1(1) «changement important», «fait important», 14(1), (2), 44(1) [mod. 1989, ch. 78, art. 16], 45(2) [mod. 1989, ch. 78, art. 16], 47(1), (2), 48(1) [mod. 1989, ch. 58, art. 12], 49(1) [mod. 1989, ch. 78, art. 20], 50(1), 67, 68 [abr. & rempl. 1989, ch. 78, art. 25], 144(1)a) [abr. & rempl. 1989, ch. 78, art. 39], b) [abr. & rempl. 1989, ch. 78, art. 39], c) [abr. & rempl. 1989, ch. 78, art. 39, mod. 1990, ch. 25, art. 49], d) [abr. & rempl. 1989, ch. 78, art. 39], 149a) [abr. & rempl. 1989, ch. 78, art. 43, mod. 1992, ch. 52, art. 27], b) [abr. & rempl. 1989, ch. 78, art. 43], c) [aj. 1992, ch. 52, art. 27], 154.2 [aj. 1988, ch. 58, art. 25].

Authors Cited

Alboini, Victor P. *Securities Law and Practice*, 2nd ed., vol. 2 (loose-leaf). Toronto: Carswell, 1984.

Johnston, David L. *Canadian Securities Regulation*. Toronto: Butterworths, 1977.

Stevens, George C. and Stephen D. Wortley. "Murray Pezim in the Court of Appeal: Draining the Lifeblood from Securities Regulation" (1992), 26 *U.B.C. L. Rev.* 331.

APPEALS from a judgment of the British Columbia Court of Appeal (1992), 66 B.C.L.R. (2d) 257, 96 D.L.R. (4th) 137, 24 W.A.C. 1, allowing an appeal from an order of the British Columbia Securities Commission. Appeals allowed.

M. J. Gregory Walsh and *Catharine M. Esson*, for the appellant the Superintendent of Brokers.

John L. Finlay and *Susan E. Ross*, for the appellant the British Columbia Securities Commission.

Alan J. Lenczner, Q.C., and *Winton K. Derby, Q.C.*, for the respondents.

Deborah K. Lovett, for the intervener the Attorney General of British Columbia.

Stephen T. Goudge, Q.C., and *Sandra Forbes*, for the intervener the Ontario Securities Commission.

Frances L. Zinger and *Glenda A. Campbell*, for the intervener the Alberta Securities Commission.

Bryan Finlay, Q.C., and *Philip Anisman*, for the intervener the Securities Dealers Society of Ontario.

The judgment of the Court was delivered by

IACOBUCCI J. — These appeals (hereinafter referred to in the singular) deal mainly with the appropriate standard of review for an appellate court reviewing a decision of a securities commission which is not protected by a privative clause when there exists a statutory right of appeal and where the case turns on a question of statutory

Doctrine citée

Alboini, Victor P. *Securities Law and Practice*, 2nd ed., vol. 2 (loose-leaf). Toronto: Carswell, 1984.

Johnston, David L. *Canadian Securities Regulation*. Toronto: Butterworths, 1977.

Stevens, George C. and Stephen D. Wortley. «Murray Pezim in the Court of Appeal: Draining the Lifeblood from Securities Regulation» (1992), 26 *U.B.C. L. Rev.* 331.

POURVOIS contre un arrêt de la Cour d'appel de la Colombie-Britannique (1992), 66 B.C.L.R. (2d) 257, 96 D.L.R. (4th) 137, 24 W.A.C. 1, qui a accueilli un appel contre une ordonnance de la British Columbia Securities Commission. Pourvois accueillis.

M. J. Gregory Walsh et *Catharine M. Esson*, pour l'appelant le Superintendent of Brokers.

John L. Finlay et *Susan E. Ross*, pour l'appelante la British Columbia Securities Commission.

Alan J. Lenczner, c.r., et *Winton K. Derby, c.r.*, pour les intimés.

Deborah K. Lovett, pour l'intervenant le procureur général de la Colombie-Britannique.

Stephen T. Goudge, c.r., et *Sandra Forbes*, pour l'intervenante la Commission des valeurs mobilières de l'Ontario.

Frances L. Zinger et *Glenda A. Campbell*, pour l'intervenante l'Alberta Securities Commission.

Bryan Finlay, c.r., et *Philip Anisman*, pour l'intervenante la Securities Dealers Society of Ontario.

Version française du jugement de la Cour rendu par

LE JUGE IACOBUCCI — Les présents pourvois (ci-après mentionnés au singulier) portent principalement sur la norme de contrôle applicable à une cour d'appel siégeant en révision d'une décision d'une commission des valeurs mobilières qui n'est pas protégée par une clause privative, lorsque la loi prévoit un droit d'appel et que le litige vise une interpretation. The appeal also raises issues of compliance with the timely disclosure requirements under applicable securities legislation.

I. Facts

At the relevant time, the respondents were directors and senior managers of Prime Resources Corporation ("Prime"), a company which headed a large corporate network which consisted of Prime, various wholly owned subsidiaries, and Prime's "managed companies", a group of about 50 public junior resource companies controlled and managed by Prime. Murray Pezim was the chairperson of Prime's board of directors and was responsible for promoting and arranging financing for Prime and the managed companies. Lawrence Page was Prime's vice president and was responsible for administration within Prime and for liaison with Prime's outside legal counsel. Finally, John Ivany was president and chief executive officer of Prime. He was also responsible for the overall direction of Prime and played a role in raising financing for the corporation.

One of Prime's managed companies was Calpine Resources Inc. ("Calpine"), which was involved in mineral exploration and development in northern British Columbia. Prime held 23 percent of Calpine's common shares. The respondents were also directors of Calpine.

Both Prime and Calpine were incorporated under the *Company Act*, R.S.B.C. 1979, c. 59 (as amended), and were reporting issuers whose common shares were listed for trading on the Vancouver Stock Exchange ("VSE"). As such, they were subject to the VSE's rules and policies concerning such matters as public disclosure of information and pricing of options. They were also subject to the continuing and timely disclosure requirements under s. 67 of the *Securities Act*, S.B.C. 1985, c. 83 (as amended) (the "Act"), which required disclosure of "material changes" in the affairs of a reporting issuer as soon as practicable, as well as the insider trading provisions under s. 68 of the

question d'interprétation des lois. Le pourvoi soulève aussi des questions de respect des exigences en matière d'information occasionnelle en vertu des dispositions législatives applicables aux valeurs mobilières.

I. Les faits

À l'époque en cause, les intimés étaient administrateurs et cadres supérieurs de Prime Resources Corporation («Prime»), société qui dirigeait un vaste réseau de sociétés composé de Prime, de diverses filiales en propriété exclusive et des «sociétés gérées», un groupe d'environ 50 petites sociétés minières contrôlées et gérées par Prime. Murray Pezim était président du conseil d'administration et avait la responsabilité de promouvoir et d'organiser le financement de Prime et de ses sociétés gérées. Lawrence Page était vice-président et était responsable de l'administration interne de Prime et des rapports avec ses conseillers juridiques externes. Enfin, John Ivany était président et directeur général. Il était responsable de l'ensemble de la direction de Prime et participait à l'obtention du financement pour la société.

L'une des sociétés gérées de Prime était Calpine Resources Inc. («Calpine»), qui œuvrait dans le domaine de l'exploration et de la mise en valeur du minerai dans le nord de la Colombie-Britannique. Prime détenait 23 pour 100 des actions ordinaires de Calpine. Les intimés étaient aussi administrateurs de Calpine.

Prime et Calpine ont été constituées en personne morale en vertu de la *Company Act*, R.S.B.C. 1979, ch. 59 (modifiée), et elles étaient des émetteurs assujettis dont les actions ordinaires étaient officiellement cotées à la Bourse de Vancouver («la Bourse»). Elles se trouvaient en conséquence régies par les règles et politiques de la Bourse en matière de divulgation publique de renseignements et de fixation du prix des options. Elles devaient également se conformer d'une part, aux exigences d'information continue et occasionnelle énoncées à l'art. 67 de la *Securities Act*, S.B.C. 1985, ch. 83 (modifiée) (la «Loi»), qui prévoit la divulgation dès que possible d'un «changement important»

Act. The British Columbia Securities Commission ("the Commission"), which is established by the Act, is charged with administering the Act and ensuring compliance with the requirements of the Act, as well as regulating the VSE.

In the spring of 1990, the Superintendent of Brokers ("Superintendent"), the chief administrative officer of the Commission, instituted proceedings against the respondents in connection with various types of transactions which occurred between July and October, 1989. The Superintendent alleged that the respondents had violated the timely disclosure provisions found in s. 67 of the Act, as well as the insider trading provisions found in s. 68. As a matter of convenience, the impugned transactions have been divided into three categories: the drilling results and share options transactions, the private placement, and the so-called ALC withdrawal. Each of these will be discussed in turn.

A. *The Drilling Results and Share Options Transactions*

In September 1988, Calpine announced the commencement of drilling on a property known as "Eskay Creek". On May 18, 1989, Calpine announced another drilling program on the same property for the summer of 1989.

Prime Explorations Ltd., one of Prime's wholly owned subsidiaries, was engaged to provide consulting and management services for the project. David Mallo, a staff geologist employed by Prime Explorations, was appointed manager of the Eskay Creek project and prepared regular written reports on the progress of the project. These reports, which contained information on the activity at the camp, as well as visual descriptions and ratings of the holes drilled since the last report, were sent to the president of Prime Explorations, Chet Idziszek, an experienced geologist. Idziszek was responsible for implementing and carrying out a system to compile the drilling and assay results, to ensure the confidentiality of the results, and to determine the time when public disclosure of the results was

survenu dans les affaires d'un émetteur assujetti, et d'autre part, aux dispositions sur les opérations d'initiés prévues à l'art. 68 de la Loi. La British Columbia Securities Commission («la Commission»), constituée par la Loi, a le mandat d'appliquer celle-ci, d'assurer le respect de ses exigences et de réglementer la Bourse.

Au printemps 1990, le Superintendent of Brokers («le surintendant»), administrateur en chef de la Commission, a intenté des poursuites contre les intimés relativement à diverses opérations conclues entre les mois de juillet et d'octobre 1989. Le surintendant soutenait que les intimés avaient contrevenu aux exigences en matière d'information occasionnelle prévues à l'art. 67 de la Loi, et aux dispositions relatives aux opérations d'initiés visées à l'art. 68. Par souci de commodité, les opérations attaquées ont été divisées en trois catégories: les résultats de forage et les options d'achat d'actions, le placement privé et ce que l'on a appelé le retrait d'ALC. Chacune de ces opérations sera examinée séparément.

A. *Les résultats de forage et les options d'achat d'actions*

En septembre 1988, Calpine a annoncé le début de travaux de forage sur un terrain appelé «Eskay Creek». Le 18 mai 1989, Calpine a annoncé un autre programme de forage sur le même terrain au cours de l'été 1989.

Prime Explorations Ltd., l'une des filiales en propriété exclusive de Prime, a été engagée pour la prestation des services de consultation et de gestion du projet. David Mallo, géologue faisant partie du personnel de Prime Explorations, a été nommé gérant du projet d'Eskay Creek et devait rédiger des rapports périodiques sur l'état d'avancement du projet. Ces rapports renfermaient des renseignements sur l'activité au camp, des descriptions visuelles et des analyses des trous forés depuis le dernier rapport, et étaient ensuite envoyés au président de Prime Explorations, Chet Idziszek, un géologue d'expérience. Idziszek était chargé de mettre sur pied et d'exploiter un système de compilation de résultats de forage et de titrage; il devait aussi assurer la confidentialité des résulrequired. Idziszek also erected a "Chinese Wall" to prevent the non-geological officers of Prime Explorations, including the respondents, from having actual knowledge of the drilling results before they were released to the public.

Early in the first program, that is in the fall of 1988, news releases had been issued to disclose the drilling results from a single hole or even a partial hole. However, by the summer of 1989, the practice was to release results about every two weeks covering several holes.

During the summer program, the drilling concentrated on two zones of mineralization, known as the 21A zone and the 21B zone. Several holes were drilled including holes 71, 93, 101 and 109. During this period, share options were granted and news releases were issued.

The first disclosure on the summer program occurred in a news release, dated June 20, 1989, to announce the commencement of the drilling activity. Five subsequent news releases were issued on July 13, 19, August 2, 15 and 22. The first four of these five news releases were issued after, rather than before, Calpine and Prime granted new share options or reduced the price of previously issued options in favour of directors (including the respondents) and employees. The fifth news release was issued before the fifth impugned share options transaction. As a matter of convenience, I set out the following chronology of events which relate to the five share options transactions and news releases:

Date	Event
July 11/12, 1989	Idziszek and Mallo visit the drill camp and are very impressed with their visual observations. A new zone of mineralization is identified and Mallo states that

tats et déterminer quand ils devaient être rendus publics. Idziszek a aussi érigé une «muraille de Chine» pour empêcher le personnel non géologue de Prime Explorations, y compris les intimés, de connaître les résultats de forage avant qu'ils soient divulgués au public.

Au début du premier programme, à l'automne 1988, on publiait des communiqués sur les résultats obtenus pour un seul trou de forage ou même un trou non complété. Cependant, à l'été 1989, on avait pris l'habitude de publier environ toutes les deux semaines des résultats pour plusieurs trous de forage.

Au cours du programme d'été, les travaux de forage ont surtout été réalisés dans deux zones minéralisées, la zone 21A et la zone 21B. Il y a eu forage de plusieurs trous, dont les trous 71, 93, 101 et 109. Au cours de cette période, des options d'achat d'actions ont été accordées et des communiqués publiés.

La première information relative au programme d'été a été divulguée dans un communiqué en date du 20 juin 1989, dans lequel on annonçait le début des travaux de forage. Par la suite, il y a eu cinq autres communiqués: les 13 et 19 juillet, et les 2, 15 et 22 août. Les quatre premiers ont été publiés après (et non avant) que Calpine et Prime eurent accordé de nouvelles options d'achat d'actions aux administrateurs (y compris les intimés) et aux employés ou leur eurent consenti une réduction du prix d'exercice d'options antérieures. Le cinquième communiqué a été publié avant la cinquième opération d'options d'achat d'actions qui est attaquée. Par souci de commodité, je présente la chronologie des événements entourant les cinq opérations en question et la publication des communiqués:

Date	Événement
11 et 12 juillet 1989	Idziszek et Mallo visitent le camp de forage et sont très impressionnés par ce qu'ils voient. On découvre une nouvelle zone minéralisée

	there is a very good chance that the reserves are doubling.
July 12, 1989	Calpine grants options on 100,000 of its common shares to the Calpine Employee Plan at a price of $1.44 per share, the previous close being $1.63 per share.
July 13, 1989	A news release is issued describing the location of the drilling. The assay results for the first hole, hole 71, are ready but they are not disclosed in the news release.
July 19, 1989	Calpine issues a news release disclosing the first assay results from the summer drilling program.
July 26, 1989	While reviewing the daily fax sent from the drill camp, Mallo finds out that hole 109 is out of the ordinary. Mallo receives chip samples from hole 109 and has assays done on them. At least one of the samples shows very high gold and silver values.
July 28, 1989	While on vacation, Idziszek is advised that visible gold has been discovered in hole 109. He immediately phones the respondent Ivany to advise him of the discovery. He then calls Mallo who informs him of the results of the chip sample assays for hole 109.

	et Mallo dit qu'il y a de très bonnes chances que les réserves doublent.
12 juillet 1989	Dans le cadre du régime des employés, Calpine accorde des options sur 100 000 de ses actions ordinaires, au coût de 1,44 $ l'action, par rapport à un cours de clôture de 1,63 $ l'action.
13 juillet 1989	Un communiqué est publié dans lequel est décrit le lieu du forage. Les résultats de titrage pour le premier trou, le trou 71, sont prêts, mais ne sont pas divulgués dans le communiqué.
19 juillet 1989	Calpine publie un communiqué divulguant les premiers résultats de titrage obtenus dans le cadre du programme de forage de l'été.
26 juillet 1989	En examinant la télécopie reçue quotidiennement du camp de forage, Mallo constate que les données pour le trou 109 sont exceptionnelles. Il reçoit des échantillons d'éclats pour le trou 109 et les fait analyser. Au moins un de ces échantillons indique une teneur très élevée en or et en argent.
28 juillet 1989	Pendant ses vacances, Idziszek est informé que l'on a découvert de l'or visible dans le trou 109. Il téléphone immédiatement à l'intimé Ivany pour l'informer de la découverte. Il appelle ensuite Mallo qui l'informe des résultats de titrage des échantillons pour le trou 109.

July 31, 1989	In the morning, Calpine grants options on 100,000 of its common shares to Leslie MacConnell, a long-time associate of Pezim's, at a price of $2.32 per share, the previous close being $2.55. Idziszek and Mallo visit the drill camp, arriving about noon. After viewing the drill core and confirming the finding of visible gold, Idziszek phones Pezim at about 1:30 p.m. and informs him of the visible gold. In the late afternoon, Pezim signs and files a declaration in which he certifies that there are no undisclosed material changes in the affairs of Calpine.
August 1, 1989	Idziszek and Mallo begin to prepare a news release and correlate the assay results that are in the office.
August 2, 1989	At Pezim's request, trading in Calpine's shares is halted from 9:40 a.m. until 9:30 a.m. the following day. A news release is issued announcing the assay results for several more holes as well as the discovery of visible gold in hole 109.
August 14, 1989	The final gold and silver assays for holes 93 and 101 arrive. They included "very good numbers".
August 15, 1989	Prime reduces, to $2.13 per share, the exercise price of

31 juillet 1989	Dans la matinée, Calpine accorde à Leslie MacConnell, un associé de longue date de Pezim, des options sur 100 000 de ses actions ordinaires, au coût de 2,32 $ l'action, par rapport à un cours de clôture de 2,55 $. Vers midi, Idziszek et Mallo arrivent pour visiter le camp de forage. Après avoir examiné la carotte de forage et confirmé la présence d'or visible, Idziszek téléphone à Pezim vers 13 h 30 et l'informe de la découverte. En fin d'après-midi, Pezim signe et dépose une déclaration dans laquelle il atteste qu'il n'est survenu aucun changement important non divulgué dans les affaires de Calpine.
1er août 1989	Idziszek et Mallo commencent à rédiger un communiqué et comparent les résultats de titrage qu'ils ont entre les mains.
2 août 1989	À la demande de Pezim, les opérations sur les actions de Calpine sont suspendues à partir de 9 h 40 jusqu'à 9 h 30 le lendemain. Un communiqué est publié annonçant les résultats de titrage pour plusieurs autres trous ainsi que la découverte d'or visible dans le trou 109.
14 août 1989	On obtient les résultats définitifs des teneurs en or et en argent pour les trous 93 et 101. Les données sont très positives.
15 août 1989	Prime réduit à 2,13 $ l'action le prix d'exercice des

	options on 3,351,383 of its common shares already granted, the previous close being $2.47. Most of these options are held by Senior Management of Prime, including the respondents. In the afternoon, Calpine issues a news release disclosing the assay results for holes 93 and 101.		options déjà accordées sur 3 351 383 de ses actions ordinaires, par rapport à un cours de clôture de 2,47 $. La plupart de ces options sont détenues par les cadres supérieurs de Prime, dont les intimés. Dans l'après-midi, Calpine publie un communiqué renfermant les résultats de titrage pour les trous 93 et 101.
August 16, 1989	The final total gold assays for hole 109 arrive at Prime Explorations in the afternoon.	16 août 1989	Prime Explorations reçoit dans l'après-midi les résultats définitifs de la teneur en or pour le trou 109.
August 17, 1989	Prime grants options on 125,000 of its common shares to Richard Warke and Murray Garrison, two Prime employees, at an exercise price of $2.28 per share, the previous close being $2.50. In the afternoon, Pezim signs and files a declaration in which he certifies that there are no undisclosed material changes in the affairs of Prime.	17 août 1989	Prime accorde à Richard Warke et Murray Garrison, deux employés de Prime, des options sur 125 000 actions ordinaires, à un coût de 2,28 $ l'action, par rapport à un cours de clôture de 2,50 $. Dans l'après-midi, Pezim signe et dépose une déclaration dans laquelle il atteste qu'il n'est survenu aucun changement important non divulgué dans les affaires de Prime.
August 22, 1989	Calpine issues a news release (dated August 21) disclosing a detailed description of the assay results for hole 109, as well as information on visual observations of nearby holes that had been subsequently drilled.	22 août 1989	Calpine publie un communiqué (en date du 21 août) décrivant en détail les résultats de titrage pour le trou 109 et comprenant des renseignements sur les observations faites dans les trous voisins forés par la suite.
August 24, 1989	Calpine grants options on 100,000 of its common shares to the Calpine Employee Plan and to Norman Pezim, Murray Pezim's brother, at an exercise	24 août 1989	Calpine accorde au régime des employés de Calpine et à Norman Pezim, frère de Murray Pezim, des options sur 100 000 de ses actions ordinaires, au coût de 4,78 $

price of $4.78 per share, the previous close being $6.

B. *The Private Placement*

On July 14, 1989, Calpine issued a news release announcing a private placement for two million units; each unit was to consist of one Calpine common share and one Calpine share purchase warrant, which entitles the holder to purchase one Calpine common share. The fact that the purchaser or placee was Prime was not disclosed in the news release even though the sale would increase Prime's interest in Calpine from 23 to 36 percent of the outstanding Calpine common shares.

On July 17, 1989, the respondent Ivany sent a notice letter to the VSE concerning the private placement. Prime Equities Inc., a wholly owned subsidiary of Prime, was named as agent for the private placement, but the notice did not indicate the name of the placee.

During the period from July 14 to August 10, 1989, the respondent Pezim told certain brokers and investors who asked him that it was Prime, directly or indirectly, that was purchasing the private placement.

On August 10, 1989, the VSE was advised that the private placement would be taken down by an entity related to Prime and that Prime Equities would not be involved in the transaction. Prime issued a news release on that same day identifying Prime as the placee and announcing that it would close the private placement by August 18, 1989.

On August 18, 1989, Calpine filed the required declaration with the VSE in which the respondent Page certified that there were no undisclosed material changes in Calpine's affairs.

Although the private placement purportedly closed on August 18, 1989, the money was not paid or the shares issued until December of that year. On December 11, 1989, Prime issued a news

l'action, par rapport à un cours de clôture de 6 $ l'action.

B. *Le placement privé*

Le 14 juillet 1989, Calpine a publié un communiqué pour annoncer un placement privé de deux millions d'unités; chaque unité devait comprendre une action ordinaire de Calpine et un bon de souscription, conférant à son détenteur le droit d'acheter une action ordinaire de Calpine. Le communiqué ne mentionnait pas que l'acheteur était Prime, même si la vente devait faire passer la participation de Prime dans Calpine de 23 à 36 pour 100 des actions ordinaires en circulation de Calpine.

Le 17 juillet 1989, l'intimé Ivany a envoyé à la Bourse un avis concernant ce placement privé. Cet avis mentionnait que Prime Equities Inc., filiale en propriété exclusive de Prime, était le mandataire du placement privé, mais il n'indiquait pas le nom de l'acheteur.

Au cours de la période du 14 juillet au 10 août 1989, pour répondre à certains courtiers et investisseurs qui le lui avaient demandé, l'intimé Pezim a dit que Prime était, directement ou indirectement, l'acheteur du placement privé.

Le 10 août 1989, la Bourse a été informée que le placement privé serait pris par une entité apparentée à Prime et que Prime Equities ne participerait pas à l'opération. Prime a publié le même jour un communiqué dans lequel elle annonçait qu'elle était l'acheteur et que l'opération de placement privé serait terminée le 18 août 1989.

Le 18 août 1989, Calpine a déposé auprès de la Bourse la déclaration requise, dans laquelle l'intimé Page attestait qu'il n'était pas survenu de changements importants non divulgués dans les affaires de Calpine.

Bien que l'opération de placement privé ait apparemment été achevée le 18 août 1989, le paiement ou l'émission des actions n'ont pas eu lieu avant décembre de la même année. Le 11 décemrelease announcing that it had completed, on December 7, 1989, the purchase of four million shares of Calpine by way of a private placement.

C. *The ALC Withdrawal*

In September 1989, Prime made a public offering of five million units, at $4.25 per unit, under a guaranteed agency agreement ("GAA") with three brokerage firms. Each unit was to consist of one Prime common share and one Prime share purchase warrant. Under the GAA, one of the brokerage firms, Canarim Investment Corporation Ltd. ("Canarim") guaranteed either to find purchasers or purchase itself four million units. An English company, Alexanders, Laing and Cruickshank Ltd. ("ALC"), entered into a deal with Canarim to buy one million Prime units. The deadline for payment under the GAA was September 29, 1989.

On September 25, 1989, Tim Hoare, a principal of ALC and a director of Prime, advised Canarim that ALC was withdrawing its purchase because it had not been adequately consulted on the price of the offering. Peter Brown, Canarim's chairperson and a director of Prime, called Pezim and told him there was a problem. Pezim told Brown to give ALC a delayed delivery contract and said he would talk to Hoare personally to convince him to take the units. Pezim also told Brown that Canarim would have to pay for the units, but indicated that Prime would try to help Canarim offset any loss through other business. On September 29, 1989, neither ALC nor Canarim paid for the unwanted one million units.

On October 16, 1989, Brown formally notified Prime that Canarim would not take down or pay for the one million Prime units. The withdrawal of Canarim was disclosed on October 19, 1989 in a planned news release intended to disclose a share swap between Prime and another company. Following this news release, Canarim came under pressure from the brokerage community to take

bre 1989, Prime a publié un communiqué pour annoncer qu'elle avait complété le 7 décembre 1989 l'achat de quatre millions d'actions de Calpine par voie de placement privé.

C. *Le retrait d'ALC*

En septembre 1989, Prime a fait un appel public à l'épargne relativement à cinq millions d'unités, à 4,25 $ l'unité, en vertu d'une entente de représentation garantie («l'entente») conclue avec trois firmes de courtage. Chacune de ces unités devait comprendre une action ordinaire de Prime et un bon de souscription à des actions de Prime. En vertu de l'entente, une des firmes de courtage, Canarim Investment Corporation Ltd. («Canarim») s'était engagée à faire acheter ou à acheter elle-même quatre millions d'unités. Une compagnie anglaise, Alexanders, Laing and Cruickshank Ltd. («ALC»), a conclu un marché avec Canarim pour l'achat d'un million d'unités de Prime. Aux termes de l'entente, la date limite de paiement était le 29 septembre 1989.

Le 25 septembre 1989, Tim Hoare, mandant d'ALC et administrateur de Prime, a informé Canarim qu'ALC retirait son offre d'achat parce qu'elle n'avait pas été suffisamment consultée quant au prix d'émission. Peter Brown, président de Canarim et administrateur de Prime, a téléphoné à Pezim pour lui dire qu'il y avait un problème. Pezim a dit à Brown de donner à ALC un contrat de livraison différée et a ajouté qu'il parlerait personnellement à Hoare pour le convaincre de prendre les unités. Pezim a aussi dit à Brown qu'il faudrait que Canarim paie les unités, mais que Prime tenterait d'aider Canarim à compenser les pertes par d'autres opérations. Le 29 septembre 1989, ni ALC ni Canarim n'avaient payé le million d'unités non désirées.

Le 16 octobre 1989, Brown a officiellement averti Prime que Canarim ne prendrait ni ne paierait le million d'unités de Prime. Le retrait de Canarim a été divulgué le 19 octobre 1989 dans un communiqué planifié visant à divulguer un échange d'actions entre Prime et une autre société. Après le communiqué, les milieux de courtage ont insisté auprès de Canarim pour qu'elle accepte les down the units. Accordingly, Canarim agreed to honour its obligation and advised Prime. This was disclosed by Prime in a news release on October 23, 1989.

Following a rather lengthy hearing relating to the three groups of impugned transactions described above, the Commission concluded that the respondents had contravened s. 67 of the Act by failing to disclose material changes in their affairs. However, no contravention of s. 68 of the Act, relating to improper insider trading, was found. The respondents were responsible for these breaches as senior managers of the companies and were suspended from trading in shares for a period of one year through the removal of their trading exemptions under the Act. Further, they were ordered to pay two-thirds of the costs incurred by the Commission and the Superintendent.

Pursuant to s. 149 of the Act, the respondents appealed to the British Columbia Court of Appeal. The order granting leave to appeal limited the appeal to the question of whether the Commission had erred as a matter of law in its conclusions on s. 67 (disclosure of material change), s. 144 (power of Commission to make orders) and s. 154.2 (power of Commission to make orders regarding costs) of the Act. The Court of Appeal allowed their appeal and set aside the orders of the Commission, Locke J.A. dissenting. The respondents were ordered to pay one tenth of the costs incurred by the Commission and the Superintendent. The Superintendent and the Commission now appeal from that decision.

II. Relevant Statutory Provisions

Securities Act, S.B.C. 1985, c. 83 (am. S.B.C. 1988, c. 58, S.B.C. 1989, c. 78, S.B.C. 1990, c. 25 and S.B.C. 1992, c. 52):

unités. Canarim a donc accepté d'honorer son obligation et a informé Prime. Ce fait a été annoncé par Prime dans un communiqué le 23 octobre 1989.

Après une audience plutôt longue relativement aux trois groupes d'opérations contestées que j'ai déjà décrites, la Commission a conclu que les intimés avaient enfreint l'art. 67 de la Loi en omettant de divulguer des changements importants survenus dans leurs affaires. Cependant, à son avis, ils n'avaient pas enfreint l'art. 68 de la Loi, qui vise les opérations d'initiés. En tant que cadres supérieurs des sociétés, les intimés étaient responsables de ces contraventions; la Commission leur a interdit de faire des opérations sur des actions pendant une période d'un an, en leur retirant la possibilité de se prévaloir pendant cette période des exemptions prévues à leur égard par la Loi. Enfin, la Commission a aussi ordonné aux intimés de payer les deux tiers des dépens de la Commission et du surintendant.

Conformément à l'art. 149 de la Loi, les intimés ont interjeté appel devant la Cour d'appel de la Colombie-Britannique. Selon l'autorisation d'appel accordée, l'appel devait seulement viser à déterminer si la Commission avait commis une erreur de droit dans ses conclusions relatives à l'art. 67 (divulgation d'un changement important), à l'art. 144 (pouvoir de la Commission de rendre des ordonnances) et à l'art. 154.2 (pouvoir de la Commission de rendre des ordonnances quant aux dépens) de la Loi. La Cour d'appel a accueilli l'appel et annulé les ordonnances de la Commission; le juge Locke était dissident. Elle a ordonné aux intimés de payer un dixième des dépens de la Commission et du surintendant. Le surintendant et la Commission se pourvoient maintenant contre cette décision.

II. Les dispositions législatives pertinentes

Securities Act, S.B.C. 1985, ch. 83 (mod. S.B.C. 1988, ch. 58, S.B.C. 1989, ch. 78, S.B.C. 1990, ch. 25 et S.B.C. 1992, ch. 52):

1. (1) In this Act

. . .

"material change" means, where used in relation to the affairs of an issuer, a change in the business, operations, assets or ownership of the issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer and includes a decision to implement that change made by

(a) senior management of the issuer who believe that confirmation of the decision by the directors is probable, or

(b) the directors of the issuer;

"material fact" means, where used in relation to securities issued or proposed to be issued, a fact that significantly affects, or could reasonably be expected to significantly affect, the market price or value of those securities;

67. (1) Where a material change occurs in the affairs of a reporting issuer, the reporting issuer shall

(a) as soon as practicable issue and file a press release that is authorized by a senior officer and that discloses the nature and substance of the change, and

(b) file a required report, as soon as practicable, but in any event no later than 10 days after the date on which the change occurs.

(2) Subsection (1) does not apply to a reporting issuer which immediately files the report required under subsection (1) (b) marked "confidential" together with written reasons why there should not be a press release under subsection (1) (a) so long as

(a) in the opinion of the reporting issuer, the disclosure required by subsection (1) would be unduly detrimental to its interests, or

(b) the material change in the affairs of the reporting issuer

(i) consists of a decision to implement a change made by senior management of the issuer who believe that confirmation of the decision by the directors is probable, and

[TRADUCTION]

1. (1) Les définitions qui suivent s'appliquent à la présente loi.

. . .

«changement important» Dans le contexte des affaires d'un émetteur, s'entend d'un changement dans ses activités commerciales, son exploitation, ses éléments d'actif ou sa propriété, s'il est raisonnable de s'attendre à ce que ce changement ait un effet appréciable sur le cours ou la valeur des valeurs mobilières de cet émetteur. La présente définition inclut la décision d'effectuer un tel changement prise:

a) soit par la direction générale de l'émetteur si celle-ci estime que cette décision sera probablement approuvée par le conseil d'administration,

b) soit par les administrateurs de l'émetteur;

«fait important» Dans le contexte de valeurs mobilières qui ont été émises ou dont l'émission est projetée, s'entend d'un fait qui a un effet appréciable sur le cours ou la valeur de ces valeurs mobilières ou dont il est raisonnable de s'attendre qu'il aura cet effet;

67. (1) Si un changement important survient dans les affaires d'un émetteur assujetti, ce dernier

a) publie et dépose dès que possible un communiqué de presse qui est autorisé par un cadre supérieur et qui divulgue la nature et la substance du changement, et

b) dépose dès que possible un rapport exigé sur ce changement et, dans tous les cas, au plus tard dix jours suivant la date à laquelle le changement est survenu.

(2) Le paragraphe (1) ne s'applique pas à un émetteur assujetti qui dépose immédiatement le rapport exigé par l'alinéa (1)b) en y inscrivant une mention portant que le rapport est «confidentiel» et en donnant par écrit les motifs pour lesquels il ne devrait pas y avoir de communiqué en vertu de l'alinéa (1)a), dans les cas suivants:

a) l'émetteur assujetti est d'avis que la divulgation exigée par le paragraphe (1) serait indûment préjudiciable à ses intérêts;

b) le changement important dans les affaires de l'émetteur assujetti

(i) consiste en une décision de mettre à exécution un changement apporté par la direction générale de l'émetteur qui estime que les administrateurs ratifieront probablement cette décision, et

(ii) senior management of the issuer has no reason to believe that persons with knowledge of the material change have made use of that knowledge in purchasing or selling securities of the issuer.

(3) Where a report has been filed under subsection (2), the reporting issuer shall advise the commission in writing, within 10 days of the date of filing the initial report and every 10 days after that, that it believes the report should continue to remain confidential until

(a) the material change is generally disclosed in the manner referred to in subsection (1) (a), or

(b) if the material change consists of a decision of the type referred to in subsection (2) (b), that decision has been rejected by the directors of the issuer.

68. (1) No person that

(a) is in a special relationship with a reporting issuer, and

(b) knows of a material fact or material change with respect to that reporting issuer, which material fact or material change has not been generally disclosed,

shall purchase or sell

(c) securities of that reporting issuer,

(d) a put, a call, an option or another right or obligation to purchase or sell securities of the reporting issuer, or

(e) a security, the market price of which varies materially with the market price of any securities of the reporting issuer.

(2) No reporting issuer and no person in a special relationship with a reporting issuer shall inform another person of a material fact or material change with respect to the reporting issuer before the material fact or material change has been generally disclosed, unless giving the information is necessary in the course of business of the reporting issuer or of the person in the special relationship with the reporting issuer.

(3) No person that proposes to

(a) make a take over bid, as defined in section 74, for the securities of a reporting issuer,

(ii) la direction générale de l'émetteur n'a aucune raison de croire que les personnes qui ont connaissance du changement important ont profité de cette connaissance en achetant ou en vendant des valeurs mobilières de l'émetteur.

(3) Si un rapport a été déposé en vertu du paragraphe (2), l'émetteur assujetti informe la commission par écrit dans les dix jours suivant la date du dépôt du rapport initial et, par la suite, tous les dix jours, qu'il estime que le rapport doit demeurer confidentiel

a) soit jusqu'à ce que le changement important soit divulgué au public de la manière prévue à l'alinéa (1)a),

b) soit, si le changement important consiste en une décision du genre de celle visée à l'alinéa (2)b), jusqu'à ce que cette décision ait été infirmée par le conseil d'administration de l'émetteur.

68. (1) Il est interdit à quiconque

a) a des rapports particuliers avec un émetteur assujetti,

b) est au courant d'un fait important ou d'un changement important concernant cet émetteur, qui n'a pas été divulgué au public,

d'acheter ou de vendre

c) des valeurs mobilières de l'émetteur assujetti,

d) une option de vente, un appel de fonds, un droit d'option ou tout autre droit ou obligation d'acheter ou de vendre des valeurs mobilières de l'émetteur assujetti,

e) une valeur mobilière dont le cours varie de façon importante par rapport à celui de toute valeur mobilière de l'émetteur assujetti.

(2) Sauf dans le cours normal de ses activités commerciales, nul émetteur assujetti et nulle personne ayant des rapports particuliers avec cet émetteur assujetti ne doit informer une autre personne d'un fait important ou d'un changement important concernant cet émetteur avant que ce fait ou ce changement n'ait été divulgué au public.

(3) Aucune personne qui a l'intention, selon le cas

a) de présenter une offre publique d'achat, au sens de l'article 74, à l'égard des valeurs mobilières d'un émetteur assujetti,

(b) become a party to a reorganization, amalgamation, merger, arrangement or similar business combination with a reporting issuer, or

(c) acquire a substantial portion of the property of a reporting issuer

shall inform another person of a material fact or material change with respect to the reporting issuer before the material fact or material change has been generally disclosed, unless giving the information is necessary to effect the take over bid, business combination or acquisition, as the case may be.

(4) A person does not contravene subsection (1), (2) or (3) if the person proves on the balance of probabilities that at the time of the purchase or sale referred to in subsection (1) or at the time of giving the information under subsection (2) or (3), as the case may be, the person reasonably believed that the material fact or material change had been generally disclosed.

144. (1) Where the commission or the superintendent considers it to be in the public interest, the commission or the superintendent, after a hearing, may order

. . .

(c) that any or all of the exemptions described in any of sections 30 to 32, 55, 58, 80 or 81 do not apply to a person,

(d) that a person

(i) resign any position that the person holds as a director or officer of an issuer, and

(ii) is prohibited from becoming or acting as a director or officer of any issuer,

. . .

149. (1) A person directly affected by a decision of the commission, other than

(a) a decision under section 33 or 59,

(b) a decision under section 147 in connection with the review of a decision of the superintendent under section 33 or 59, or

(c) a decision by a person acting under authority delegated by the commission under section 6,

may appeal to the Court of Appeal with leave of a justice of that court.

b) de participer à une réorganisation, une fusion, un arrangement ou un regroupement similaire d'entreprises avec un émetteur assujetti;

c) d'acquérir une portion importante des biens d'un émetteur assujetti,

ne doit informer une autre personne d'un fait important ou changement important concernant cet émetteur avant que ce fait ou ce changement n'ait été divulgué au public, sauf si la divulgation de ces renseignements est nécessaire pour effectuer l'offre publique d'achat, le regroupement d'entreprises ou l'acquisition.

(4) Une personne ne contrevient pas au paragraphe (1), (2) ou (3) si elle établit, selon une prépondérance des probabilités, qu'elle avait alors des motifs raisonnables de croire que le fait important ou le changement important avait été préalablement divulgué au public.

144. (1) Lorsqu'ils estiment dans l'intérêt public de le faire, la commission ou le surintendant peuvent, après audience, ordonner

. . .

c) qu'une ou l'autre ou l'ensemble des exemptions visées aux articles 30 à 32, 55, 58, 80 ou 81 ne s'applique pas à une personne,

d) qu'une personne

(i) démissionne du poste qu'elle occupe comme administrateur ou dirigeant d'un émetteur, et

(ii) ne peut plus devenir administrateur ou dirigeant d'un émetteur ou agir à ce titre,

. . .

149. (1) Une personne directement touchée par une décision de la commission peut, avec autorisation, interjeter appel devant la Cour d'appel, sauf s'il s'agit

a) soit d'une décision prise en vertu de l'article 33 ou 59,

b) soit d'une décision prise en vertu de l'article 147 relativement à l'examen d'une décision du surintendant en vertu de l'article 33 ou 59,

c) ou d'une décision prise par une personne dans l'exercice d'un pouvoir que lui a délégué la commission en vertu de l'article 6.

154.2 The person presiding at a hearing required or permitted under this Act or the regulations may order a person whose affairs are the subject of the hearing to pay prescribed fees or charges for the costs of or related to the hearing that are incurred by or on behalf of the commission or the superintendent including, without limiting this,

(a) costs of matters preliminary to the hearing,

(b) costs for time spent by the commission or the superintendent or the staff of either of them,

(c) fees paid to an expert or witness, and

(d) costs of legal services.

III. Judgments Below

1. *British Columbia Securities Commission*

The Commission's reasons for judgment were handed down in two parts: the findings of the Commission and the decision of the Commission.

In its findings, released on November 16, 1990, the Commission began by commenting on its jurisdiction. It held that, because it was vested with the responsibility of regulating the financial markets, it had broad powers. More specifically, the Commission stated that its jurisdiction was not limited to breaches of the Act, but extended to "circumstances where no provision of any law has been violated . . . since, no matter how extensive the specific provisions are, there will be fertile and unscrupulous minds to invent schemes that will skirt the words of all published pronouncements". The Commission concluded its discussion of jurisdiction as follows:

> The Commission may from time to time judge the conduct of directors against a standard found in the Company Act. In other instances it may, through policy statements, impose a higher standard or one more specific in its terms. The Commission may exercise its jurisdiction even when there is no published policy. The focus of the Commission's inquiry remains constant: the conduct of market participants and its impact on the efficiency and fairness of the market. Where the public interest requires its intervention, the Commission's

154.2 La personne qui préside une audience exigée ou permise en vertu de la présente loi ou de son règlement d'application peut ordonner à une personne dont les affaires font l'objet de l'audience de payer les coûts ou dépens engagés par la commission ou le surintendant ou en leur nom, y compris notamment

a) les coûts de toute question préliminaire à l'audience,

b) les coûts au titre du temps consacré par la commission ou le surintendant ou leur personnel,

c) les indemnités payées à un expert ou à un témoin,

d) les coûts des services juridiques.

III. Les juridictions inférieures

1. *La British Columbia Securities Commission*

La Commission a présenté ses motifs en deux parties: ses conclusions et sa décision.

Dans ses conclusions prononcées le 16 novembre 1990, la Commission a tout d'abord commencé par examiner sa compétence. Elle a conclu qu'elle possédait de vastes pouvoirs parce qu'elle était investie de la responsabilité de réglementer les marchés financiers. Plus particulièrement, la Commission a précisé qu'elle n'était pas limitée dans l'exercice de sa compétence aux violations de la Loi, mais qu'elle pouvait aussi examiner [TRADUCTION] «les cas où il n'y a eu violation d'aucune loi [. . .] puisque, quelle que soit l'ampleur des dispositions données, il y aura toujours des esprits fertiles et malhonnêtes qui sauront mettre sur pied des plans pour éluder le libellé même de tous les textes publiés». Voici comment la Commission a conclu l'examen de sa compétence:

> [TRADUCTION] La Commission peut à l'occasion examiner la conduite des administrateurs par rapport à une norme établie dans la Company Act. Dans d'autres cas, elle peut, par des déclarations de principe, imposer une norme plus sévère ou plus précise. La Commission peut exercer sa compétence même en l'absence d'une politique publiée. L'objet de toute enquête de la Commission demeure constant: la conduite des participants sur le marché boursier et l'incidence de cette conduite sur l'efficacité et l'équité du marché. Dans les cas où l'inté-

response is a proper exercise of its jurisdiction and a fulfilment of its mandate.

Following these comments, the Commission examined the various impugned transactions in order to determine whether or not ss. 67 and 68 of the Act had been breached. It divided its findings according to the three types of transactions identified above in the recital of the facts.

A. *The Drilling Results and Share Options Transactions*

The Commission found that Prime or Calpine had, on four occasions in July and August 1989, contravened s. 67 of the Act in failing to disclose all material changes in their affairs prior to granting or repricing options. The Commission's key holding was that the "Chinese Wall", an internal company stratagem, did not relieve the senior managers from their obligations under s. 67 of the Act, which mandates disclosure of material change "as soon as practicable". The Commission stated:

> The accumulation of drilling results for release at periodic intervals is, in most circumstances, a reasonable approach to the disclosure of such information. Where an issuer proposes to engage in a securities transaction, however, it must ensure that any undisclosed material change is disclosed before proceeding with the transaction. The words "as soon as practicable" have a different meaning in this context than they might in the absence of the securities transaction.

In the view of the Commission, there was a positive obligation on the managers to make inquiries to determine whether there had been a material change prior to engaging in any securities transactions. The "Chinese Wall", though effective in shielding the managers from knowledge, did not release them from this obligation.

With respect to the fifth options transaction, the Commission found that Calpine had abused the ten day average pricing formula under the VSE's options policy, in failing to set the price of the

rêt public exige l'intervention de la Commission, les mesures prises à cette fin constituent un exercice approprié de sa compétence et s'inscrivent dans le cadre de l'exécution de son mandat.

Après avoir fait ces commentaires, la Commission a examiné les diverses opérations attaquées pour déterminer s'il y avait eu violation des art. 67 et 68 de la Loi. Elle a divisé ses conclusions en fonction des trois types d'opérations que j'ai citées dans l'exposé des faits.

A. *Les résultats de forage et les options d'achats d'actions*

La Commission a conclu que Prime ou Calpine avait, à quatre reprises en juillet et août 1989, contrevenu à l'art. 67 de la Loi en omettant de divulguer tous les changements importants survenus dans les affaires de la société avant l'attribution des options ou la redétermination de leur prix. La principale conclusion de la Commission était que la «muraille de Chine», un stratagème interne de la société, ne libérait pas les cadres supérieurs de leurs obligations en vertu de l'art. 67 de la Loi, qui oblige à divulguer «dès que possible» tout changement important. La Commission a dit:

> [TRADUCTION] L'accumulation des résultats de forage publiés périodiquement est, dans la plupart des cas, une bonne façon de divulguer ces renseignements. Cependant, lorsqu'un émetteur envisage de procéder à une opération sur valeurs mobilières, il doit veiller à ce que soit préalablement divulgué tout changement important qui ne l'a pas encore été. Dans ce contexte, l'expression «dès que possible» a un sens différent de celui qu'il pourrait avoir en l'absence d'une telle opération.

De l'avis de la Commission, préalablement à toute opération sur valeurs mobilières, les cadres avaient une obligation positive de s'enquérir de tout changement important. Si la «muraille de Chine» établie a permis d'empêcher que les gestionnaires soient mis au courant, elle ne les a pas pour autant libérés de l'obligation de s'enquérir.

Pour ce qui est de la cinquième opération concernant les options d'achat, la Commission a conclu que Calpine avait mal utilisé la formule de calcul du prix moyen sur une période de dix jours, en options at a level reflecting the dissemination of recently disclosed material changes.

The Commission also found that, in two filings with the VSE for approval of options transactions, Pezim falsely certified that there were no material changes in the affairs of Calpine and Prime, respectively, that had not been publicly disclosed.

Finally, with respect to s. 68 of the Act, the Commission found, as noted above, that the "Chinese Wall" was effective in shielding the respondents from having knowledge of undisclosed material facts or material changes. Accordingly, the respondents had no knowledge of the drilling results when Prime and Calpine granted and repriced the options. Consequently, there was no breach of s. 68 of the Act.

B. *The Private Placement*

The Commission found that Calpine's disclosure of the private placement on July 14, 1989 was not in compliance with s. 67 of the Act because it failed to disclose that Prime was the placee and what effect the private placement would have on the control of Calpine. The Commission stated the following:

> The fact that Calpine's major shareholder would, through the private placement, raise its interest from 23 per cent to 36 per cent, assuming exercise of the warrants, represented a change in the ownership of Calpine that, by significantly reducing the possibility of a challenge for control, would reasonably be expected to cause a significant effect on the market price or value of Calpine's shares. It was therefore a material change in Calpine's affairs and was required to be disclosed, under section 67 of the Act.

The Commission also found that Calpine misled the VSE on July 17, 1989 by representing that the private placement was to be brokered by Prime Equities, and that Page falsely certified to the VSE

vertu de la politique de la Bourse relative aux options, parce qu'elle n'avait pas fixé le prix des options en fonction des changements importants récemment divulgués.

La Commission a aussi conclu que Pezim avait, à deux reprises lorsqu'il a soumis les options d'achat à l'approbation de la Bourse, faussement attesté qu'il n'était survenu dans les affaires de Calpine et de Prime aucun changement important non divulgué au public.

Enfin, en ce qui concerne l'art. 68 de la Loi, comme je l'ai déjà fait remarquer, la Commission a conclu que la «muraille de Chine» avait permis d'empêcher que les intimés soient mis au courant de faits ou de changements importants non divulgués. Par conséquent, les intimés n'étaient pas au courant des résultats de forage lorsque Prime et Calpine ont accordé des options et en ont redéterminé les prix. En conséquence, il n'y a pas eu violation de l'art. 68 de la Loi.

B. *Le placement privé*

La Commission a conclu que la divulgation que Calpine avait faite de l'existence du placement privé le 14 juillet 1989 n'était pas conforme à l'art. 67 de la Loi puisqu'elle ne précisait pas que Prime était l'acheteur ni quel allait être l'effet de ce placement privé sur le contrôle de Calpine. La Commission a déclaré:

> [TRADUCTION] Le fait que la participation du principal actionnaire de Calpine, par le jeu du placement privé, devait passer de 23 à 36 pour 100, en supposant l'exercice des bons de souscription d'actions, représentait un changement dans la propriété de Calpine puisqu'il était raisonnable de s'attendre à ce que ce changement, en réduisant dans une large mesure la possibilité d'une contestation du contrôle, ait un effet appréciable sur le cours ou la valeur des actions de Calpine. Il s'agissait en conséquence d'un changement important dans les affaires de Calpine, qui devait être divulgué en vertu de l'article 67 de la Loi.

La Commission a aussi conclu, que, le 17 juillet 1989, Calpine avait induit la Bourse en erreur lorsqu'elle l'a avisée que le placement privé devait être effectué par l'intermédiaire de Prime Equities, on August 18, 1989 that there were no material changes in the affairs of Calpine that had not been publicly disclosed. With respect to the private placement, the Commission found no contravention of s. 68 of the Act.

C. *The ALC Withdrawal*

The Commission could not accept the respondents' argument that, with respect to the ALC withdrawal, there was nothing to disclose. In its view, the situation Prime found itself in on September 25, 1989 "would reasonably have been expected to have a significant effect on the market price of Prime's shares". Consequently, the Commission found that, in failing to make timely and adequate disclosure of the dispute with Canarim following ALC's withdrawal, Prime contravened s. 67 of the Act.

D. *The Orders*

In its findings, the Commission did not make any orders and preferred instead to hear submissions from the parties, following the release of its findings, with respect to the terms of the orders to be made under ss. 144 and 154.2 of the Act.

In its decision, released December 17, 1990, the Commission reviewed the parties submissions relating to orders and concluded that the respondents' improper conduct was related to distributions of securities under the exemptions in the Act. Consequently, in order to indicate the seriousness with which it viewed the contraventions, the Commission considered it to be in the public interest to remove the respondents' right to rely on the exemptions. Since the respondents were directors and senior management of Prime and Calpine, and had responsibility for ensuring compliance with securities regulatory requirements, the Commission decided not to differentiate among them in making its orders.

With respect to costs, the Commission rejected the respondents' argument that the length of the

et que, le 18 août 1989, Page avait faussement attesté à la Bourse qu'il n'était pas survenu dans les affaires de Calpine de changements importants qui n'avaient pas été divulgués au public. En ce qui concerne le placement privé, la Commission a conclu qu'il n'y avait pas eu de contravention à l'art. 68 de la Loi.

C. *Le retrait d'ALC*

La Commission n'a pu souscrire à l'argument des intimés qu'il n'y avait rien à divulguer relativement au retrait d'ALC. À son avis, [TRADUCTION] «il était raisonnable de s'attendre à ce que [la situation dans laquelle se trouvait Prime le 25 septembre 1989] ait un effet appréciable sur le cours des actions de Prime». La Commission a donc conclu que Prime avait contrevenu à l'art. 67 de la Loi en omettant de divulguer en temps opportun et de façon appropriée l'existence d'un différend avec Canarim à la suite du retrait d'ALC.

D. *Les ordonnances*

Dans ses conclusions, la Commission n'a pas rendu d'ordonnance et a préféré entendre, après la publication de ses conclusions, les observations des parties relativement aux ordonnances à rendre en vertu des art. 144 et 154.2 de la Loi.

Dans sa décision publiée le 17 décembre 1990, la Commission a examiné les observations des parties relativement aux ordonnances et a conclu que l'inconduite des intimés avait trait au placement de valeurs mobilières en vertu des exemptions de la Loi. Par conséquent, pour indiquer qu'elle jugeait ces contraventions sérieuses, la Commission a déterminé qu'il était dans l'intérêt public de retirer aux intimés le droit de se prévaloir des exemptions. Puisque les intimés étaient à la fois administrateurs et cadres supérieurs de Prime et de Calpine et qu'ils avaient la responsabilité d'assurer le respect des exigences réglementaires en matière de valeurs mobilières, la Commission a décidé de ne pas faire entre eux de distinction dans les ordonnances qu'elle a prononcées.

En ce qui concerne les dépens, la Commission a rejeté l'argument des intimés que la durée de l'en-investigation and the hearing related mostly to the allegations of insider trading, which were not established. Rather, it found that most of the hearing related to evidence concerning those matters in respect of which it did find contravention. It held further that the suspicions which led to the other allegations were aroused by the respondents' own conduct in failing to make required disclosure and in filing misleading documents with the VSE.

The Commission concluded by making the following orders:

- under section 144(1)(c) of the Act, that the exemptions described in sections 30 to 32, 55, 58, 80 and 81 do not apply to Pezim, Page and Ivany for a period of one year, beginning January 1, 1991; and
- under section 154.2 of the Act, that Pezim, Page and Ivany pay prescribed fees or charges for two thirds of the costs of or related to the hearing that have been incurred by the Commission and the Superintendent, with the amount to be determined on further application to the Commission if the parties are unable to agree on the amount.

2. *British Columbia Court of Appeal* (1992), 66 B.C.L.R. (2d) 257

Lambert J.A., Carrothers J.A. concurring

The majority did not expressly consider the appropriate standard of review in the circumstances. Lambert J.A. merely stated the following at the outset of his reasons, at pp. 262-63:

> I think we may consider alleged errors of law in relation to both the interpretation and the application of those three specified sections of the Act. Alleged errors in interpretation are, of course, errors of law. Alleged errors of application may be errors of law or errors of fact or errors of mixed law and fact. We are required and permitted to consider only alleged errors of application that are errors of law.

quête et de l'audience était en grande partie imputable à l'examen des allégations d'opérations d'initiés, qui n'ont pas été prouvées. Elle a plutôt conclu que la majeure partie de l'audience avait été consacrée à l'examen de la preuve se rapportant aux infractions qui, selon ses conclusions, avaient été commises. Elle a aussi conclu que ce sont les intimés eux-mêmes qui, en omettant de faire les divulgations requises et en déposant auprès de la Bourse des documents trompeurs, ont suscité les doutes qui ont donné lieu aux autres allégations.

La Commission a rendu les ordonnances suivantes:

[TRADUCTION]

- que, en vertu de l'alinéa 144(1)c) de la Loi, les exemptions visées aux articles 30 à 32, 55, 58, 80 et 81 ne s'appliquent pas à Pezim, Page et Ivany pour une période d'un an à compter du 1er janvier 1991, et
- que, en vertu de l'article 154.2 de la Loi, Pezim, Page et Ivany paient les deux tiers des frais ou dépens réglementaires, directement ou indirectement engagés par la Commission et le surintendant dans le cadre de l'audience; le montant devant être établi sur présentation d'une autre demande à la Commission si les parties n'arrivent pas à s'entendre.

2. *La Cour d'appel de la Colombie-Britannique* (1992), 66 B.C.L.R. (2d) 257

Le juge Lambert, avec l'appui du juge Carrothers

La Cour d'appel à la majorité n'a pas explicitement examiné la norme de contrôle applicable dans les circonstances. Le juge Lambert a tout simplement mentionné ce qui suit au début de ses motifs, aux pp. 262 et 263:

> [TRADUCTION] À mon avis, nous pouvons examiner les erreurs de droit présumées relativement à l'interprétation et à l'application de ces trois dispositions précises de la Loi. Il va sans dire que les erreurs d'interprétation présumées sont des erreurs de droit. Des erreurs d'application présumées peuvent être des erreurs de droit ou des erreurs de fait ou encore des erreurs mixtes de droit et de fait. Nous ne pouvons examiner que les erreurs d'application présumées qui sont des erreurs de droit.

The majority went on to examine the three types of impugned transactions in order to determine whether or not the Commission had erred in finding a breach of s. 67 of the Act and no breach of s. 68.

A. *The Drilling Results and Share Options Transactions*

Lambert J.A. determined that the Commission's findings were predicated on a finding that drilling results could be a "material change" within the meaning of s. 67 of the Act. He distinguished between s. 67, a reporting provision dealing with a material change and s. 68, a prohibitory provision dealing with material facts. Drilling reports, he said, are capable of being material facts. However, information obtained from those reports does not constitute a material change as that term is defined in the Act. Lambert J.A. explained this conclusion as follows, at p. 268:

> In my opinion, geological information of the nature obtained on a continuing basis as a result of a planned drilling program does not constitute a change in the business, the operations, the assets, or the ownership of the issuer, no matter what information is obtained from the drilling results. Such information may constitute a basis for a perception that there has been a change in the value of an asset. But that is a far different thing than a change in an asset.

Having determined that the Commission erred in its interpretation of "material change", the majority of the Court of Appeal held that all the conclusions of the Commission with respect to the drilling results and options transactions were flawed and could not stand.

Having made the distinction between material facts and material changes, the majority of the Court of Appeal further held that s. 67 does not impose a duty to inquire into material facts prior to engaging in securities transactions. Lambert J.A. stated the following at p. 279:

La cour à la majorité a ensuite examiné les trois types d'opérations contestées pour déterminer si la Commission avait commis une erreur en concluant qu'il y avait eu violation de l'art. 67 mais non de l'art. 68 de la Loi.

A. *Les résultats de forage et les options d'achat d'actions*

Le juge Lambert a affirmé que la Commission avait fondé ses conclusions sur la prémisse que les résultats de forage pouvaient constituer «un changement important» au sens de l'art. 67 de la Loi. Il a établi une distinction entre l'art. 67, portant sur la divulgation d'un changement important, et l'art. 68, portant sur une interdiction reliée à des faits importants. À son avis, les rapports de forage peuvent constituer des faits importants. Cependant, les renseignements tirés de ces rapports ne constituent pas un changement important au sens de la définition de la Loi. Le juge Lambert explique cette conclusion en ces termes, à la p. 268:

> [TRADUCTION] À mon avis, les renseignements géologiques obtenus de façon continue dans le cadre d'un programme de forage planifié ne constituent pas un changement dans les activités commerciales, l'exploitation, les éléments d'actif ou la propriété de l'émetteur, quels que soient les renseignements tirés des résultats de forage. On peut se fonder sur ces renseignements pour affirmer qu'il s'est produit un changement dans la valeur d'un élément d'actif. Cependant, c'est loin d'être la même chose qu'un changement dans un élément d'actif.

Après avoir conclu que la Commission avait commis une erreur dans son interprétation de l'expression «changement important», la Cour d'appel à la majorité a statué que toutes les conclusions de la Commission relativement aux résultats de forage et aux options d'achat d'actions étaient entachées d'erreur et ne pouvaient être confirmées.

Une fois établie la distinction entre les faits importants et les changements importants, la Cour d'appel à la majorité a ensuite conclu que l'art. 67 n'imposait pas une obligation d'examiner les faits importants avant de procéder à des opérations sur valeurs mobilières. Le juge Lambert a affirmé, à la p. 279:

There is a duty to disclose material facts that are known. There is a duty to disclose material changes in the business, operations, assets or ownership of the issuer, and perhaps to make enquiries about whether there are such material changes if it should happen that they are not known. But there is no duty to enquire about material facts, and to find them out, and not to engage in securities transactions if there are any material facts that could have been found out. Section 68(2) [since repealed] specifically contemplates that there is no such duty.

B. *The Private Placement*

For reasons of convenience, I reproduce below the Commission's two findings with respect to the private placement:

[The Commission] ... found that Calpine's disclosure of the private placement on July 14 was not in compliance with section 67 of the Act because it failed to disclose that Prime was the placee and what effect the private placement would have on the control of Calpine.

[The Commission] ... also found that Calpine misled the Exchange [VSE] on July 17 by representing that the private placement was to be brokered by Prime Equities, and that Page falsely certified to the Exchange on August 18 that there were no material changes in the affairs of Calpine that had not been publicly disclosed.

With respect to the first finding, the majority found no error of law on the part of the Commission, holding that the effect of the private placement constituted a material change in the affairs of Calpine in the form of a change of ownership which could reasonably be expected to have a significant effect on the market price or on the value of the common shares of Calpine.

The majority also held that the Commission did not err in law in its conclusion in the first part of the second finding that Calpine ought to have disclosed that Prime was to be the placee, although Lambert J.A. at p. 273 thought that to say that

[TRADUCTION] Il existe une obligation de divulguer des faits importants connus. Il existe une obligation de divulguer des changements importants dans les activités commerciales, l'exploitation, les éléments d'actif ou la propriété de l'émetteur, peut-être même de s'enquérir de tels changements dans le cas où ils ne sont pas connus. Cependant, il n'existe aucune obligation de s'enquérir de faits importants, ni de les découvrir, ni de s'abstenir de faire des opérations sur valeurs mobilières s'il existe des faits importants qui auraient pu être découverts. Le paragraphe 68(2) [abrogé depuis] précise explicitement que cette obligation n'existe pas.

B. *Le placement privé*

Par souci de commodité, je reproduis les deux conclusions de la Commission relativement au placement privé:

[TRADUCTION] [La Commission] [. . .] a conclu que la divulgation que Calpine avait faite de l'existence du placement privé le 14 juillet n'était pas conforme à l'article 67 de la Loi puisqu'elle ne précisait pas que Prime était l'acheteur ni quel allait être l'effet de ce placement privé sur le contrôle de Calpine.

[La Commission] [. . .] a aussi conclu que, le 17 juillet, Calpine avait induit la Bourse en erreur lorsqu'elle l'a avisée que le placement privé devait être effectué par l'intermédiaire de Prime Equities et que, le 18 août 1989, Page avait faussement attesté à la Bourse qu'il n'était pas survenu dans les affaires de Calpine de changements importants qui n'avaient pas été divulgués au public.

Relativement à la première conclusion, la Cour d'appel à la majorité a statué que la Commission n'avait pas commis d'erreur de droit puisque l'effet du placement privé constituait un changement important dans les affaires de Calpine, soit un changement dans la propriété, duquel on pouvait raisonnablement s'attendre à ce qu'il ait un effet appréciable sur le cours ou la valeur des actions ordinaires de Calpine.

La cour à la majorité a aussi conclu que la Commission n'avait pas commis d'erreur de droit relativement à la première partie de la deuxième conclusion, c'est-à-dire que Calpine aurait dû divulguer que Prime devait être l'acheteur; cependant, selon le juge Lambert, à la p. 273, dire que

Calpine "misled the [VSE]" was a "somewhat harsh way of describing the filing".

The majority did, however, overturn the second part of the second finding. According to Lambert J.A., the Commission's conclusion was flawed by the error in law encompassed by regarding the undisclosed assays as constituting material changes in the affairs of Calpine.

C. *The ALC Withdrawal*

Once again, the majority held that the Commission's finding was flawed by the error of law in misinterpreting the definition of "material change". According to Lambert J.A., the oral statements by Brown, Canarim's chairperson, that his company did not consider itself bound to take four million units but only three million units, did not amount to a default of the GAA, and thus it could not be said that there was a change in the "business, operations, assets or ownership of the issuer" under s. 67 of the Act. He was also of the view that the telephone calls and meetings relating to the negotiations did not amount to a material change. Lambert J.A. stated that it may well have been counterproductive for the respondents to issue a press release during the difficult and delicate negotiations and thus may not have been in the public interest.

D. *The Orders*

With respect to s. 144 of the Act, the majority of the Court of Appeal held that the words "in the public interest" limit the range of orders that may be made by the Commission under that provision. It continued as follows at p. 281:

> If there is no rational link between the conduct of the person in question and the order made by the commission, or if that rational link is not a rational link for which the justification rests on the public interest, then such an order of the commission would be outside the commission's powers under s. 144(1).

Calpine «avait induit la Bourse en erreur» constituait une façon [TRADUCTION] «un peu sévère de décrire la situation».

Cependant, la Cour d'appel à la majorité a infirmé la seconde partie de la seconde conclusion. Selon le juge Lambert, la conclusion de la Commission était viciée par l'erreur de droit que constituait le fait d'avoir considéré que les résultats de titrage non divulgués constituaient des changements importants dans les affaires de Calpine.

C. *Le retrait d'ALC*

De nouveau, la Cour d'appel à la majorité a jugé que la conclusion de la Commission était viciée par l'erreur de droit que constituait le fait d'avoir mal interprété la définition de l'expression «changement important». Selon le juge Lambert, Brown, président de Canarim, n'avait pas contrevenu à l'entente en déclarant que sa société ne s'estimait pas tenue d'acquérir quatre millions d'unités, mais seulement trois; on ne pouvait en conséquence affirmer qu'il était survenu un changement «dans [l]es activités commerciales, [l']exploitation, [l]es éléments d'actif ou [l]a propriété» de l'émetteur au sens de l'art. 67 de la Loi. Le juge a aussi affirmé que les appels téléphoniques et les séances de négociations ne constituaient pas un changement important. Le juge Lambert a affirmé qu'il aurait peut-être été inefficace pour les intimés de publier un communiqué pendant les négociations difficiles et délicates et que cela n'aurait peut-être pas été dans l'intérêt public.

D. *Les ordonnances*

En ce qui concerne l'art. 144 de la Loi, la Cour d'appel à la majorité a conclu que l'expression «dans l'intérêt public» restreint la gamme des ordonnances susceptibles d'être rendues par la Commission en vertu de cette disposition. Elle affirme, à la p. 281:

> [TRADUCTION] S'il n'existe pas de lien rationnel entre la conduite de la personne en question et l'ordonnance rendue par la commission, ou encore si ce lien rationnel n'en est pas un dont la justification repose sur l'intérêt public, la commission se trouve alors à excéder les pouvoirs que lui confère le par. 144(1).

Lambert J.A. then seemed to hold that there was no link between the order made in this case and the respondents' conduct since the order that was chosen was made in respect of personal trading. Lambert J.A. did not pursue this argument given his findings that the Commission had erred in law in finding a breach of the Act. Accordingly, the majority held that the Commission's orders under s. 144 could not stand.

Le juge Lambert semble ensuite avoir déterminé qu'il n'existait pas de lien entre l'ordonnance prononcée et la conduite des intimés puisque l'ordonnance visait des opérations personnelles. Il n'a pas poursuivi l'examen de cet argument puisqu'il avait conclu que la Commission avait commis une erreur de droit en concluant qu'il y avait eu violation de la Loi. La Cour d'appel à la majorité a en conséquence affirmé qu'il n'y avait pas lieu de maintenir les ordonnances rendues par la Commission en vertu de l'art. 144.

On the issue of costs, the respondents argued that, because the Act requires the Commission to fund its own activities, there was a reasonable apprehension of bias with respect to the order that they pay two-thirds of the costs of the hearing. The majority rejected this argument stating that it was not the appropriate time in the proceedings to raise such an argument. The fact that the Commission was required to be self-funding did not impact on the legality of its order. Nevertheless, the majority ordered that the order of the Commission be set aside and that the respondents pay one tenth of the Commission's costs of the investigation. Disputes relating to costs were to be brought back to the Court of Appeal.

Relativement à la question des dépens, les intimés ont allégué que, vu que la Loi exige de la Commission qu'elle finance ses propres activités, l'ordonnance exigeant d'eux qu'ils paient les deux tiers des dépens soulevait une crainte raisonnable de partialité. La cour à la majorité a rejeté cet argument et précisé que ce n'était pas le moment opportun de soulever un tel argument. Le fait que la Commission est tenue de s'autofinancer n'a aucune incidence sur la légalité de l'ordonnance. Néanmoins, la cour à la majorité a ordonné que l'ordonnance de la Commission soit annulée et que les intimés paient un dixième des coûts d'enquête de la Commission. Tout litige concernant les dépens devait être soumis de nouveau à la Cour d'appel.

Locke J.A., dissenting

Le juge Locke, dissident

In most comprehensive reasons, Locke J.A. began by stating that the appeal was being heard under a general appellate provision and not as an application for judicial review under a particular statute. He then reviewed several cases dealing with the purpose and characteristics of securities commissions and concluded at p. 300 that "[i]n the case of appeals from specialized tribunals . . . an appellate court should be slow to interfere unless the tribunal is shown to be clearly wrong either on fact or law".

Dans des motifs fort exhaustifs, le juge Locke a tout d'abord affirmé qu'il s'agissait d'un appel entendu en vertu d'une disposition générale, et non d'une demande de contrôle judiciaire en vertu d'une loi particulière. Il a ensuite examiné plusieurs décisions portant sur l'objet et les caractéristiques des commissions des valeurs mobilières et, à la p. 300, il est arrivé à la conclusion que [TRADUCTION] «[d]ans le cas d'appels à l'encontre de décisions de tribunaux spécialisés [. . .] une cour d'appel devrait hésiter à intervenir sauf si le tribunal a de toute évidence commis une erreur de fait ou de droit».

Locke J.A went on to examine the three types of impugned transactions as identified in the facts.

A. *The Drilling Results and Share Options Transactions*

In interpreting the disclosure requirements of s. 67 of the Act, Locke J.A. rejected the narrow approach advocated by the respondents. He held, at p. 308, that "information per se is capable of being an 'asset' within the meaning of the Act". This interpretation of the Act, according to Locke J.A. at p. 309, is consistent with its aims, which include "prevent[ing] high-pressure sales tactics, seeing that disclosure is complete, and ensuring that all individuals are informed before actually entering into a securities transaction". Locke J.A. then reviewed the drilling results as well as their potential effect. He held that the information found in these results could indeed be interpreted as a material change in the assets of the company within the meaning of the Act.

Noting that the Act is not penal legislation but rather is regulatory in scope, Locke J.A. would have interpreted its provisions as advocated by the appellants. He concluded at p. 315 that there was "overwhelming evidence to support each finding of the commission" and would not tamper with them.

B. *The Private Placement*

After reviewing the facts surrounding the private placement, Locke J.A again concluded that there was ample evidence to support the Commission's findings and that there was no basis for interfering with them.

C. *The ALC Withdrawal*

Locke J.A. reviewed the facts and the findings relating to the ALC matter, and concluded, at p. 329, that there was "no justifiable reason" for the

Le juge Locke a ensuite examiné les trois types d'opérations attaquées mentionnés dans les faits.

A. *Les résultats de forage et les options d'achat d'actions*

Pour ce qui est de l'interprétation des exigences en matière de divulgation prévues à l'art. 67 de la Loi, le juge Locke a rejeté la démarche restrictive préconisée par les intimés. Il a conclu, à la p. 308, que [TRADUCTION] «des renseignements peuvent en soi constituer «un élément d'actif» au sens de la Loi». D'après le juge Locke, à la p. 309, cette interprétation de la Loi est compatible avec ses objets, notamment: [TRADUCTION] «empêcher le recours à des tactiques de vente sous pression, veiller à ce que la divulgation soit complète et s'assurer que toute personne soit informée avant de procéder à des opérations sur valeurs mobilières». Le juge Locke a ensuite examiné les résultats de forage et leur incidence possible. Il a conclu que ces résultats pouvaient en fait être interprétés comme un changement important dans les éléments d'actif de la société au sens de la Loi.

Après avoir fait remarquer que la Loi n'est pas une loi à caractère pénal, mais de nature réglementaire, le juge Locke a dit qu'il l'aurait interprétée de la façon préconisée par les appelants. Il a conclu, à la p. 315, qu'il existait [TRADUCTION] «de nombreux éléments de preuve à l'appui de chacune des conclusions de la commission» et qu'il ne les modifierait pas.

B. *Le placement privé*

Après avoir examiné les faits entourant le placement privé, le juge Locke a de nouveau conclu qu'il y avait de nombreux éléments de preuve à l'appui des conclusions de la Commission et que rien ne justifiait de les modifier.

C. *Le retrait d'ALC*

Le juge Locke a examiné les faits et les conclusions se rapportant au retrait d'ALC et il a statué, à la p. 329, qu'il n'existait [TRADUCTION] «pas de respondents' delay in informing the public of the default. He added, at p. 329, that Ivany's natural reluctance to inform the public as well as his hopes to remedy the situation "constitute[d] no legal excuse for withholding the information".

D. *The Orders*

With respect to the orders handed down by the Commission, Locke J.A. stated, at p. 339, that the appropriateness of a penalty is a matter for a commission to decide and that a court should not interfere unless it is clear that "there is such an injustice as indicates a legal error". Locke J.A. found no such error.

On the issue of costs, Locke J.A. rejected the respondents' argument that there was an apprehension of bias. He also did not disturb the proportion of the costs (two thirds) which the respondents were ordered to pay. Locke J.A. did have concerns, however, regarding the compilation of the "expenses" charged as costs to the appellants under s. 154.2. However, as he pointed out at p. 344, his concerns relate to a matter "for legislators and not judges".

IV. Issues

Although the parties to this appeal have made specific allegations of error on the part of the Commission and of the Court of Appeal, the issues can be reduced to the following two questions:

1. What is the appropriate standard of review for an appellate court reviewing a decision of a securities commission not protected by a privative clause when there exists a statutory right of appeal and where the case turns on a question of interpretation?

2. In the case at bar, did the British Columbia Court of Appeal exercise the appropriate standard of review?

raison permettant de justifier» pourquoi les intimés avaient tardé à informer le public du retrait d'ALC. Il a ajouté, à la p. 329, que l'hésitation naturelle d'Ivany à informer le public et l'espoir qu'il avait de remédier à la situation [TRADUCTION] «ne constitu[ai]ent pas en droit une excuse pour dissimuler les renseignements».

D. *Les ordonnances*

Relativement aux ordonnances rendues par la Commission, le juge Locke a affirmé, à la p. 339, qu'il appartient à une commission de décider du caractère approprié d'une peine et qu'une cour de justice ne devrait pas intervenir sauf s'il est évident qu'une [TRADUCTION] «injustice équivalant à une erreur de droit a été commise». Il n'a pas conclu à l'existence d'une telle erreur.

Sur la question des dépens, le juge Locke a rejeté l'argument des intimés qu'il existait une crainte de partialité. Il n'a pas non plus modifié la proportion des dépens (deux tiers) que la Commission avait ordonné aux intimés de payer. Cependant, il a précisé qu'il était préoccupé par la question des «dépenses» imputées comme coûts aux appelants en vertu de l'art. 154.2. Cependant, comme il l'a fait remarquer, à la p. 344, ce sont des préoccupations qui relèvent [TRADUCTION] «des législateurs et non des juges».

IV. Les questions en litige

Les parties ont fait des allégations précises d'erreurs que la Commission et la Cour d'appel auraient commises; cependant, les points soulevés se ramènent aux deux questions suivantes:

1. Quelle est la norme de contrôle applicable à une cour d'appel siégeant en révision d'une décision d'une commission des valeurs mobilières qui n'est pas protégée par une clause privative, lorsque la loi prévoit un droit d'appel et que le litige vise une question d'interprétation?

2. En l'espèce, la Cour d'appel de la Colombie-Britannique a-t-elle appliqué la norme de contrôle appropriée?

V. Analysis

1. What is the appropriate standard of review for an appellate court reviewing a decision of a securities commission not protected by a privative clause when there exists a statutory right of appeal and where the case turns on a question of interpretation?

In order to answer this first question, I should like to discuss a number of factors and principles which come into play.

A. *The Nature of the Statute*

It is important to note from the outset that the Act is regulatory in nature. In fact, it is part of a much larger framework which regulates the securities industry throughout Canada. Its primary goal is the protection of the investor but other goals include capital market efficiency and ensuring public confidence in the system: David L. Johnston, *Canadian Securities Regulation* (1977), at p. 1.

Within this large framework of securities regulation, there are various government administrative agencies which are responsible for the securities legislation within their respective jurisdictions. The Commission is one such agency. Also within this large framework are self-regulatory organizations which possess the power to admit and discipline members and issuers. The VSE falls under this head. Having regard to this rather elaborate framework, it is not surprising that securities regulation is a highly specialized activity which requires specific knowledge and expertise in what have become complex and essential capital and financial markets.

B. *Principles of Judicial Review*

From the outset, it is important to set forth certain principles of judicial review. There exist various standards of review with respect to the myriad of administrative agencies that exist in our country. The central question in ascertaining the standard of review is to determine the legislative intent in conferring jurisdiction on the administrative tri-

V. Analyse

1. Quelle est la norme de contrôle applicable à une cour d'appel siégeant en révision d'une décision d'une commission des valeurs mobilières qui n'est pas protégée par une clause privative, lorsque la loi prévoit un droit d'appel et que le litige vise une question d'interprétation?

Pour répondre à la première question, j'examinerai certains facteurs et principes pertinents.

A. *Nature de la loi*

Il importe tout d'abord de faire remarquer que la Loi est une loi de nature réglementaire. En fait, elle s'inscrit dans le cadre d'un régime de réglementation beaucoup plus vaste de l'industrie des valeurs mobilières au Canada. Elle vise avant tout à protéger l'investisseur, mais aussi à assurer le rendement du marché des capitaux et la confiance du public dans le système: David L. Johnston, *Canadian Securities Regulation* (1977), à la p. 1.

À l'intérieur de ce grand régime de réglementation des valeurs mobilières, il existe divers organismes gouvernementaux responsables de l'application des lois sur les valeurs mobilières dans leur ressort respectif. C'est la fonction de la Commission. Il y a également des organismes autonomes qui possèdent le pouvoir d'inscrire des membres et des émetteurs et d'assurer la discipline. C'est le rôle de la Bourse. Compte tenu de cette toile de fond plutôt compliquée, il n'est pas étonnant que la réglementation des valeurs mobilières soit une activité fort spécialisée qui exige des connaissances et une expertise particulières du domaine complexe et essentiel des marchés financiers.

B. *Principes de contrôle judiciaire*

Il importe tout d'abord de formuler certains principes en matière de contrôle judiciaire. Il existe diverses normes de contrôle applicables à la myriade d'organismes administratifs qui existent au Canada. Dans l'examen de la norme de contrôle applicable, il faut avant tout déterminer quelle était l'intention du législateur lorsqu'il a conféré combunal. In answering this question, the courts have looked at various factors. Included in the analysis is an examination of the tribunal's role or function. Also crucial is whether or not the agency's decisions are protected by a privative clause. Finally, of fundamental importance, is whether or not the question goes to the jurisdiction of the tribunal involved.

Having regard to the large number of factors relevant in determining the applicable standard of review, the courts have developed a spectrum that ranges from the standard of reasonableness to that of correctness. Courts have also enunciated a principle of deference that applies not just to the facts as found by the tribunal, but also to the legal questions before the tribunal in the light of its role and expertise. At the reasonableness end of the spectrum, where deference is at its highest, are those cases where a tribunal protected by a true privative clause, is deciding a matter within its jurisdiction and where there is no statutory right of appeal. See *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048, at p. 1089 (*Bibeault*), and *Domtar Inc. v. Quebec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 S.C.R. 756.

At the correctness end of the spectrum, where deference in terms of legal questions is at its lowest, are those cases where the issues concern the interpretation of a provision limiting the tribunal's jurisdiction (jurisdictional error) or where there is a statutory right of appeal which allows the reviewing court to substitute its opinion for that of the tribunal and where the tribunal has no greater expertise than the court on the issue in question, as for example in the area of human rights. See for example *Zurich Insurance Co. v. Ontario (Human Rights Commission)*, [1992] 2 S.C.R. 321; *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R.

pétence au tribunal administratif. Pour répondre à cette question, les tribunaux ont examiné divers facteurs, dont le rôle ou la fonction du tribunal. Il est également essentiel de savoir si les décisions de l'organisme sont protégées par une clause privative. Enfin, il est d'une importance fondamentale de savoir si la question touche la compétence du tribunal concerné.

Compte tenu du grand nombre de facteurs pertinents pour la détermination de la norme de contrôle applicable, les tribunaux ont élaboré toute une gamme de normes allant de celle de la décision manifestement déraisonnable à celle de la décision correcte. Les tribunaux ont également formulé un principe de retenue judiciaire qui s'applique à l'égard non seulement des faits constatés par le tribunal, mais aussi des questions de droit dont le tribunal est saisi en raison de son rôle et de son expertise. Pour ce qui est des décisions manifestement déraisonnables, qui appellent la plus grande retenue, ce sont les cas où un tribunal protégé par une véritable clause privative rend une décision relevant de sa compétence et où il n'existe aucun droit d'appel prévu par la loi. Voir les arrêts *Le Syndicat canadien de la Fonction publique, section locale 963 c. La Société des alcools du Nouveau-Brunswick*, [1979] 2 R.C.S. 227; *U.E.S., local 298 c. Bibeault*, [1988] 2 R.C.S. 1048, à la p. 1089 (*Bibeault*), et *Domtar Inc. c. Québec (Commission d'appel en matière de lésions professionnelles)*, [1993] 2 R.C.S. 756.

Quand aux décisions correctes où l'on est tenu à une moins grande retenue relativement aux questions juridiques, ce sont les cas où les questions en litige portent sur l'interprétation d'une disposition limitant la compétence du tribunal (erreur dans l'exercice de la compétence) ou encore les cas où la loi prévoit un droit d'appel qui permet au tribunal siégeant en révision de substituer son opinion à celle du tribunal, et où le tribunal ne possède pas une expertise plus grande que la cour de justice sur la question soulevée, par exemple dans le domaine des droits de la personne. Voir les arrêts *Zurich Insurance Co. c. Ontario (Commission des droits de la personne)*, [1992] 2 R.C.S. 321; *Canada*

554, and *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353.

The case at bar falls between these two extremes. On one hand, we are dealing with a statutory right of appeal pursuant to s. 149 of the Act. On the other hand, we are dealing with an appeal from a highly specialized tribunal on an issue which arguably goes to the core of its regulatory mandate and expertise.

This Court's decision in *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722 (*Bell Canada*), is particularly helpful in deciding the present case as it dealt with a statutory right of appeal rather than an application for judicial review. Gonthier J., writing for this Court, stated the following at pp. 1745-46:

> It is trite to say that the jurisdiction of a court on appeal is much broader than the jurisdiction of a court on judicial review. In principle, a court is entitled, on appeal, to disagree with the reasoning of the lower tribunal.
>
> However, within the context of a statutory appeal from an administrative tribunal, additional consideration must be given to the principle of specialization of duties. Although an appeal tribunal has the right to disagree with the lower tribunal on issues which fall within the scope of the statutory appeal, curial deference should be given to the opinion of the lower tribunal on issues which fall squarely within its area of expertise. [Emphasis added.]

Consequently, even where there is no privative clause and where there is a statutory right of appeal, the concept of the specialization of duties requires that deference be shown to decisions of specialized tribunals on matters which fall squarely within the tribunal's expertise. This point was reaffirmed in *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 (*Bradco*), where Sopinka J., writing for the majority, stated the following at p. 335:

(Procureur général) c. Mossop, [1993] 1 R.C.S. 554, et *Université de la Colombie-Britannique c. Berg*, [1993] 2 R.C.S. 353.

Le présent pourvoi se situe entre ces deux extrêmes. D'une part, il existe en l'espèce un droit d'appel conformément à l'art. 149 de la Loi. D'autre part, il s'agit d'un appel contre la décision d'un tribunal très spécialisé sur une question qui, peut-on soutenir, touche directement le mandat et l'expertise que lui confère le texte réglementaire.

L'arrêt de notre Cour *Bell Canada c. Canada (Conseil de la radiodiffusion et des télécommunications canadiennes)*, [1989] 1 R.C.S. 1722 (*Bell Canada*), est tout particulièrement utile en l'espèce puisqu'il portait sur un droit d'appel prévu par la loi plutôt que sur une demande de contrôle judiciaire. Le juge Gonthier, s'exprimant au nom de notre Cour, affirme, aux pp. 1745 et 1746:

> Il va de soi que la compétence d'un tribunal saisi d'un appel est beaucoup plus large que celle d'un tribunal qui exerce un contrôle judiciaire. En principe, le tribunal saisi d'un appel a le droit d'exprimer son désaccord avec le raisonnement du tribunal d'instance inférieure.
>
> Toutefois, dans le contexte d'un appel prévu par la loi d'une décision d'un tribunal administratif, il faut de plus tenir compte du principe de la spécialisation des fonctions. Bien qu'un tribunal d'appel puisse être en désaccord avec le tribunal d'instance inférieure sur des questions qui relèvent du pouvoir d'appel prévu par la loi, les tribunaux devraient faire preuve de retenue envers l'opinion du tribunal d'instance inférieure sur des questions qui relèvent parfaitement de son champ d'expertise. [Je souligne.]

Par conséquent, même lorsqu'il n'existe pas de clause privative et que la loi prévoit un droit d'appel, le concept de la spécialisation des fonctions exige des cours de justice qu'elles fassent preuve de retenue envers l'opinion du tribunal spécialisé sur des questions qui relèvent directement de son champ d'expertise. Ce point a été confirmé dans l'arrêt *Fraternité unie des charpentiers et menuisiers d'Amérique, section locale 579 c. Bradco Construction Ltd.*, [1993] 2 R.C.S. 316 (*Bradco*), dans lequel le juge Sopinka, s'exprimant au nom de la majorité, affirme, à la p. 335:

> . . . the expertise of the tribunal is of the utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision in the absence of a full privative clause. Even where the tribunal's enabling statute provides explicitly for appellate review, as was the case in *Bell Canada, supra,* it has been stressed that deference should be shown by the appellate tribunal to the opinions of the specialized lower tribunal on matters squarely within its jurisdiction.

On the other side of the coin, a lack of relative expertise on the part of the tribunal *vis-à-vis* the particular issue before it as compared with the reviewing court is a ground for a refusal of deference.

In my view, the pragmatic or functional approach articulated in *Bibeault* is also helpful in determining the standard of review applicable in this case. At page 1088 of that decision, Beetz J., writing for the Court, stated the following:

> . . . the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.

As already mentioned, the primary goal of securities legislation is the protection of the investing public. The importance of that goal in assessing the decisions of securities commissions has been recognized by this Court in *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301 (*Brosseau*), where L'Heureux-Dubé J., writing for the Court, stated the following at p. 314:

> Securities acts in general can be said to be aimed at regulating the market and protecting the general public. This role was recognized by this Court in *Gregory & Co. v. Quebec Securities Commission*, [1961] S.C.R. 584, where Fauteux J. observed at p. 588:
>
> The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to

> . . . son expertise [du tribunal] est de la plus haute importance pour ce qui est de déterminer l'intention du législateur quant au degré de retenue dont il faut faire preuve à l'égard de la décision d'un tribunal en l'absence d'une clause privative intégrale. Même lorsque la loi habilitante du tribunal prévoit expressément l'examen par voie d'appel, comme c'était le cas dans l'affaire *Bell Canada*, précitée, on a souligné qu'il y avait lieu pour le tribunal d'appel de faire preuve de retenue envers les opinions que le tribunal spécialisé de juridiction inférieure avait exprimées sur des questions relevant directement de sa compétence.

Par contre, lorsque, comparativement au tribunal d'examen, le tribunal administratif manque d'expertise relative en ce qui concerne la question dont il a été saisi, cela justifie de ne pas faire preuve de retenue.

À mon avis, l'analyse pragmatique ou fonctionnelle formulée dans l'arrêt *Bibeault* est également utile à la détermination de la norme de contrôle applicable en l'espèce. À la page 1088 de cet arrêt, le juge Beetz, s'exprimant au nom de la Cour, affirme:

> . . . la Cour examine non seulement le libellé de la disposition législative qui confère la compétence au tribunal administratif, mais également l'objet de la loi qui crée le tribunal, la raison d'être de ce tribunal, le domaine d'expertise de ses membres, et la nature du problème soumis au tribunal.

Comme je l'ai déjà mentionné, les lois sur les valeurs mobilières visent avant tout à protéger le public investisseur. Dans l'arrêt *Brosseau c. Alberta Securities Commission*, [1989] 1 R.C.S. 301 (*Brosseau*), notre Cour a reconnu l'importance de cet objectif lorsqu'il faut procéder à l'examen de décisions prises par des commissions des valeurs mobilières; le juge L'Heureux-Dubé, s'exprimant au nom de notre Cour, dit, à la p. 314:

> D'une manière générale, on peut dire que les lois sur les valeurs mobilières visent à réglementer le marché et à protéger le public. Cette Cour a reconnu ce rôle dans l'arrêt *Gregory & Co. v. Quebec Securities Commission*, [1961] R.C.S. 584, dans lequel le juge Fauteux a fait remarquer à la p. 588:
>
> [TRADUCTION] L'objet prépondérant de la loi est d'assurer que les personnes qui, dans la province, exercent le commerce des valeurs mobilières ou qui agissent comme conseillers en placement, sont hon-

protect the public, in the province or elsewhere, from being defrauded as a result of certain activities initiated in the province by persons therein carrying on such a business.

This protective role, common to all securities commissions, gives a special character to such bodies which must be recognized when assessing the way in which their functions are carried out under their Acts.

In *National Corn Growers Assn. v. Canada (Import Tribunal)*, [1990] 2 S.C.R. 1324, Wilson J., in a concurring judgment, referred at p. 1336 to financial markets as a field where specialized tribunals have an important role to play:

> Canadian courts have struggled over time to move away from the picture that Dicey painted toward a more sophisticated understanding of the role of administrative tribunals in the modern Canadian state. Part of this process has involved a growing recognition on the part of courts that they may simply not be as well equipped as administrative tribunals or agencies to deal with issues which Parliament has chosen to regulate through bodies exercising delegated power, e.g., labour relations, telecommunications, financial markets and international economic relations. Careful management of these sectors often requires the use of experts who have accumulated years of experience and a specialized understanding of the activities they supervise.
>
> Courts have also come to accept that they may not be as well qualified as a given agency to provide interpretations of that agency's constitutive statute that make sense given the broad policy context within which that agency must work. [Emphasis added.]

The breadth of the Commission's expertise and specialisation is reflected in the provisions of the Act. Section 4 of the Act identifies the Commission as being responsible for the administration of the Act. The Commission also has broad powers with respect to investigations, audits, hearings and orders. Section 144.2 provides that any decision of the Commission filed in the Registry of the

nêtes et de bonne réputation et, ainsi, de protéger le public, dans la province ou ailleurs, contre toute fraude consécutive à certaines activités amorcées dans la province par des personnes qui y exercent ce commerce.

Ce rôle protecteur, qui est commun à toutes les commissions des valeurs mobilières, donne à ces organismes un caractère particulier qui doit être reconnu lorsqu'on examine la manière dont leurs fonctions sont exercées aux termes des lois qui leur sont applicables.

Dans l'arrêt *National Corn Growers Assn. c. Canada (Tribunal des importations)*, [1990] 2 R.C.S. 1324, le juge Wilson, dans des motifs concordants, affirme, à la p. 1336, que les marchés financiers constituent un domaine où les tribunaux spécialisés ont un rôle important à jouer:

> Les tribunaux judiciaires canadiens se sont efforcés au fil des ans de se détacher du point de vue de Dicey pour en arriver à une compréhension plus subtile du rôle des tribunaux administratifs dans l'État canadien moderne. C'est là un processus qui s'est traduit notamment par une reconnaissance accrue de la part des cours de justice qu'il se peut qu'elles soient simplement moins en mesure que les tribunaux ou organismes administratifs de statuer dans des domaines que le Parlement a choisi de réglementer par l'intermédiaire d'organismes exerçant un pouvoir délégué, comme, par exemple, les relations de travail, les télécommunications, les marchés financiers et les relations économiques internationales. Une gestion prudente de ces secteurs nécessite souvent le recours à des experts ayant à leur actif des années d'expérience et une connaissance spécialisée des activités qu'ils sont chargés de surveiller.
>
> Les cours de justice ont également fini par se faire à l'idée qu'elles ne sont peut-être pas aussi bien qualifiées qu'un organisme administratif déterminé pour donner à la loi constitutive de cet organisme des interprétations qui ont du sens compte tenu du contexte des politiques générales dans lequel doit fonctionner cet organisme. [Je souligne.]

La Loi fait bien ressortir l'étendue de l'expertise et de la spécialisation de la Commission. Son article 4 précise que la Commission est responsable de son application. La Commission possède également de vastes pouvoirs en matière d'enquêtes, de vérifications, d'audiences et d'ordonnances. En vertu de l'art. 144.2, toute décision de la Commission déposée au greffe de la Cour suprême de la

Supreme Court of British Columbia has the force and effect of a decision of that court. Finally, pursuant to s. 153 of the Act, the Commission has the power to revoke or vary any of its decisions. Sections 14 and 144 are of particular importance as they reveal the breadth of the Commission's public interest mandate:

14. (1) The commission may, where it considers it to be in the public interest, make any decision respecting

(a) a bylaw, rule or other regulatory instrument or policy, or a direction, decision, order or ruling made under a bylaw, rule or other regulatory instrument or policy, of a self regulatory body or stock exchange,

(b) the procedures or practices of a self regulatory body or stock exchange,

(c) the manner in which a stock exchange carries on business,

(d) the trading of securities on or through the facilities of a stock exchange,

(e) a security listed and posted for trading on a stock exchange, and

(f) issuers, whose securities are listed and posted for trading on a stock exchange, to ensure that they comply with this Act and the regulations.

(2) A person affected by a decision made by the commission under subsection (1) shall act in accordance with it.

144. (1) Where the commission or the superintendent considers it to be in the public interest, the commission or the superintendent, after a hearing, may order

(a) that a person comply with or cease contravening, and that the directors and senior officers of the person cause the person to comply with or cease contravening,

(i) a provision of this Act or the regulations,

(ii) a decision, whether or not the decision has been filed under section 144.2, or

(iii) a bylaw, rule, or other regulatory instrument or policy or a direction, decision, order or ruling made under a bylaw, rule or other regulatory instrument or policy of a self regulatory body

Colombie-Britannique est exécutoire comme décision de cette cour. Enfin, conformément à l'art. 153 de la Loi, la Commission a le pouvoir de révoquer ou de modifier ses décisions. Les articles 14 et 144 sont tout particulièrement importants puisqu'ils révèlent l'étendue du mandat de la Commission en matière d'intérêt public:

[TRADUCTION] **14.** (1) La commission peut, lorsqu'elle estime dans l'intérêt public de le faire, rendre une décision concernant:

a) un règlement administratif, une règle ou un autre instrument ou politique de réglementation, ou une directive, décision ou ordonnance prises en vertu d'un règlement administratif, d'une règle ou d'un autre instrument ou politique de réglementation d'un organisme autonome ou d'une bourse,

b) les procédures ou les pratiques d'un organisme autonome ou d'une bourse,

c) le fonctionnement d'une bourse,

d) les opérations sur valeurs mobilières par l'intermédiaire d'une bourse,

e) une valeur mobilière officiellement cotée à une bourse,

f) les émetteurs, dont les valeurs mobilières sont officiellement cotées à la bourse, pour s'assurer qu'ils respectent la présente loi et son règlement d'application.

(2) Toute personne visée par une décision prise par la commission en vertu du par. (1) doit s'y conformer.

144. (1) Lorsqu'ils estiment dans l'intérêt public de le faire, la commission ou le surintendant peuvent, après audition, ordonner

a) qu'une personne se conforme ou cesse de contrevenir, et que les administrateurs et les cadres supérieurs fassent que cette personne se conforme ou cesse de contrevenir:

(i) à une disposition de la présente loi ou de son règlement d'application,

(ii) à une décision, déposée ou non en vertu de l'art. 144.2,

(iii) à un règlement administratif, une règle ou un autre instrument ou politique de réglementation, ou à une directive, décision ou ordonnance prises en vertu d'un règlement adminisor stock exchange, as the case may be, which has been recognized by the commission under section 11,

(b) that

(i) all persons

(ii) the person or persons named in the order, or

(iii) one or more classes of persons

cease trading in a specified security or in a class of security,

(c) that any or all of the exemptions described in any of sections 30 to 32, 55, 58, 80 or 81 do not apply to a person,

(d) that a person

(i) resign any position that the person holds as a director or officer of an issuer, and

(ii) is prohibited from becoming or acting as a director or officer of any issuer,

. . .

In reading these powerful provisions, it is clear that it was the legislature's intention to give the Commission a very broad discretion to determine what is in the public's interest. To me, this is an additional basis for judicial deference.

It must also be noted that the definitions in the Act exist in a factual or regulatory context. They are part of the larger regulatory framework discussed above. They are not to be analyzed in isolation but rather in their regulatory context. This is something that requires expertise and thus falls within the jurisdiction of the Commission. This is yet another basis for curial deference.

Finally, it is noteworthy that various courts, including this Court, have shown deference towards the decisions of securities commission: *Pacific Coast Coin Exchange v. Ontario Securities Commission*, [1978] 2 S.C.R. 112; *Brosseau, supra*; *Four Star Mgmt. Ltd. v. B.C. Securities Comm.* (1990), 46 B.C.L.R. (2d) 195 (C.A.), leave

tratif, d'une règle ou d'un autre instrument ou politique de réglementation d'un organisme autonome ou d'une bourse, selon le cas, que la commission a reconnu en vertu de l'article 11,

b) que

(i) toute personne,

(ii) toute personne nommée dans l'ordonnance,

(iii) une ou plus d'une catégorie de personnes

cessent de faire des opérations sur une valeur mobilière donnée ou une catégorie de valeurs mobilières,

c) qu'une ou l'autre ou l'ensemble des exemptions visées aux articles 30 à 32, 55, 58, 80 ou 81 ne s'applique pas à une personne,

d) qu'une personne

(i) démissionne du poste qu'elle occupe comme administrateur ou dirigeant d'un émetteur, et

(ii) ne peut plus devenir administrateur ou dirigeant d'un émetteur ou agir à ce titre,

. . .

En lisant ces dispositions éloquentes, on se rend compte que la législature avait l'intention de conférer à la Commission un très vaste pouvoir discrétionnaire dans la détermination de ce qui constitue l'intérêt public. À mon avis, il s'agit là d'un motif additionnel de faire preuve de retenue judiciaire.

On doit aussi se rappeler que les définitions dans la Loi sont présentées dans un contexte de nature factuelle ou réglementaire. Elles font partie de l'ensemble du régime de réglementation qui a déjà été examiné. Elles ne doivent pas être analysées séparément, mais plutôt dans leur contexte de réglementation. Cette analyse nécessite une certaine expertise et relève en conséquence de la compétence de la Commission. C'est là un autre motif de faire preuve de retenue judiciaire.

Enfin, il est important de faire remarquer que divers tribunaux, y compris notre Cour, ont fait preuve de retenue à l'égard des décisions de commissions des valeurs mobilières: *Pacific Coast Coin Exchange c. Commission des valeurs mobilières de l'Ontario*, [1978] 2 R.C.S. 112; *Brosseau*, précité; *Four Star Mgmt. Ltd. c. B.C. Securities* to appeal refused, *sub nom. Williams (Byron Leslie) v. British Columbia Securities Comm.*, [1991] 1 S.C.R. xv; and *Gordon Capital Corp. v. Ontario Securities Commission* (1991), 14 O.S.C.B. 2713 (Div. Ct.).

C. *The Role of the Commission*

Where a tribunal plays a role in policy development, a higher degree of judicial deference is warranted with respect to its interpretation of the law. This was stated by the majority of this Court in *Bradco* at pp. 336-37:

> . . . a distinction can be drawn between arbitrators, appointed on an *ad hoc* basis to decide a particular dispute arising under a collective agreement, and labour relations boards responsible for overseeing the ongoing interpretation of legislation and development of labour relations policy and precedent within a given labour jurisdiction. To the latter, and other similar specialized tribunals responsible for the regulation of a specific industrial or technological sphere, a greater degree of deference is due their interpretation of the law notwithstanding the absence of a privative clause. [Emphasis added.]

In the case at bar, the Commission's primary role is to administer and apply the Act. It also plays a policy development role. Thus, this is an additional basis for deference. However, it is important to note that the Commission's policy-making role is limited. By that I mean that their policies cannot be elevated to the status of law; they are not to be treated as legal pronouncements absent legal authority mandating such treatment.

Thus on precedent, principle and policy, I conclude as a general proposition that the decisions of the Commission, falling within its expertise, warrant judicial deference.

D. *The Questions of Law at Issue*

As mentioned above, it is also necessary to focus on the specific question of law at issue to determine whether it falls within the tribunal's expertise and whether deference is warranted. The

Comm. (1990), 46 B.C.L.R. (2d) 195 (C.A.), autorisation de pourvoi refusée *sub nom. Williams (Byron Leslie) c. British Columbia Securities Comm.*, [1991] 1 R.C.S. xv, et *Gordon Capital Corp. c. Ontario Securities Commission* (1991), 14 O.S.C.B. 2713 (Cour div.).

C. *Rôle de la Commission*

Lorsqu'un tribunal participe à l'établissement de politiques, il faut faire preuve d'une plus grande retenue à l'égard de son interprétation de la loi. Telle était l'opinion de notre Cour à la majorité dans l'arrêt *Bradco*, à la p. 337:

> . . . on peut faire une distinction entre les arbitres *ad hoc* nommés pour régler un différend particulier découlant d'une convention collective et les commissions des relations de travail chargées de surveiller l'interprétation permanente de textes législatifs et d'établir des politiques et précédents en matière de relations du travail dans un ressort donné. Il faut faire preuve, en ce qui concerne ces commissions et d'autres tribunaux spécialisés chargés de réglementer un domaine industriel ou technologique précis, d'une plus grande retenue à l'égard de leur interprétation de la loi, et ce, malgré l'absence de clause privative. [Je souligne.]

En l'espèce, la Commission a pour rôle principal d'appliquer la Loi. Elle participe aussi à l'établissement de politiques. C'est donc un autre motif de faire preuve de retenue à l'égard de ses décisions. Cependant, il importe de faire remarquer que la Commission n'a qu'un rôle limité en matière d'établissement de politiques. Je veux dire par là que ses politiques ne peuvent obtenir le statut de lois ni être considérées comme telles en l'absence d'un pouvoir à cet effet prévu dans la loi.

Compte tenu des précédents, des principes et des politiques, je conclus qu'il faut généralement faire preuve de retenue judiciaire à l'égard des décisions que la Commission rend à l'intérieur de sa sphère de compétence.

D. *Questions de droit en litige*

Comme je l'ai mentionné, il faut également examiner la question de droit en litige pour déterminer si elle relève de la compétence du tribunal et s'il y a lieu de faire preuve de retenue. En l'espèce, les specific sections at issue in this case are ss. 67, 144 and 154.2 of the Act.

The decision to make an order and the precise nature of that order, under s. 144, as well as any decision obliging a person to pay the costs of a hearing necessitated by his or her conduct, pursuant to s. 154.2, are clearly within the jurisdiction and expertise of the Commission. The other provision at issue is s. 67 which involves an interpretation of the words "material change" and "as soon as practicable".

Both "material change" and "material fact" are defined in s. 1 of the Act. They are defined in terms of the significance of their impact on the market price or value of the securities of an issuer. The definition of "material fact" is broader than that of "material change"; it encompasses any fact that can "reasonably be expected to significantly affect" the market price or value of the securities of an issuer, and not only changes in the "business, operations, assets or ownership of the issuer" that would reasonably be expected to have such an effect.

The use of these two terms in the Act also reflects the differences in their scope. For example, a prospectus relating to a public distribution of securities must disclose all material facts relating to the issuer: ss. 44(1), 45(2), 49(1) and 50(1). However, the prospectus need be amended only when a material change occurs: ss. 47(1), (2) and 48(1).

Sections 67 and 68 of the Act also reflect the differences between a material change and a material fact. As Victor P. Alboini points out in *Securities Law and Practice*, 2nd ed., vol. 2 (1984), at p. 18-13, "[t]he concept of 'material change' should be distinguished from that of 'material fact'. Undisclosed material facts concerning a reporting issuer may not require timely disclo-

dispositions visées sont les art. 67, 144 et 154.2 de la Loi.

La Commission possède clairement toute la compétence et l'expertise nécessaires lorsqu'il s'agit de rendre une ordonnance et d'en préciser la nature, conformément à l'art. 144, et d'obliger une personne à payer, conformément à l'art. 154.2, les dépens d'une audience à laquelle sa conduite a donné lieu. L'autre disposition en cause est l'art. 67, qui soulève la question de l'interprétation des expressions «changement important» et «dès que possible».

L'article premier de la Loi définit les expressions «changement important» et «fait important». Ces expressions sont définies en fonction de l'importance de l'effet du changement ou du fait sur le cours ou la valeur des valeurs mobilières d'un émetteur. La définition de l'expression «fait important» est plus large que celle de «changement important»; un «fait important» s'entend de tout fait «dont il est raisonnable de s'attendre» qu'il aura «un effet appréciable» sur le cours ou la valeur des valeurs mobilières d'un émetteur, et non seulement des changements «dans [l]es activités commerciales, [l']exploitation, [l]es éléments d'actif ou [l]a propriété» de l'émetteur, dans les cas où il est raisonnable de s'attendre à ce que ce changement ait un tel effet.

L'emploi de ces deux expressions dans la Loi est également une indication qu'elles ont une portée différente. Par exemple, un prospectus visant un placement de valeurs mobilières dans le public doit divulguer tous les faits importants relativement à l'émetteur: par. 44(1), 45(2), 49(1) et 50(1). Cependant, il y a lieu de modifier le prospectus seulement dans les cas où il se produit un changement important: par. 47(1), (2) et 48(1).

Les articles 67 et 68 de la Loi reflètent également les différences qui existent entre un changement important et un fait important. Comme l'indique Victor P. Alboini dans *Securities Law and Practice*, 2^{e} éd., vol. 2 (1984), à la p. 18-13, [TRADUCTION] «[i]l faut établir une distinction entre le «changement important» et le «fait important». Les faits importants non divulgués relativement à sure . . . although they do restrict trading". Under the timely disclosure provision of the Act, s. 67, only material changes require that a press release be issued and that a report be filed. In contrast, under the insider trading provision, s. 68, a person who is in a special relationship with a reporting issuer is prohibited from buying or selling securities of the issuer when the person knows of either a material change or a material fact which has not been publicly disclosed.

As already mentioned, the present case turns partly on the definition of "material change". Three elements emerge from that definition: the change must be (a) "in relation to the affairs of an issuer", (b) "in the business, operations, assets or ownership of the issuer" and (c) material, i.e., would reasonably be expected to have a significant effect on the market price or value of the securities of the issuer. Thus, not all changes are material changes; the latter are set in the context of making sure that issuers keep investors up to date. Consequently, it would seem wholly uncontroversial that the determination of what information should be disclosed is an issue which goes to the heart of the regulatory expertise and mandate of the Commission, i.e, regulating the securities markets in the public's interest.

This case also turns on the meaning of the words "as soon as practicable" in s. 67 of the Act which reveal when a material change should be disclosed to the public. In my view, the timeliness of disclosure also falls within the Commission's regulatory jurisdiction.

In summary, having regard to the nature of the securities industry, the Commission's specialization of duties and policy development role as well as the nature of the problem before the court, con-

un émetteur assujetti ne doivent peut-être pas faire l'objet d'une information occasionnelle [. . .] même s'ils limitent effectivement les opérations». En vertu de l'art. 67, qui porte sur l'information occasionnelle, seulement les changements importants nécessitent la publication d'un communiqué et le dépôt d'un rapport. Par contre, en vertu de l'art. 68, qui porte sur les opérations d'initiés, il est interdit à quiconque a des rapports particuliers avec un émetteur assujetti et qui est au courant d'un fait important ou d'un changement important qui n'a pas été divulgué au public, d'acheter ou de vendre des valeurs mobilières de cet émetteur.

Comme je l'ai déjà mentionné, le présent pourvoi porte en partie sur la définition de l'expression «changement important». Trois éléments se dégagent de cette définition: le changement a) «[d]ans le contexte des affaires d'un émetteur», b) «s'entend d'un changement dans ses activités commerciales, son exploitation, ses éléments d'actif ou sa propriété» et c) doit être important, c'est-à-dire qu'il doit être raisonnable de s'attendre à ce que ce changement ait un effet appréciable sur le cours ou la valeur des valeurs mobilières de l'émetteur. En conséquence, ce ne sont pas tous les changements qui sont des changements importants; la divulgation des changements importants a pour but de veiller à ce que les émetteurs tiennent les investisseurs au courant. Par conséquent, il semblerait tout à fait incontestable d'affirmer que la détermination des renseignements à divulguer est une question qui touche directement l'expertise et le mandat que la loi confère à la Commission, soit la réglementation du marché des valeurs mobilières dans l'intérêt public.

Le présent pourvoi porte aussi sur l'interprétation de l'expression «dès que possible» à l'art. 67 de la Loi, c'est-à-dire le moment où un changement important doit être divulgué au public. À mon avis, la détermination de cette question relève également de la compétence de la Commission en matière de réglementation.

En résumé, compte tenu de la nature de l'industrie des valeurs mobilières, des fonctions spécialisées de la Commission, de son rôle en matière d'établissement de politiques et de la nature du siderable deference is warranted in the present case notwithstanding the fact that there is a statutory right of appeal and there is no privative clause.

2. In the case at bar, did the British Columbia Court of Appeal exercise the appropriate standard of review?

A. *The Drilling Results and Share Options Transactions*

The Commission's conclusion that s. 67 was violated in the context of the share options transactions can be subdivided into two parts. The first element of the conclusion is that undisclosed drilling results can constitute a material change in the affairs of a reporting issuer. Locke J.A. of the Court of Appeal agreed. Lambert J.A., however, writing for the majority of the Court of Appeal, was of a different view. He held at p. 268 that information obtained from assay results cannot constitute a material change:

> In my opinion, geological information obtained from observations of visible matter and geological information from drill cores in the form of assay results, or in the form of a properly plotted plan prepared from the results of a number of assays, are all capable of being material facts. Let us assume that the geological information relied upon by the commission constituted material facts in this case. That does not mean that the same geological information constituted material changes. In my opinion, geological information of the nature obtained on a continuing basis as a result of a planned drilling program does not constitute a change in the business, the operations, the assets or the ownership of the issuer, no matter what information is obtained from the drilling results. Such information may constitute a basis for a perception that there has been a change in the value of an asset. But that is a far different thing than a change in an asset. [Emphasis added.]

As already mentioned, the determination of what constitutes a material change for the purposes of general disclosure under s. 67 of the Act is a matter which falls squarely within the regulatory mandate and expertise of the Commission. Consequently, when the majority of the Court of Appeal

problème en cause, il y a lieu de faire preuve en l'espèce d'une grande retenue malgré le droit d'appel prévu par la loi et l'absence d'une clause privative.

2. En l'espèce, la Cour d'appel de la Colombie-Britannique a-t-elle appliqué la norme de contrôle appropriée?

A. *Les résultats d'analyse de forage et les options d'achat d'actions*

On peut subdiviser en deux la conclusion de la Commission qu'il y a eu violation de l'art. 67 dans le contexte des options d'achat d'actions. Le premier élément de la conclusion est que des résultats de forage non divulgués peuvent constituer un changement important dans les affaires d'un émetteur assujetti. Le juge Locke de la Cour d'appel est de cet avis. Cependant, le juge Lambert, s'exprimant au nom de la majorité, a formulé un avis différent. Il a affirmé, à la p. 268, que les renseignements tirés des résultats de titrage ne peuvent constituer un changement important:

> [TRADUCTION] À mon avis, sont tous susceptibles de constituer des faits importants les renseignements géologiques tirés des observations de matière visible et ceux tirés de carottes de forage sous forme de résultats de titrage ou d'un plan soigneusement dressé à partir de divers résultats de titrage. Supposons que les renseignements géologiques utilisés par la commission constituaient des faits importants. Cela ne signifie pas que ces renseignements géologiques constituaient des changements importants. À mon avis, les renseignements géologiques obtenus de façon continue dans le cadre d'un programme de forage planifié ne constituent pas un changement dans les activités commerciales, l'exploitation, les éléments d'actif ou la propriété de l'émetteur, quels que soient les renseignements tirés des résultats de forage. On peut se fonder sur ces renseignements pour affirmer qu'il s'est produit un changement dans la valeur d'un élément d'actif. Cependant, c'est loin d'être la même chose qu'un changement dans un élément d'actif. [Je souligne.]

Comme je l'ai mentionné, la détermination de ce qui constitue un changement important pour les fins de divulgation générale en vertu de l'art. 67 de la Loi est une question qui relève directement du mandat et de l'expertise de la Commission en matière de réglementation. Par conséquent, la Cour rejected the Commission's findings on this matter, it fell into error. Furthermore, the majority's view on this point is, in my opinion, clearly wrong and is inconsistent with the economic and regulatory realities the Act sets out to address. Counsel for the respondents conceded this point, during the hearing of this appeal, and stated that "information from a drilling program can be tantamount to a material change".

In the mining industry, mineral properties are constantly being assessed to determine whether there is a change in the characterization of the property. Thus, from the point of view of investors, new information relating to a mining property (which is an asset) bears significantly on the question of that property's value. Accordingly, I agree with the approach taken by the Commission, namely that a change in assay and drilling results can amount to a material change depending on the circumstances.

George C. Stevens and Stephen D. Wortley, authors of "Murray Pezim in the Court of Appeal: Draining the Lifeblood from Securities Regulation" (1992), 26 *U.B.C. L. Rev.* 331, are of the same view. In commenting on the above quoted passage, they stated the following at pp. 336-37:

> To the geologist or the mining property valuator, Lambert J.A.'s statement is astonishing. Every mine starts from host rock. Every drill hole leads not merely to a change of perception of the asset: it is a piece in the puzzle that ultimately determines whether the asset is moose pasture or ore. Each new result may change the characterization of the asset from rock, to mineral deposit, to inferred ore, to probable ore and ultimately, with enough holes supported by a feasibility study, to proven ore.
>
> Even more astonishing was the Court's conclusion, without receipt of any evidence, that drilling results

d'appel à la majorité a commis une erreur lorsqu'elle a omis d'examiner s'il y avait lieu de faire preuve de retenue relativement aux conclusions de la Commission sur cette question. En outre, bien qu'il ne soit pas nécessaire que je me prononce sur ce point, j'estime que les conclusions de la Commission étaient correctes et compatibles avec les réalités sur les plans économique et réglementaire dont la Loi veut tenir compte. Au cours de l'audition du pourvoi, l'avocat des intimés a reconnu ce point et a affirmé que [TRADUCTION] «les renseignements obtenus dans le cadre d'un programme de forage peuvent équivaloir à un changement important».

Dans l'industrie minière, on procède à des évaluations constantes des propriétés minières pour déterminer s'il y a eu un changement dans leur caractérisation. Par conséquent, du point de vue des investisseurs, tout nouveau renseignement sur les propriétés minières (un élément d'actif) a une incidence importante sur la question de leur valeur. En conséquence, je suis d'accord avec la conclusion de la Commission qu'un changement dans les résultats de titrage et de forage peut, selon les circonstances, constituer un changement important.

George C. Stevens et Stephen D. Wortley, auteurs de «Murray Pezim in the Court of Appeal: Draining the Lifeblood from Securities Regulation» (1992), 26 *U.B.C. L. Rev.* 331, sont du même avis. Relativement au passage que je viens de citer, ils affirment, aux pp. 336 et 337:

> [TRADUCTION] Pour le géologue ou l'évaluateur de propriétés minières, l'affirmation du juge Lambert de la Cour d'appel est étonnante. Pour qu'il y ait une mine, il doit y avoir une roche encaissante. Chaque trou de forage n'aboutit pas simplement à un changement dans la façon dont le bien est perçu: c'est un morceau du casse-tête qui permet de déterminer si le bien en question est un pâturage ou s'il renferme du minerai. Chaque nouveau résultat peut changer la caractérisation du bien: roche, dépôt de minerai, réserve de minerai possible, réserve de minerai probable ou, après suffisamment de trous de forage et une étude de faisabilité, réserve de minerai prouvé.
>
> Ce qui est encore plus étonnant est le fait que la cour a conclu, sans aucune preuve à l'appui, que les résultats

would never constitute a change in the operations or assets of an issuer.

. . .

Can the Court really suggest that there has not been a change in a company's assets when, following adequate sampling, a discovery is made on a portion of its property that had been previously categorized as having no known mineralization? Surely, given the basic aim of the *Act*—to protect the investing public through full, true and plain disclosure of all material facts relating to securities—one could conclude (as did Mr. Justice Locke, the dissenting judge) that the Commission did not make a "plain and vital mistake" in the application of the words in s. 67 of the Act to the facts before it....

Consequently, I am of the view, as found by the Commission and Locke J.A., that the assay results constituted a change with respect to or in the companies' assets and is "material" for the purposes of the Act.

The second element of the Commission's conclusion that s. 67 was violated in the context of the share options transactions is that the obligation to disclose "as soon as practicable" takes on a different meaning when an issuer is about to engage in a securities transaction:

Where an issuer proposes to engage in a securities transaction . . . it must ensure that any undisclosed material change is disclosed before proceeding with the transaction. The words "as soon as practicable" have a different meaning in this context than they might in the absence of the securities transaction.

Senior Management were responsible for managing the affairs of Prime and Calpine and for ensuring that they complied with their obligations under the Act. In carrying out this responsibility, Senior Management ought to have made reasonable inquiries, before causing Prime and Calpine to engage in securities transactions, to

de forage ne constitueraient jamais un changement dans l'exploitation ou les éléments d'actif d'un émetteur.

. . .

La cour peut-elle vraiment laisser entendre qu'il ne se produit pas de changement dans les éléments d'actif d'une société dans le cas où, après un échantillonnage adéquat, une découverte est faite sur une partie de terrain où, selon la caractérisation antérieure, il n'existait pas de minéralisation? Certes, compte tenu de l'objet fondamental de la Loi — protéger le public investisseur au moyen d'une divulgation complète, fidèle et claire de tous les faits importants se rapportant aux valeurs mobilières —, on pourrait conclure (à l'instar du juge Locke, dissident) que la Commission n'a pas commis une «erreur évidente et fondamentale» lorsqu'elle a appliqué aux faits dont elle était saisie le libellé de l'art. 67 de la Loi . . .

Par conséquent, je suis d'avis, comme l'ont affirmé la Commission et le juge Locke de la Cour d'appel, que les résultats de titrage constituaient un changement dans les éléments d'actif de la société ou les concernant et que ce changement est «important» pour les fins de la Loi.

Le deuxième élément de la conclusion de la Commission, selon laquelle il y aurait eu violation de l'art. 67 dans le contexte des options d'achat d'actions est que l'obligation de divulguer «dès que possible» prend un sens tout à fait différent si un émetteur est sur le point de conclure une opération sur valeurs mobilières:

[TRADUCTION] . . . lorsqu'un émetteur envisage de procéder à une opération sur valeurs mobilières, il doit veiller à ce que soit divulgué préalablement tout changement important qui ne l'a pas encore été. Dans ce contexte, l'expression «dès que possible» a un sens différent de celui qu'elle pourrait avoir en l'absence d'une telle opération.

Les cadres supérieurs étaient chargés de gérer les affaires de Prime et de Calpine et de veiller à ce que celles-ci se conforment aux obligations de la Loi. Dans l'exercice de cette responsabilité, avant de faire participer Prime et Calpine à une opération sur valeurs mobilières, les cadres supérieurs auraient dû faire une ensure that all material changes in their affairs had been disclosed.

. . .

Considering the importance of the principles involved here, any securities transactions by Prime or Calpine in their own securities warranted inquiries and any reasonable inquiries would have led to any undisclosed material changes that may have existed. [Emphasis added.]

By stating the following at p. 279, the majority of the Court of Appeal appeared to disagree:

> . . . the commission erred in law by interpreting and applying the defined phrase "material change" in s. 67 as if it were equivalent to the phrase "material fact" . . . .
>
> As a consequence of that error in law, the commission regarded Prime and Calpine and the senior officers of those issuers as having a duty, before Prime or Calpine engaged in any securities transaction, to make enquiries of the senior geologist who was responsible for releasing all geological information as soon as it was practicable to do so in comprehensible form, about whether there was any material geological information that had not been released.
>
> There are sound arguments both for and against the imposition of such a duty. But in balancing those arguments the legislature has chosen against imposing that duty.

However, in this next passage at p. 279, the majority seems to say that, although there is no duty to inquire about material facts, there may be a duty to inquire about material changes:

> There is a duty to disclose material facts that are known. There is a duty to disclose material changes in the business, operations, assets or ownership of the issuer, and perhaps to make inquiries about whether there are such material changes if it should happen that they are not known. But there is no duty to inquire about material facts, and to find them out, and not to engage in securities transactions if there [were] any material facts that could have been found out. Section 68(2) [since

enquête raisonnable pour s'assurer qu'il y avait eu divulgation de tous les changements importants dans leurs affaires.

. . .

Compte tenu de l'importance des principes en cause, toute opération par Prime ou Calpine sur leurs propres valeurs mobilières devait être précédée d'une enquête; d'ailleurs, toute enquête raisonnable aurait permis de découvrir les changements importants qui n'avaient pas été divulgués. [Je souligne.]

La Cour d'appel à la majorité paraît être en désaccord avec la Commission lorsqu'elle affirme, à la p. 279:

> [TRADUCTION] . . . la commission a commis une erreur de droit en interprétant et en appliquant l'expression «changement important» figurant à l'art. 67 comme si elle avait un sens équivalant à l'expression «fait important» . . .
>
> Par suite de cette erreur de droit, la commission a considéré que Prime et Calpine et les cadres supérieurs de ces émetteurs avaient l'obligation, avant même que Prime ou Calpine puissent procéder à des opérations sur valeurs mobilières, de s'enquérir auprès du géologue principal, qui était chargé de publier dès que possible tous renseignements sous une forme exhaustive, de tout renseignement géologique important qui n'aurait pas été divulgué.
>
> Il existe des arguments solides pour et contre l'imposition d'une telle obligation. Cependant, après les avoir soupesés, le législateur a décidé de ne pas l'imposer.

Toutefois, dans le passage qui suit, la cour à la majorité semble affirmer, à la p. 279, qu'il peut exister une obligation de s'enquérir des changements importants, même s'il n'y a pas d'obligation de s'enquérir des faits importants:

> [TRADUCTION] Il existe une obligation de divulguer les faits importants connus. Il existe une obligation de divulguer tous les changements importants dans les activités commerciales, l'exploitation, les éléments d'actif ou la propriété de l'émetteur, voire peut-être une obligation de s'enquérir des changements importants non connus. Cependant, il n'existe pas d'obligation de s'enquérir des faits importants, ni de les découvrir, ni de ne pas procéder à des opérations sur valeurs mobilières si des

repealed] specifically contemplates that there is no such duty.

From this passage, it appears that the majority of the Court of Appeal is itself unclear as to whether or not there is a duty under s. 67 to inquire as to the existence of material changes before causing a reporting issuer to engage in securities transactions. In any event, I find that it was well within the Commission's jurisdiction to interpret s. 67 in the manner it did, and I fully agree with its position on this point. Although a duty to inquire is not expressly stated in s. 67, such an interpretation contextualizes the general obligation to disclose material changes and guarantees the fairness of the market, which is the underlying goal of the Act. Stevens and Wortley, *supra*, also support this position, at pp. 338-39:

> Now the duty to disclose all material facts arises when a company enters the public market. Its prospectus must contain full, true and plain disclosure of all material facts. Compliance with that fundamental rule does indeed put a duty of inquiry on those who sign the prospectus, Lambert J.A.'s statement notwithstanding. Thereafter, the duty to disclose material facts is really a duty to disclose *changes* from the basket of facts disclosed originally and from time to time afterwards. That is why the *Act* uses "material facts" and "material changes" in different contexts.
>
> Nowhere, however, in this underlying statutory scheme of continuous disclosure is there a principle that states the duty of inquiry imposed upon management when a company first enters the securities markets is in some way lessened thereafter. On this point the Court has made unhappy new law. [Emphasis in original.]

It must be noted that a duty to inquire under s. 67 is not incompatible with the insider trading provision of the Act, s. 68. If an issuer wishes to engage in a securities transaction, its directors must inquire about all material changes in the issu-

faits importants auraient pu être découverts. Le paragraphe 68(2) [abrogé depuis] prévoit explicitement l'absence d'une telle obligation.

Il ressort de ce passage que la Cour d'appel à la majorité ne précise pas clairement s'il existe ou non en vertu de l'art. 67 une obligation de s'enquérir de l'existence de changements importants avant qu'un émetteur assujetti puisse participer à des opérations sur valeurs mobilières. Quoi qu'il en soit, je suis d'avis qu'il relevait nettement de la compétence de la Commission d'interpréter l'art. 67 comme elle l'a fait et qu'elle était en droit de s'attendre à une certaine retenue à cet égard. Je souscris pleinement à son opinion sur ce point. Bien que l'art. 67 ne précise pas explicitement une obligation de s'enquérir, une telle interprétation permet de placer dans son contexte l'obligation générale de divulgation de tout changement important et de garantir l'équité du marché, objet sous-jacent de la Loi. Stevens et Wortley, *loc. cit.*, appuient cette position, aux pp. 338 et 339:

> [TRADUCTION] Dès qu'une société devient une société ouverte, elle est obligée de divulguer tous les faits importants. Son prospectus doit contenir une divulgation complète, fidèle et claire de tous les faits importants. Le respect de cette règle fondamentale impose aux signataires du prospectus, nonobstant les propos du juge Lambert, une obligation de s'enquérir. De ce fait, l'obligation de divulguer les faits importants est réellement une obligation de divulguer les *changements* dans les faits initialement divulgués, et par la suite de le faire occasionnellement. C'est pourquoi la *Loi* utilise les expressions «faits importants» et «changements importants» dans des contextes différents.
>
> Cependant, à l'intérieur de ce régime sous-jacent d'information continue prévu dans la loi, on ne retrouve aucun principe qui prévoit que diminue avec le temps l'obligation initiale de s'enquérir qu'ont les cadres au moment où une société accède au marché des valeurs mobilières. Sur ce point, la Cour d'appel a formulé de malencontreuses nouvelles règles de droit. [En italique dans l'original.]

Il faut se rappeler que l'obligation de s'enquérir en vertu de l'art. 67 n'est pas incompatible avec la disposition sur les opérations d'initiés (art. 68). Si un émetteur souhaite participer à une opération sur valeurs mobilières, ses administrateurs doivent er's affairs. Consequently, the directors will have, at one point in time, knowledge of undisclosed material facts and material changes which constitute inside information. However, as long as the material facts and material changes are adequately disclosed prior to the transaction, there will be no possibility of insider trading. It must also be noted that the erecting of a Chinese Wall, which prevents directors of a company from having inside information, does not erase the duty imposed on directors to inquire about material changes, as the disclosure requirements under s. 67 are on the issuer.

Having concluded that information contained in drilling results can constitute a material change in the affairs of a reporting issuer and that s. 67 imposes on senior management a duty to inquire as to the existence of material changes before causing a reporting issuer to engage in a securities transaction, the Commission went on to review the circumstances surrounding the share options transactions of July 12 and 31, August 15 and 17, 1989. The Commission made the following findings: (1) The July 12 transaction was completed after a new zone of mineralization had been identified, as well as a possible doubling of the reserves, but before the news release of July 13 was issued. (2) The July 31 transaction was concluded after the discovery of visible gold and extensive other mineralization in hole 109, but before the news release of August 2. (3) The August 15 transaction was completed after Prime was in possession of the assay results for holes 93 and 101 but before the news release was issued that afternoon. (4) The August 17 transaction followed the arrival of the gold assays for hole 109; the news release relating to these assays was issued on August 22. Based on these findings, the Commission held that the respondents failed to disclose various material changes in the affairs of Prime and Calpine before causing these two companies to engage in securi-

s'enquérir de tout changement important dans ses affaires. Par conséquent, les administrateurs seront, à un moment donné, au courant de faits importants non divulgués et de changements importants qui constituent des renseignements d'initiés. Cependant, dans la mesure où ces faits importants et ces changements importants sont divulgués comme il se doit avant l'opération, il n'y a pas de risque d'opérations d'initiés. On doit aussi faire remarquer que l'établissement d'une muraille de Chine, destiné à empêcher que les administrateurs d'une société aient accès à des renseignements d'initiés, n'élimine pas l'obligation qu'ils ont de s'enquérir des changements importants, puisque c'est l'émetteur qui, en vertu de l'art. 67, doit respecter les exigences en matière de divulgation.

Après avoir conclu que les renseignements contenus dans les résultats de forage peuvent constituer un changement important dans les affaires d'un émetteur assujetti et que l'art. 67 impose aux cadres supérieurs une obligation de s'enquérir de l'existence de changements importants avant qu'un émetteur assujetti puisse participer à une opération sur valeurs mobilières, la Commission a examiné les circonstances entourant les opérations d'options d'achat d'actions des 12 et 31 juillet et des 15 et 17 août 1989. La Commission a tiré les conclusions suivantes: (1) L'opération du 12 juillet a été achevée après la découverte d'une nouvelle zone minéralisée et d'un doublement possible des réserves, mais avant la publication du communiqué du 13 juillet. (2) L'opération du 31 juillet a été terminée après la découverte d'or visible et de nombreuses zones minéralisées dans le trou 109, mais avant le communiqué du 2 août. (3) L'opération du 15 août a été complétée après que Prime ait eu en sa possession les résultats de titrage pour les trous 93 et 101, mais avant la publication du communiqué dans l'après-midi. (4) L'opération du 17 août a eu lieu après l'arrivée des analyses de teneur en or pour le trou 109; le communiqué relatif à ces analyses a été publié le 22 août. Se fondant sur ces conclusions, la Commission a conclu que les intimés avaient omis de divulguer divers changements importants dans les affaires de Prime et de Calpine avant que celles-ci prennent part à des ties transactions. Consequently, the respondents had contravened s. 67 of the Act.

Like Locke J.A., I find that there was overwhelming evidence to support each of the Commission's findings and I would not disturb any of them. Consequently, the majority of the Court of Appeal erred in interfering with the Commission's conclusion that, with respect to the share options transactions, the respondents breached their timely disclosure obligations under s. 67 of the Act.

As the majority of the Court of Appeal did not discuss the fifth impugned share options transaction, the Commission's finding with respect to this transaction will stand.

B. *The Private Placement*

The majority of the Court of Appeal agreed with the Commission that s. 67 of the Act was breached when Calpine failed to disclose the identity of the placee or the fact that Prime was to increase its control over Calpine from 23 to 36 percent, assuming exercise of the warrants. In this respect, it is worth noting that by obtaining a 36 percent holding in Calpine, Prime thereby could prevent the passing of a special resolution as defined in s. 1 of the *Company Act*, which in turn empowered Prime to prevent a number of important transactions for which a special resolution of shareholders is required under the *Company Act* (see, for example, ss. 255, 267 and 272).

The majority also agreed that Calpine misled the VSE on July 17, 1989 by representing that the private placement was to be brokered by Prime Equities. However, the majority overturned the Commission's finding that Page falsely certified to the VSE on August 18, 1989 that there were no material changes in the affairs of Calpine that had not been publicly disclosed. It predicated its conclu-

opérations sur valeurs mobilières. Les intimés avaient en conséquence contrevenu à l'art. 67 de la Loi.

À l'instar du juge Locke, je suis d'avis qu'il existe de nombreux éléments de preuve à l'appui de chacune des conclusions de la Commission et qu'il n'y a pas lieu de les modifier. Par conséquent, la Cour d'appel à la majorité a commis une erreur en modifiant la conclusion de la Commission que, relativement à l'exercice des options d'achat d'actions, les intimés avaient contrevenu aux obligations d'information occasionnelle prévues à l'art. 67 de la Loi.

Puisque la Cour d'appel à la majorité n'a pas examiné la cinquième opération relative aux options d'achat d'actions, la conclusion de la Commission à cet égard est confirmée.

B. *Le placement privé*

La Cour d'appel à la majorité a souscrit à l'opinion de la Commission, qui avait affirmé qu'il y avait eu violation de l'art. 67 de la Loi lorsque Calpine a omis de divulguer l'identité de l'acheteur ou le fait que le contrôle de Prime sur Calpine devait passer de 23 à 36 pour 100, en supposant qu'elle aurait exercé les bons de souscription d'actions. À cet égard, il importe de signaler que, en exerçant un contrôle sur 36 pour 100 des actions de Calpine, Prime pouvait empêcher l'adoption d'une résolution spéciale au sens de l'article premier de la *Company Act* et, de ce fait, la tenue d'un certain nombre d'opérations importantes nécessitant une résolution spéciale des actionnaires en vertu de la *Company Act* (voir, par exemple, les art. 255, 267 et 272).

La Cour d'appel à la majorité a également confirmé que Calpine avait induit la Bourse en erreur le 17 juillet 1989 en l'informant que le placement privé devait se faire par l'intermédiaire de Prime Equities. Cependant, elle a infirmé la conclusion de la Commission que, le 18 août 1989, Page avait faussement attesté à la Bourse qu'il n'était pas survenu, dans les affaires de Calpine, de changements importants non divulgués au public. Elle a fondé sa sion on the fact that undisclosed assays cannot constitute a material change.

As already mentioned, the determination of what constitutes a material change goes to the heart of the expertise and mandate of the Commission. Furthermore, having regard to the realities of the mining industry, information from assay results can properly be characterized as a material change in the business, operations, assets or ownership of a reporting issuer. To conclude, I agree with Locke J.A. that the findings of the Commission on the private placement issue reveal no error.

C. *The ALC Withdrawal*

The majority of the Court of Appeal overturned the Commission's finding that s. 67 had been breached by not disclosing the ALC withdrawal. The majority viewed the ALC withdrawal in contractual terms and stated that it did not have to be disclosed until there was repudiation of the contract and such repudiation was accepted by Prime.

In my view, this narrow approach is wrong and is inconsistent with the purpose of the Act, i.e., to protect the investing public. Again, like Locke J.A., I find there is little basis for disagreeing with the Commission's conclusions. ALC's withdrawal represented a $4.25 million contractual dispute. It would seem wholly uncontroversial to consider such a dispute a change in the business, operations, ownership or affairs of a reporting issuer. As Stevens and Wortley point out, *supra*, at p. 338, "an account receivable that was to be transformed into cash on September 29 became instead nothing more than a disputed claim for breach of contract". Accordingly, non-disclosure of this dispute constituted a failure to disclose a material change. Thus, the majority of the Court of Appeal erred in rejecting the Commission's findings on this point.

conclusion sur le fait que les résultats de titrage non divulgués ne pouvaient constituer un changement important.

Comme je l'ai déjà mentionné, la détermination de ce qui constitue un changement important touche directement l'expertise et le mandat de la Commission. En outre, compte tenu des réalités qui caractérisent l'industrie minière, on peut qualifier les résultats de titrage de changement important dans les activités commerciales, l'exploitation, les éléments d'actif ou la propriété d'un émetteur assujetti. En conclusion, à l'instar du juge Locke, je suis d'avis que la Commission n'a pas commis d'erreur dans ses conclusions relatives au placement privé.

C. *Le retrait d'ALC*

La Cour d'appel à la majorité a infirmé la conclusion de la Commission qu'il y avait eu violation de l'art. 67 à cause de la non-divulgation du retrait d'ALC. Elle a considéré le retrait d'ALC du point de vue contractuel et précisé que ce retrait n'avait pas à être divulgué tant qu'il n'y avait pas eu résiliation du contrat et acceptation de cette résiliation par Prime.

À mon avis, cette interprétation restrictive est erronée et incompatible avec l'objet de la Loi, qui est de protéger le public investisseur. De nouveau, à l'instar du juge Locke, j'estime qu'il y a peu de motifs de ne pas souscrire aux conclusions de la Commission. Le retrait d'ALC représentait un différend contractuel de l'ordre de 4,25 millions de dollars. Il semble absolument incontestable qu'un tel différend constitue un changement dans les activités commerciales, l'exploitation, la propriété ou les affaires d'un émetteur assujetti. Comme l'ont fait remarquer Stevens et Wortley, *loc. cit.*, à la p. 338, [TRADUCTION] «une créance qui devait devenir une encaisse le 29 septembre n'a abouti qu'à une revendication pour inexécution de contrat». La non-divulgation de ce différend constituait en conséquence une omission de divulguer un changement important. La Cour d'appel à la majorité a donc commis une erreur en rejetant les conclusions de la Commission sur ce point.

In stating the above, I do not wish to imply that it is always self-evident as to what constitutes a material change. In this respect, it is interesting to note that the Chair of the Ontario Securities Commission has encouraged in that province an early warning system which allows informal disclosure to the Commission of a proposed transaction on a confidential basis. According to Alboini, *supra*, at pp. 18-14 and 18-15, such a system "allows for appropriate steps to be taken by the Commission to permit stock watches, while also creating an opportunity to discuss with Commission members or staff possible orders or applications that may be required in order to facilitate the transaction from a regulatory point of view".

D. *The Orders*

The respondents' argument that there must be a rational link between the conduct of the person in question and the order made by the Commission must be rejected. As we have seen, s. 144 of the Act gives the Commission a broad discretion to make orders that it considers to be in the public interest. Thus, a reviewing court should not disturb a Commission's order unless the Commission has made some error in principle in exercising its discretion or has exercised its discretion in a capricious or vexatious manner.

The discretion given to Securities Commissions to determine what is in the public interest was discussed by the Ontario Court of Appeal in *Re the Securities Commission and Mitchell*, [1957] O.W.N. 595, at p. 599:

> The Chairman and other members of the Commission are selected and appointed by the Lieutenant-Governor in Council for their high qualifications, ability and experience. It is the function and duty of the Commission under s. 8 of The Securities Act to form an opinion whether or not it is in the public interest to suspend or cancel the registration of any person. It is intended by the legislation that the Commission shall have extremely wide powers of discretion in forming its opinion.

Je ne veux pas pour autant donner à entendre qu'on saura toujours ce qui constitue un changement important. À cet égard, il est intéressant de constater que le président de la Commission des valeurs mobilières de l'Ontario a favorisé dans cette province l'établissement d'un système d'avertissement rapide qui permet aux intéressés de divulguer tout projet d'opération à la Commission, de façon informelle et à titre confidentiel. Selon Alboini, *op. cit.*, aux pp. 18-14 et 18-15, ce système [TRADUCTION] «permet à la Commission de prendre des mesures appropriées pour surveiller les opérations sur actions, et aux intéressés d'examiner avec les membres ou le personnel de la Commission les ordonnances ou les demandes susceptibles d'être nécessaires pour faciliter l'opération du point de vue de la réglementation».

D. *Les ordonnances*

Je dois rejeter l'argument des intimés selon lequel il doit exister un lien rationnel entre la conduite de la personne en question et l'ordonnance rendue par la Commission. Comme nous l'avons vu, l'art. 144 de la Loi donne à la Commission un vaste pouvoir discrétionnaire de rendre les ordonnances qu'elle estime dans l'intérêt public. En conséquence, un tribunal qui siège en révision ne devrait pas modifier une ordonnance rendue par la Commission, sauf si celle-ci a commis une erreur de principe dans l'exercice de son pouvoir discrétionnaire ou si elle l'a exercé d'une façon arbitraire ou vexatoire.

Dans l'arrêt *Re the Securities Commission and Mitchell*, [1957] O.W.N. 595, à la p. 599, la Cour d'appel de l'Ontario a examiné le pouvoir discrétionnaire qui est conféré aux commissions des valeurs mobilières de déterminer ce qui est dans l'intérêt public:

> [TRADUCTION] Le lieutenant-gouverneur en conseil choisit et nomme le président et les autres membres de la Commission en fonction de leur expertise, leur compétence et leur expérience. En vertu de l'art. 8 de la *Securities Act*, il appartient à la Commission de déterminer s'il est dans l'intérêt public de suspendre ou d'annuler l'inscription d'une personne. La loi vise à conférer à la Commission un pouvoir discrétionnaire extrêmement vaste lorsqu'elle se fait une opinion.

The opinion of the Commission should not be set aside or altered upon an appeal unless the Commission has erred in some principle of law or unless it appears clearly that the Commission has not proceeded to form its opinion in a judicial manner or unless it appears that the opinion of the Commission is so clearly wrong as to amount to an injustice requiring a remedy on appeal.

These words were adopted with approval in *Bay Street West Securities (1983) Inc. v. Alberta Securities Commission* (1984), 56 A.R. 19 (C.A.).

In the present case, the Commission exercised its discretion in a judicial manner. Following the release of its findings, it held a supplementary hearing to receive submissions from both parties as to the appropriate sanctions to impose on the respondents. In its final decision, the Commission held that the respondents were responsible for Prime and Calpine's contravention of the timely disclosure requirements of the Act. It further held that the respondents' conduct was related to distributions of securities under the exemptions in the Act. Consequently, the Commission removed the respondents' trading exemptions under the Act for a period of one year.

Some may argue that the Commission could not make the orders it did with respect to the respondents because the duty to make timely disclosure under s. 67 of the Act applies to a "reporting issuer". This argument must be rejected for two reasons. First, as Alboini points out, *supra*, at p. 18-26, "[a]lthough responsibility for timely disclosure is vested in the reporting issuer . . . effective responsibility rests with the senior officers and the directors of the reporting issuer". Second, not only does s. 144 of the Act give the Commission a broad public interest to make orders it considers to be in the public interest, it also confers upon the Commission the authority to make orders with respect to "a person".

In summary, it was clearly within the Commission's jurisdiction to order that the trading exemptions not apply to the respondents for a period of

On ne devrait pas annuler ou modifier en appel l'opinion de la Commission, sauf si celle-ci a commis une erreur dans l'application d'un principe de droit, s'il appert clairement que son opinion n'a pas été formée d'une manière judiciaire ou s'il appert que son opinion est tellement erronée qu'elle équivaut à une injustice devant donner lieu à un redressement en appel.

Ce passage a été adopté et approuvé dans l'arrêt *Bay Street West Securities (1983) Inc. c. Alberta Securities Commission* (1984), 56 A.R. 19 (C.A.).

En l'espèce, la Commission a exercé son pouvoir discrétionnaire d'une manière judiciaire. Après avoir rendu publiques ses conclusions, elle a tenu une audience supplémentaire pour connaître les observations des deux parties quant aux peines qu'il convenait d'imposer aux intimés. Dans sa décision finale, la Commission a conclu que la contravention par Prime et Calpine aux exigences d'information occasionnelle prévues dans la Loi étaient imputable aux intimés. Elle a de plus conclu que la conduite des intimés était liée aux placements de valeurs mobilières effectués en vertu des exemptions prévues dans la Loi. La Commission a donc interdit aux intimés de se prévaloir pendant une année des exemptions relatives aux opérations sur valeurs mobilières.

D'aucuns soutiendront que la Commission ne pouvait pas rendre les ordonnances en question contre les intimés parce que l'obligation d'information occasionnelle prévue à l'art. 67 de la Loi est imposée à un «émetteur assujetti». Cet argument doit être rejeté pour deux motifs. Premièrement, comme le fait remarquer Alboini, *op. cit.*, à la p. 18-26, [TRADUCTION] «[b]ien que l'obligation d'information occasionnelle soit imposée à l'émetteur assujetti [. . .] ce sont les cadres supérieurs et les administrateurs qui ont en fait cette responsabilité». Deuxièmement, l'art. 144 de la Loi confère à la Commission non seulement un vaste pouvoir de rendre les ordonnances qu'elle estime dans l'intérêt public mais aussi celui de rendre des ordonnances relativement à «une personne».

Bref, la Commission avait nettement la compétence voulue pour interdire aux intimés de se prévaloir pendant une année des exemptions en one year. Furthermore, the Commission's orders were not vexatious or erroneous in law. Consequently, the order under s. 144 of the Act must stand.

The Commission's order with respect to costs was also well within its jurisdiction. Consequently, considerable deference is in order. Moreover, although the respondents argued that the length of the investigation and the hearing related mostly to the allegations of insider trading, which were not proven, this was not the case. The Commission specifically stated so:

> The Respondents argued that we should make no order for payment of costs. They said that the length of the investigation and the hearing were made necessary only by the allegations related to insider trading and breach of directors' duties, which were not proven. However, most of the hearing related to evidence concerning those matters in respect of which we did find contraventions. Furthermore, the suspicions which led to the other allegations, about which the Respondents complained, were aroused, quite reasonably, by the Respondents' own conduct in failing to make required disclosure and in filing misleading documents with the [VSE]. [Emphasis added.]

Since no persuasive basis has been suggested for overturning the order relating to costs, I would not interfere with it.

VI. Conclusion and Disposition

The majority of the Court of Appeal erred in failing to appreciate the Commission's role in an area requiring special knowledge and sophistication. It also failed to recognize the Legislature's intent to confer a broad public interest mandate on the Commission to carry out its role. There was ample evidence to support each of the Commission's findings. There being no reviewable error of law, the majority of the Court of Appeal erred in interfering with the Commission's findings. Consequently, I would allow the appeal, set aside the judgment of the British Columbia Court of Appeal and substitute therefor the findings and orders of

matière d'opérations sur valeurs mobilières. En outre, les ordonnances de la Commission n'étaient ni vexatoires ni erronées en droit. L'ordonnance rendue en vertu de l'art. 144 de la Loi doit donc être confirmée.

La Commission avait toute la compétence requise pour rendre l'ordonnance quant aux dépens. C'est pourquoi il y a lieu de faire preuve d'une grande retenue. Par ailleurs, bien que les intimés aient soutenu que la durée de l'enquête et de l'audience était en grande partie imputable aux allégations concernant les opérations d'initiés, qui n'ont pas été prouvées, ce ne fut pas le cas. La Commission l'a expressément affirmé:

> [TRADUCTION] Les intimés soutiennent que nous ne devrions pas rendre d'ordonnance quant au paiement des dépens. Selon eux, la durée de l'enquête et de l'audience était imputable uniquement à l'examen des allégations concernant les opérations d'initiés et le manquement aux devoirs des administrateurs, qui n'ont pas été prouvées. Cependant, la majeure partie de l'audience a été consacrée à l'examen de la preuve se rapportant aux infractions, que nous estimons avoir été commises. De plus, ce sont les intimés eux-mêmes qui, en omettant de faire les divulgations requises et en déposant auprès de la Bourse des documents trompeurs, ont suscité les doutes, tout à fait logiques, qui ont donné lieu aux autres allégations dont ils se plaignent. [Je souligne.]

Puisque l'on ne m'a fourni aucun motif convaincant d'infirmer l'ordonnance quant aux dépens, je ne la modifierai pas.

VI. Conclusion et dispositif

La Cour d'appel à la majorité a commis une erreur en ne tenant pas compte du rôle de la Commission dans un domaine nécessitant des connaissances spécialisées et poussées. Elle a aussi omis de reconnaître que le législateur avait l'intention de conférer à la Commission un vaste mandat d'agir dans l'intérêt public dans le cadre de l'exercice de ses fonctions. De nombreux éléments de preuve ont été déposés à l'appui de chacune des conclusions de la Commission. Puisqu'il y avait lieu de faire preuve de retenue et qu'aucune erreur de droit donnant lieu à révision n'a été commise, la Cour d'appel à la majorité a commis une erreur en the Commission. The appellants shall have their costs here and in the court below.

Appeals allowed with costs.

Solicitors for the appellant the Superintendent of Brokers: Walsh & Company, Vancouver.

Solicitors for the appellant the British Columbia Securities Commission: Arvay, Finlay, Victoria.

Solicitors for the respondents: Lenczner, Slaght, Royce, Smith, Griffin, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: The Attorney General of British Columbia, Victoria.

Solicitors for the intervener the Ontario Securities Commission: Davies, Ward & Beck, Toronto.

Solicitor for the intervener the Alberta Securities Commission: The Alberta Justice, Edmonton.

Solicitors for the intervener the Securities Dealers Society of Ontario: Weir & Foulds, Toronto.

modifiant les conclusions de la Commission. En conséquence, je suis d'avis d'accueillir le pourvoi, d'annuler l'arrêt de la Cour d'appel de la Colombie-Britannique et de rétablir les conclusions et les a ordonnances de la Commission. Les appelants ont droit aux dépens en notre Cour et en Cour d'appel.

Pourvois accueillis avec dépens.

b *Procureurs de l'appelant le Superintendent of Brokers: Walsh & Company, Vancouver.*

Procureurs de l'appelante la British Columbia Securities Commission: Arvay, Finlay, Victoria.

c

Procureurs des intimés: Lenczner, Slaght, Royce, Smith, Griffin, Toronto.

d *Procureur de l'intervenant le procureur général de la Colombie-Britannique: Le procureur général de la Colombie-Britannique, Victoria.*

Procureurs de l'intervenante la Commission des e *valeurs mobilières de l'Ontario: Davies, Ward & Beck, Toronto.*

Procureur de l'intervenante l'Alberta Securities Commission: Le ministère de la Justice de f *l'Alberta, Edmonton.*

Procureurs de l'intervenante la Securities Dealers Society of Ontario: Weir & Foulds, Toronto.

TAB 5

PP. 24-26

Court File No. CV-10-883-00CL

SUPERIOR COURT OF JUSTICE

B E T W E E N :

ONTARIO SECURITIES COMMISSION

Applicant

v.

PETER ABARAGLIA, MANDY SBARAGLIA, CO CAPITAL GROWTH INC. and

91 DAYS HYGIENE SERVICES INC.

----Before THE HONOURABLE MR. JUSTICE MORAWETZ, held at The Courthouse, 330 University, on December 23, 2010 commencing at 10:00 a.m.

REASONS FOR JUDGMENT

A P P E A R A N C E S :

Pamela Foy	- for the Applicant
M. P. Gottlieb	- for RSN Richter Inc. Receiver of and Robert Mander
Milton Davis	- for the Respondents
Kelli Preston	- for the Respondents
Paul-Erik Veel	- for Creditors the Respondent CO Capital Growth Inc.

0087 (12/94)

THURSDAY, DECEMBER 23, 2010

The Ontario Securities Commission ("OSC") brings this application for an order appointing RSM Richter Inc. as receiver of the assets, undertaking and property of Dr. Peter Sbaraglia, Ms. Mandy Sbaraglia, CO Capital Growth Inc. and 91 Days Hygiene Services Inc.

This matter has a long history. In July 2008, staff of the OSC obtained an order from the Commission pursuant to s. 11(1) of the Securities Act to investigate an inquiry into the business and affairs of Dr. Sbaraglia, Mr. Robert Mander, CO and Pero Assets Inc. with respect to trading in securities and potential breaches of Ontario securities law.

Based on the information that OSC staff received, it appeared that CO was obtaining funds from investors and investing those funds in securities.

The primary concern of the Commission was the use of investor funds by CO and Mr. Mander and Dr. Sbaraglia and whether funds and assets were available do as to ensure that the investors would be repaid.

During its investigation, the staff learned that a significant amount of funds obtained from investors had been transferred to Mr. Mander and his companies.

Mr. Mander operated and owned EMB Asset Group Inc. Through EMB, Mr. Mander operated a fraudulent Ponzi scheme involving in excess of $40 million of investors funds. In certain instances, investors, such as CO Capital, invested money with Mr. Mander or EMB which had been loaned to them from third-party investors.

CO was run by Dr. Sbaraglia and Mr. Mander. The record also establishes that Ms. Sbaraglia was integrally involved in the business of CO.

Throughout the period under review, CO was used by Dr. and Ms. Sbaraglia as an investment vehicle to solicit third-party investors to invest with Mr. Mander through CO.

Neither Dr. or Ms. Sbaraglia were registered with the OSC. CO raised approximately $21.2 million from investors, who Dr. Sbaraglia described as both friends and family. There were approximately 25 to 30 CO investors.

It has been determined that a significant portion of investor funds were not invested at all. Rather, the funds were used by Mr. Mander, and by CO to repay other investors.

The OSC takes the position that the Sbaraglias, through their role in CO and their close involvement with Mr. Mander, participated in the Ponzi scheme in a manner which they knew or ought reasonably to have known, perpetrated a fraud on investors contrary to s. 126(1)(e) of the Securities Act.

This is disputed by the Sbaraglias who take the position that they were victims of the fraud and not perpetrators of the fraud as they did not know about the fraud until the summer of 2009.

CO was incoprorated on January 5, 2006. The first Investor Agreement is dated January 9, 2006 and CO continued to enter into loan agreements with investors until August 2009.

The OSC takes the position that CO's purported business model provided that CO would solicit investors to loan money; funds would then be loaned to CO for a fixed term, generally 1 to 3 years at a fixed high rate of interest ranging from 20% to 30%. CO would issue a loan agreement to each investor; funds from CO were transferred to Mr. Mander personally or through EMB or other Mander controlled companies for investment purposes and the profits generated from these investments above the fixed interest rate promised to investors were to be split equally between CO and Mr. Mander.

The record established that CO's actual business varied from the above model in a number of ways. First, CO did not transfer all of the funds of CO investors to Mr. Mander as approximately

$6 - 7 million was not transferred directly to Mr. Mander or EMB. These funds were used in a number of way by Dr. Sbaraglia, acting on behalf of CO, by making payments to CO investors with newly received funds from other CO investors, or in making investments in securities either directly in trading accounts in the names of other companies, which resulted in significant losses.

Further, it became clear thatthe funds that Mr. Mander did receive from CO were not invested, but were used to pay the returns to other investors that he was dealing with independently from CO.

RSM Richter as receiver of the EMB Asset Group, Mr. Mander and related entities obtained an order on July 14, 2010 in the receivership proceedings of EMB, which authorized the receiver to conduct ivnestigations into the business and affairs of Dr. Sbaraglia and Ms. Sbaraglia and the CO group.

According to the receiver's reports, $15.4 million of the $21.2 million raised by CO from its investors was transferred to Mr. Mander/EMB.

The balance of what CO raised, estimated to be between $6 and 7 million can be accounted for as follows. $2.1 million was recieved personally by Dr. and Ms. Sbaraglia at the direction of Mr. Mander, purportedly for profits earned by them from the actions of Mr. Mander.

Approximately $2.4 million was lost through trading accounts. Approximately $985,000 in general expenses of CO were paid from the CO bank accounts. Approximtely $585,000 was used by CO to purchase open ventures securities, which securities have very little value today. Approximately $213,000 in rent payments in respect of a property located at 239 Church Street, Oakville, Ontario were made by CO to 91 Days Hygiene, a company wholly owned by Ms. Sbaraglia. Approximately $383,000 in charges were incurred on a corporte visa in the name of CO, a significant number of which were not for the benefit of CO investors, but rather, were for the personal benefit of the Sbaraglias including significant payments for restaurants, renovations of 239 Church Street and numerous other personal expenses,

Dr. Sbaraglia, on behalf of CO, opened bank accounts over which he had sighning authority. The accounts were used to pool investor funds. At no time were the funds aggregated in any manner.

Dr. Sbaraglia acknowledged that throughout the review period CO used funds raised from one investor to pay amounts owing to other investor. This issue was specifically referenced in cross-examiantion, the transcript of which reads, commencing at Question 954 as follows:

Q. And Ms. Burton was an investor?
A. Yes.
Q. And this payment of $63,250 was paid to her in connection with her investment?
A. Yes.
Q. And tht payment was made just using other investors funds also? Correct?
A. Yes.
Q. And I can keep going through this book, but what we will see is throughout this entire piece payments are being made by CO Capital directly from funds paid into CO Capital from other investors?
A. Right.
Q. And you are aware of that?
A. Yes.
Q. And you were aware that this was going on throughout the piece?
A. Yes.

The payments to investors from the CO bank accounts were made with cheques signed by Mr. Sbaraglia. Ms. Sbaraglia undertook the bank statement and loan reconciliations, for the payments.

In July 2009, as part ot its investigtion, OSC staff conducted examinations of Mr. Mander and Dr. Sbaraglia. They were represented by the same legal counsel, who attended with each of them at their respective examinations/

Dr. Sbaraglia had retained legal counsel in or around June 2009 and it is apparent that Dr. Sbaraglia knew that the OSC's primary concern was whether investors funds were at risk and whether CO could properly account for the funds. Dr. Sbaraglia understood that the OSC staff would be seeking verification from CO that the assets as between CO and Mr. Mander and EMB were in excess of what was owed to CO investors.

Dr. Sbaraglia specifically acknowledged that he was under oath and he swore to tell the truth at this OSC examination.

During the examination, OSC staff were advised by counsel to Dr. Sbaraglia, of the following. CO investors consisted of only friends and family and that each of the investors had approached Dr. Sbaraglia about investing. CO had relied on legal advice obtained from another law firm with respect to CO's compliance with Ontario securities law in raising funds from third parties. CO investor funds were not at risk. The amount owing by CO to the CO investors was approximately $8.5 million, but the bulk of the value of CO investors funds were invested in real estate assets purchased by Mr. Mander and Dr. Sbaraglia. Dr. Sbaraglia and Mr. Mander had a verbal arrangement whereby all assets held by the Sbaraglias were used by Mr. Mander for the benefit of CO investors and that the assets held by Dr. Sbaraglia and Mr. Mander were valued at approximately $12 million, and therefore well in excess of all amounts owing to CO investors.

At no time during the examination did Dr. Sbaraglia correct his legal counsel. Further, it is clear that Dr. Sbaraglia was aware that his legal counsel was speaking on his behalf during the examination.

OSC takes the position that the statements made by Dr. Sbaraglia were materially misleading and that among other things, Dr. Sbaraglia did not advise that CO had raised almost $1 million in 2006 prior to obtaining any legal advice as to whether CO was in compliance with Ontario securities law. Dr. Sbaraglia did not disclose a $6 million obligation to CO to Pero pursaunt to a loan agreement dated March 1, 2009. Dr. Sbaraglia does take the position that the obligation is not one of CO and that it was transferred to Mr. Mander. Documentation was produced that evidences a transfer to EMB/Mander, but there is no documented release from Pero in favour of CO or Dr. Sbaraglia. Further, Dr. Sbaraglia now claims that he feels only morally obligated to CO investors. Dr. and Ms. Sbaraglia wish to use the proceeds from the sale of their assets to pay certain of the CO investors in priority to others based on their assessment of the relative needs of the CO investors. It is also apparent that all the assets of the Sbaraglias and Mr. Mander and CO were not, in fact, available to satisfy the amounts owing to CO investors as Mander had loans outstanding with many additional investors, other than the CO investors, all of which has been documented in the Mander receivership.

On August 7, 2009, following the examination, Dr. Sbaraglia's counsel provided OSC staff with a loan agreement between EMB and CO and an undertaking to the OSC in respect of loans made by CO investors to the real assets, which are being held for the benefit of those investors.

The undertaking provided that: (a) CO would not enter into any further loan agreements with third-party investors; (b) CO would cause outstanding loans to CO investors to be paid as they became due; (c) CO had used the loans from CO investors to acquire the assets listed in the schedule to the undertaking.

OSC takes the position that the undertaking constitutes an obligation and commitment in favour of OSC.

OSC also takes the position that immediately after entering into the undertaking, CO breached the terms of the undertaking by entering into a new loan agreement on August 21, 2009 in the amount of approximately $54,000. Dr. Sbaraglia takes the position that this was not a new loan agreement, but a rollover of an existing agreement.

OSC also takes the position that Dr. Sbaraglia failed to identify material obligations in its schedule of outstanding loans. The undertaking failed to list nine loan agreements for a total of approximately $9.4 million, which includes the Pero investment of $6 million. Even taking into account the position put forth by Dr. Sbaraglia that the $6 million position put forth by Dr. Sbaraglia that the $6 million Pero investment was an obligation transferred to Mr. Mander, there remains $3.4 million in loans which were not listed.

Counsel for Dr. Sbaraglia and Ms. Sbaraglia and the CO Group paints a very different picture of events. Counsel suggests that the proper narrative should be that a well-intentioned family was caught in the middle of a Ponzi scheme, that they were led into error by a career fraudster and ill-advising lawyers. Counsel portrays his clients as victims of Mr. Mander, a predator fraudster. Counsel puts forth that his clients are guilty of no wrong-doing and that no investor has sued or made any claim against them. In fact, all investors without exception, support them. Mr. Davis does acknowledge that Mr. Obradovich is one investor who raises the specter of a claim against Ms. Sbaraglia through Pero, on the basis that notwithstanding the transfer of the obligstion to Mr. Mander there is still no obligation fron CO.

Counsel for the Sbragalias takes the position that his clients are not to blame, but rather, others were involved. These include the lawyers who acted for both the Sbaraglias and also Mr. Mander. Mr. Davis also contends that these lawyers breached their fiduciary duty, hid informationf from the Sbaraglias in their representation before the OSC and despite a grave conflict of interest, counsel advised the Sbaraglia and misinformed the OSC.

Mr. Davis also puts forth that Dr. Sbagalia and Ms. Sbaraglia have been and remain committed to helping repair the damage to repay those who invested with them and to co-operate with the OSC. The Sbaralias are also suing their lawyers to pay for the repairs.

The Sbaraglias also takes the position that the OSC has been deficient in its investigation insofar as it had in its possession evidence of Mr. Mander's fraud for the better part of the year before examining Dr. Sbaraglia. Further, it takes the position that the receivership is not necessary for a number of reasons including: (a) the creditors - who also victims of Mr. Mander - oppose the receivership; (b) the receivership would strip the Sbaraglias of their assests without any action or proceeding having been commenced, in effect denying them due process; (c) the receivership would be destructive, and it would diminish the Sbaraglias efforts to make the creditors whole; (d) it would punish the Sbaraglias for Mr. Mander's wrong-doing and would ignore their innocence; and (e) it would ignore the Sbaraglias diligence in trying to avoid this current predicament as it would reduce the prospects of recovery in the litigation against the lawyers. In all respects the Sbaraglias remain transparent in which to co-operate with the OSC.

The Sbaraglias also take the position that the receivership will benefit no one and will be costly and consequently the OCS's application, they take the position, should be dismissed, and they should be relieved of their undertaking and allowed to continue with their work.

From their standpoint the matter began to unravel in the spring of 2009 when CO Capital stopped making money for new investments. As noted previously, the OSC served Dr. Sbaraglia and Ms. Sbaraglia with a summons under the Securities Act and they were required to attend examinations. The Sbaraglias had no reasons, they say, to have known about Mr. Mander's fraud at that point. There was also no reason to think that they were caught in a fraudulent scheme, as Mr. Mander had paid all investors to that date.

Dr. Sbaraglia acknowledges that his OSC examination and the participation of his counsel at this examination resulted in statements that may not have been accurate. Certain aspects were not true. He now says that he knew that some of the statements been made by his counsel were not true at the time, but he did not correct these statements. He now states that he was surprised by the disclosure. He also felt that he was under duress at the time. He acknowledges that he knew the information was inaccurate, but he did not speak up. Dr. Sbaraglia is of the view that he had paid dearly for his legal counsel's trangressions and having already been victimized by the fraud he now find himself victimized by his own lawyer. He has sued that lawyer.

Dr. Sbaraglia also referenced the undertaking to the OSC. It is described in his counsel's factum as being an ill-advised undertaking. It is also referenced that the undertaking was a misrepresentation in certain respects. The undertaking states that the property had been bought with CO's Capital money; this was false. It was also false insofar as certain properties had been bought before CO Capital's incorporation.

Dr. Sbaraglia takes the position his legal counsel had prepared the statutory declaration which he had signed and swore that assets that he owned or controlled would be held in trust as security for the repayment of loans. He also took the position that it was his legal consel who provided assurances to him which misled him into signing the undertaking. Dr. Sbaraglia also takes the position that he should be relieved of the undertaking as it was not freely given or independently given and that it was not accurate.

It is apparent that the Sbaraglias have also acknowledged that they have suffered financial and personal devastation at Mr. Mander's hands and that they are now working to repay investors fully, but they are struggling to meet their expenses. Their insolvency has been acknowledged.

Mr. Sbaraglia also takes the position that the OSC and the receiver are trying to access their personal assets, i.e., the proceeds or potential proceeds from the sale of their home or corporate assets, i.e., the proceeds through the sale of 239 Church Street to repay investors, most of whom are unrelated to the Sbaraglias.

The Sbaraglias also take the position that both the OSC and the receiver ignored the fact that the three properties in question were bought before the Sbaraglias met Mr. Mander and that there is no basis in law for stripping them of their personal assets.

The Sbaraglias also place certain responsibility on the OSC. The OSC was investigating Mr. Mander as early as 2008 and by August 2008 the OSC obtained bank records showing millions of dollars flowing to EMB, yet the Sbaraglias contend the OSC stood back and did nothing.

They do not accept the receiver's report as being accurate. They also stress that the receiver has not reviewed monies paid by CO Capital to its investors and, as a result, the accounting and subsequent allegations against Dr. Sbaraglia and Ms. Sbaraglia have been skewed.

Counsel for the Sbaraglias does acknowledge that mistakes were made and that misrepresentations were made. However, he submits that there is nothing to be gained from a receivership; there are no hidden assets, the investigations have been complete and the most viable assets that the Sbaraglias have, mainly litigation against former counsel, can only be optimized in the absence of a receivership.

He also stressed that a number of CO Capital investors are in dire dire straits, that they are losing homes or businesses and that his clients are trying to arrange for these investors to receive some monies now so as to avoid disaster. Further, counsel contends that the Sbaraglias themselves are in dire need and that while they seek to re-establish themselves professionally they need money for basic living expenses.

The two positions are diametrically opposed. The position put forward by the OSC is supported by the receiver and by counsel to Mr. Obradovich who claims he is a creditor for some $6 million. The position of Dr. Sbaraglia is supported by all of the remaining creditors, most of whom are family and friends.

Turning now to an analysis of the law. Section 129 of the Securities Act permits the commission to apply to the court for an order appointing a receiver for all the property, assets and undertakings of a person or company. Such an order can be made where the court is satisfied that such an appointment is in the best interest of the company's creditors of the security holders or if it is appropriate for the due administration of Ontario securities law.

A threshold question was raised by counsel on behalf of certain creditors of CO Capital, contending that the court has no jurisdiction to appoint a receiver under s. 129 of the Act because constitutional principles impose a limitation on the power of the court to appoint a receiver under a provincial statute in situations where the entity over whose assets the receiver is sought to be appointed as insolvent

This position is based on the Constitution Act 1867, which gives exclusive jurisdiction over bankruptcy and insolvency to the federal parliament. On this basis, counsel contends that the Supreme Court has repeatedly held that a provincial statute which purports to impact creditors priorities or to otherwise substantially regulate the affairs of an insolvent person or company vis-a-vis its debtors is unconstitutional.

Counsel goes on to submit that in the present case there is no challenge to the validity of s. 129 itself. It is not a necessary condition for the appointment of a receiver under s. 129 that the person or company over whose assets the receiver is being appointed be insolvent. Section 129, therefore, does not in pith and substance relate to bankruptcy and insolvency.

The constitutional challenge was raised on behalf of creditors of CO Capital and not by counsel on behalf of Dr. Sbaraglia and Ms. Sbaraglia of CO Capital, who declined to take a position.

No notice of a constitutional question was served on the Attorney General of Canada and the Attorney General of Ontario as provided for in s. 109 of the Courts of Justice Act. Counsel for the creditos who put forth this argument relies on his statement that there is no direct challenge to the validity of s. 129 itself.

Counsel to the receiver submits that this submission is belied by the statements contained at paragraph 25 of the factum of counsel for the CO Capital creditors, which takes direct aim on the constitutional validity or constitutional applicability of the Act in this context, and further, that the notice provision s. 109 Courts of Justice is mandatory. In the absence of such notice s. 109(2) of the Courts of Justice Act provides that the Act, Regulation and Bylaw, a rule of common law shall not be adjudged to be invalid or inapplicable.

In my view, the position put forth by the creditors of CO Capital calls into question the constitutional validity of the Securities Act in this context. No case law was put forward to support this position. This seems unusual because as was pointed out to counsel in argument, if this position is correct with respect to the Securities Act, it would also call into question the thousands and thousands of receivership orders granted over the years under s. 101 of the Courts of Justice Act. Counsel was unable to reference any case law under where such a challenge had been successfully made to receiverships granted under the Courts of Justice Act.

I am satisfied that if counsel wished to raise this issue, the same should have been done after providing the required Notice of of Constitutional Question.

A number of disputes have been raised by the Sbaraglias with respect to the factual background. However, putting their position at its highest, there are still a number of facts that are most troubling.

1. Neither Dr. Sbaraglia or Ms. Sbaraglia were registered with the Commission. CO raised approximately $21.2 million from CO investors.

2. CO did not transfer all the funds of CO investors to Mr. Mander and EMB. Approximately one-third of the funds raised, namely $6 - 7 million were not transferred. These funds were used in part to make payments to CO investors with newly received

funds from other CO investors. This activity took place over a number of months. It cannot be characterized as a mistake.

3. $213,000 in payments were made in respect to property located at 239 Church Street. These payments were made by CO to 91 Days Hygiene Services Inc.

4. $383,000 in charges were incurred on corporate visa in the name of CO with a significant number of payments being made not for the benefit of CO investors, but rather, for the personal benefit of the Sbaraglias.

5. It is also clear that the OSC was misled in its investigation. The Sbaraglias did not advise OSC that they raised almost $1 million prior to receiving any legal advice as to whether they were in compliance with securities law. They did not disclose the $6 million obligation to Pero, regardless of whether the matter had been transferred to Mander. They did not fully disclose their remaining creditors.

6. With respect to the undertaking it seems to me clear that the Sbaraglias knew counsel's strategy was to convince the OSC that there were sufficient assets to repay all CO investors and accordingly proceedings should not be taken against them. Throughout the investigation the Sbaraglias sat by and let legal counsel make representtions to the OSC that they knew were false. In this respect, the Sbaraglias did have options. They could have taken steps to ensure that the truth came out. They chose to remain silent.

The Sbaraglias take the position that the receivership will achieve nothing. They insist that the litigation can only be maximized under their direction. They insist that they are the ones who should be able to direct the payment of funds to creditors in dire straits.

Counsel to the Sbaraglias and also to the CD creditors submit that if there are any issues that require a resolution they can be brought forth to the court. In this respect I take it from their submissions that there is a tacit acknowledgement that there are several loose ends in this matter that will require further direction.

The criteria for determining what is in the best interest of creditors, security holders or subscribers for the purposes of the appointment of a receiver pursuant to securities legislation is broader than the solvency test. The criteria should take into consideration all the circumstances and whether in the context of the circumstances it is in the best interest of creditors that a receiver be appointed. The criteria should also take into account the interests of all stakeholders with references being made to OSC v. Factorcorp 2007 OJ 4496 OSC v. Sextant 2009 OJ 3063 and BOSC 138 DR 4th 263.

Further, where there is a history mismanagement, no evidence of a tangible_alternative resolution, evidence that investors interest will not be served by maintaining the status quo and evidence that the company is not in a better position than a receiver to protect investors' interest, it is appropriate to appoint a receiver.

Further, where there is evidence of regulatory breaches and evidence that the value and integrity of the assets purchase with investor funds has been compromised, it is in the investor's best interest that a receiver be appointed such that the investors are provided with an independent and verifiable review and analysis. Investors deserve treatment they can rely on (see Factorcorp., Sextant and OSC and ASL Direct).

The second part of the test, the alternate test, is that the securities legislation has as its primary goal, the protection of the investing public and the protection of the integrity of the capital markets. Section 1.1 of the Act provides that the purposes of the Act are to provide protection to investors from unfair or improper or fraudulent practices and to foster fair and efficient capital markets and confidence in the capital market.

It seems to me that an assessment of whether the appointment of a receiver is appropriate for the due administration of Ontario Securities Law must therefore take into consideration the purposes of the Act to be undertaken with a view to determining whether such an appointment is consistnet with the goals of protecting investors and protecting the integrity of the capital markets.

In this respect, it is noteworthy that, pursuant to s. 122 of the Act, it is an offence to mislead staff for the commission during the course of an examination taken as part of an investigation.

The failure to advise staff of complete information about the flow of investor funds in the operation and business of the entity in question amounts to a contravention of s. 122 of the Act. The offence of misleading staff can occur by making affirmative statements and can equally occur by omission references to

Northshield Asset Management Canada Limited 2010, 33 OSCB 7171.

In addition, s. 216 of the Act prohibits conduct which perpetrates a fraud on investors. The use of investor funds to repay other investors for personal benefit constitute security fraud pursuant to s. 126.1(b) of the Act.

Having considered the uncontradicted facts noted above, it is clear to me that this is a situation that cries out for the appointment of a receiver. I am satisfied that by using investor funds to repay other investors, by using investor funds for personal use, by being untruthful to the OSC by not fully disclosing to creditors of CO to the OSC, it cannot be in the best interest of creditors of CO Capital that the continued administration of creditor affairs be administered by the Sbaraglias. This is a situation that requires an independent court officer to oversee.

I make this finding notwithstanding the level of support provided by the family and friends who are creditors of the Sbaraglias. It could very well be that there are other creditors, most notably Mr. Obradovich. It is essential, in my view, that a claims process be established which can be verified as being accurate. I am not satisfied that this can be accomplished without an independent court officer overseeing the process.

In making this determination I cannot overlook that CO, Dr. Sbaraglia and Ms. Sbaraglia retained and had access to funds in excess of $6 million. I also cannot overlook that they improperly used some of these funds for personal use or for related corporate use. I also cannot overlook that some of the new money was used to pay interest payments to old investors. To use the words of counsel of the receiver, "This is the hallmark of a Ponzi scheme where you keep the dollars rolling."

I have no doubt that Mr. Mander contributed significantly to the problems that the Sbaraglias currently face. I also have to take into account that there may be issues with respect to deficiencies in the legal advice that can be pursued in due course. With respect to the litigation against former counsel, I have not been persuaded that the Sbaraglias are the best party to direct such litigation. Rather, it seems to me that the insertion of an independent court officer is essential to ensure the best outcome for creditors.

The Sbaraglias have also blamed the OSC for not taking more prompt action. It could very well be that the OSC could have acted more promptly. However, the timing of the OSC's involvement does not excuse or explain the activities of the Sbaraglias that led to determination being made today.

The Sbaraglias also take the position that breaches of securities legislation have not been clearly proven. I do note that under s. 129 there is a broad discretion that the courts can make such an order which does not require evidence of a breach. Having said that, there are certain very serious concerns that have been raised by the OSC with respect to possible breaches of the statute.

With respect to the second part of the test which provides a receiver can be appointed if it is appropriate for the due administration of Ontario securities laws, I am satisfied that this is the type of case that calls for such an appointment. The factors that had led to my decision to appoint a receiver as being in the best interest of the company's creditors and the potential Sbaraglia creditors is also applicable for the appointment under the second part of the test. This was a Ponzi scheme. Although Mr. Mander may have been the head of the Ponzi scheme, it is clearly apparent that by using investor's money to repay other investors, steps were taken by the Sbaraglias that were improper. The use of investors money to pay personal and related company expenses is also improper, It also cannot be overlooked that the Sbaraglias misled the OSC in the course of its investigation. This type of activity cannot and should not be overlooked and I am satisfied that the appointment of the receiver is also justified under the second part of the test.

As Mr. Gottlieb summed up in his reply, the remedy of the appointment of a receiver goes beyond certain principles. it also takes into account the importance of a neutral court officer to oversee the claims process, the evaluation process and to provide appropriate recommendations as to the administration of the estate.

A considerable amount of investigation has already been done. Most assets have been identified. However, issues remain outstanding with respect to the identification of proper creditors, maximizing asset realization through litigation and the necessity to demonstrate that transparency exists in all respects in the resolution of all outstanding matters.

For the foregoing reasons, the application of the OSC is granted. I would be grateful if counsel could prepare an appropriate order for my review.

CERTIFIED:

H. P. Sinclair
....
Helen P. Sinclair, C.S.R.
Official Court Reporter
SUPERIOR COURT OF JUSTICE

TAB 6

Paras. 233 and 234

2011 CarswellOnt 3302
Ontario Securities Commission

Sextant Capital Management Inc., Re

2011 CarswellOnt 3302, 34 O.S.C.B. 5829, 34 O.S.C.B. 5863

In the Matter of the Securities Act, R.S.O. 1990, c. S.5, as Amended

In the Matter of Sextant Capital Management Inc., Sextant Capital GP Inc., Otto Spork, Konstantinos Ekonomidis, Robert Levack and Natalie Spork

Carol S. Perry Commr., James D. Carnwath Chair

Heard: June 7 - December 10, 2010
Judgment: May 17, 2011
Docket: None given.

Counsel: Tamara Center, Brendan Van Niejenhuis, Pavel Malysheuski, for Staff of the Commission
Suzy Kauffman, for PricewaterhouseCoopers in its capacity as Receiver and Manager of Sextant Capital Management Inc. and Sextant Capital GP Inc.
Joseph Groia, Kevin Richard, David Sischy, Ashley Krol, Tatsiana Okun (Student-at-Law), for Otto Spork, Natalie Spork and Konstantinos Ekonomidis
Wendy Berman, for Otto Spork, Natalie Spork and Konstantinos Ekonomidis in attendance on October 5, 2010

Subject: Corporate and Commercial; Securities

Headnote

Securities --- Offences — Fraud

Securities --- Offences — Miscellaneous

Table of Authorities

Cases considered:

Al-Tar Energy Corp., Re (2010), 33 O.S.C.B. 5535, 2010 CarswellOnt 3966 (Ont. Securities Comm.) — considered

Anderson v. British Columbia (Securities Commission) (2004), 2004 BCCA 7, 2004 CarswellBC 9, [2004] 4 W.W.R. 81, 192 B.C.A.C. 119, 315 W.A.C. 119, 23 B.C.L.R. (4th) 182 (B.C. C.A.) — considered

Anderson v. British Columbia (Securities Commission) (2004), 2004 CarswellBC 1493, 2004 CarswellBC 1494, 210 B.C.A.C. 320 (note), 348 W.A.C. 320 (note), 331 N.R. 399 (note) (S.C.C.) — considered

Barry v. Alberta (Securities Commission) (1989), 1989 CarswellAlta 611, 35 Admin. L.R. 1, [1989] 1 S.C.R. 301, [1989] 3 W.W.R. 456, (sub nom. *Brosseau v. Alberta (Securities Comm.)*) 57 D.L.R. (4th) 458, 93 N.R. 1, 65 Alta. L.R. (2d) 97, 96 A.R. 241, 1989 CarswellAlta 19 (S.C.C.) — considered

Biovail Corp., Re (2010), 2010 CarswellOnt 7449, 33 O.S.C.B. 8914 (Ont. Securities Comm.) — considered

Global Partners Capital, Re (2010), 2010 CarswellOnt 6337, 33 O.S.C.B. 7783 (Ont. Securities Comm.) — considered

Lehman Cohort Global Group Inc., Re (2010), 12 Admin. L.R. (5th) 219, 33 O.S.C.B. 7041, 2010 CarswellOnt 5609 (Ont. Securities Comm.) — considered

Norshield Asset Management (Canada) Ltd., Re (2009), 32 O.S.C.B. 1249, 2009 CarswellOnt 528 (Ont. Securities Comm.) — considered

R. v. Currie (1984), 5 O.A.C. 280, 1984 CarswellOnt 1237 (Ont. C.A.) — considered

R. v. Shubley (1990), 1990 CarswellOnt 75, 1990 CarswellOnt 985, 74 C.R. (3d) 1, [1990] 1 S.C.R. 3, 104 N.R. 81, 65 D.L.R. (4th) 193, 37 O.A.C. 63, 42 Admin. L.R. 118, 52 C.C.C. (3d) 481, 46 C.R.R. 104, 71 O.R. (2d) 63 (note) (S.C.C.) — considered

R. v. Théroux (1993), 1993 CarswellQue 5, 1993 CarswellQue 2040, 19 C.R. (4th) 194, 79 C.C.C. (3d) 449, 151 N.R. 104, 54 Q.A.C. 184, 100 D.L.R. (4th) 624, [1993] 2 S.C.R. 5 (S.C.C.) — considered

R. v. Wholesale Travel Group Inc. (1991), 1991 CarswellOnt 117, 4 O.R. (3d) 799 (note), 1991 CarswellOnt 1029, 67 C.C.C. (3d) 193, 130 N.R. 1, 38 C.P.R. (3d) 451, 8 C.R. (4th) 145, 49 O.A.C. 161, 7 C.R.R. (2d) 36, [1991] 3 S.C.R. 154, 84 D.L.R. (4th) 161 (S.C.C.) — considered

R. v. Wigglesworth (1987), 1987 CarswellSask 385, 1987 CarswellSask 519, [1988] 1 W.W.R. 193, [1987] 2 S.C.R. 541, 45 D.L.R. (4th) 235, 81 N.R. 161, 24 O.A.C. 321, 61 Sask. R. 105, 28 Admin. L.R. 294, 37 C.C.C. (3d) 385, 60 C.R. (3d) 193, 32 C.R.R. 219 (S.C.C.) — considered

Rowan, Re (2009), 33 O.S.C.B. 91, 2009 CarswellOnt 8219 (Ont. Securities Comm.) — considered

Rowan, Re (2010), (sub nom. *Rowan v. Ontario Securities Commission)* 272 O.A.C. 119, 2010 ONSC 7029, 2010 CarswellOnt 9956, (sub nom. *Rowan v. Ontario Securities Commission)* 103 O.R. (3d) 484 (Ont. Div. Ct.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
Generally — referred to

s. 1 — referred to

s. 11 — considered

s. 11(d) — referred to

Commodity Futures Act, R.S.O. 1990, c. C.20
Generally — referred to

Securities Act, R.S.O. 1990, c. S.5
Generally — referred to

s. 3.4(2) [en. 1997, c. 10, s. 37] — referred to

s. 3.4(2)(a) [en. 1997, c. 10, s. 37] — referred to

s. 3.4(2)(b) [en. 1997, c. 10, s. 37] — referred to

s. 19 — referred to

s. 116 — referred to

s. 126.1 [en. 2002, c. 22, s. 182] — referred to

s. 126.1(b) [en. 2002, c. 22, s. 182] — referred to

Statutory Powers Procedure Act, R.S.O. 1990, c. S.22
s. 15.2 [en. 1994, c. 27, s. 56(31)] — referred to

Decision of the Board:

I. Introduction

1 Staff of the Ontario Securities Commission (the "Commission") allege that Otto Spork, Sextant Capital Management Inc. ("SCMI") and Sextant Capital GP Inc. ("Sextant GP") committed non-criminal fraud during the period from July 2007 to December 2008 in three ways:

(a) they sold investment fund units with falsely inflated values;

(b) they took millions of dollars in fees based on falsely inflated values; and

(c) they directly misappropriated money from investment funds.

2 Staff allege the fraud was perpetrated through three investment funds managed from Toronto — the Sextant Strategic Opportunities Hedge Fund L.P. (the "Canadian Fund") in Ontario, the Sextant Strategic Hybrid2Hedge Resource Fund Offshore Ltd. (the "Hybrid Fund") incorporated in the Cayman Islands and the Sextant Strategic Global Water Fund Offshore Ltd. (the "Water Fund") incorporated in the Cayman Islands (the three funds together, the "Sextant Funds").

3 Staff make further allegations of conduct contrary to the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "*Act*") and contrary to the public interest against some or all the named Respondents. Staff allege that Otto Spork, Konstantinos (Dino) Ekonomidis, Natalie Spork and Robert Levack, each had a role in managing the Canadian Fund. Staff allege that all of the named Respondents breached their management duties to that fund, to the detriment of investors.

4 There is a Temporary Cease Trade Order in place against certain Respondents, made on December 8, 2008. The order also suspended SCMI's registration and continues until the conclusion of the hearing on the merits. Various directions freezing a custodial trading account and bank accounts related to the Canadian Fund were also issued by the Commission and continued by the Ontario Superior Court of Justice.

5 On application of the Commission dated March 5, 2009, the Canadian Fund, SCMI and Sextant GP were placed into receivership by Order of the Ontario Superior Court of Justice dated July 19, 2009.

6 On May 15, 2009, the Cayman Islands Monetary Authority appointed controllers over the Hybrid Fund and the Water Fund. The powers of the controllers were confirmed by Order of the Grand Court of the Cayman Islands dated June 16, 2009.

II. Issues

7 The Statement of Allegations requires us to answer the following questions:

(a) Did Otto Spork, SCMI and Sextant GP commit a fraud on investors contrary to s. 126.1 *Act*?

(b) Did SCMI, Sextant GP, Otto Spork, Dino Ekonomidis and Natalie Spork breach their duties as investment fund managers contrary to s. 116 of the *Act*?

(c) Did SCMI, Otto Spork, Dino Ekonomidis and Natalie Spork breach their duties pursuant to OSC Rule 31-505 — *Conditions of Registration* ("Rule 31-505")?

(d) Did SCMI and Sextant GP fail to maintain proper books and records contrary to s. 19 of the *Act*?

(e) Did the Respondents act contrary to the public interest?

8 Robert Levack is no longer a respondent. On June 1, 2010, a Commission Panel approved his settlement agreement.

III. The Material Filed

9 At the opening of the hearing on the merits, twenty volumes of hearing briefs were provisionally filed as Exhibit 4. Counsel agreed that their admission as exhibits would take place in the course of the hearing as documents in those volumes were identified by witnesses. References to the exhibits in these Reasons will be by exhibit number, tab number and where necessary, page number ("Ex.-, Tab.-, p.-").

10 In addition there is a complete transcript of the proceedings comprising 14 volumes. Reference to the transcript will be by volume number, page number and line, as required ("Tr., Vol. -.p.-, l.-"). As well, there are transcripts of the closing submissions referred to by date.

IV. The Major Players

11 The following descriptions of the major players are the Panel's findings of fact based on the evidence, the agreement of counsel and information not seriously challenged by the parties.

12 Otto Spork is a former dentist, with subsequent experience as a trader on the TSX. In 2006 and early 2007, he created the three hedge funds described in these reasons as the Sextant Funds. Otto Spork managed the Sextant Funds through companies which he controlled. He was registered under the *Act* as Officer and Director (Trading and Non-Advising), Designated Compliance Officer and Ultimate Responsible Person in the category of limited market dealer, investment counsel and portfolio manager with SCMI from February 1, 2006 to June 5, 2008.

13 Helen Spork is Otto Spork's wife.

14 Dino Ekonomidis is Helen Spork's brother and Otto Spork's brother-in-law. He was vice-president, Corporate Developments, for SCMI and registered under the *Act* as a salesperson with SCMI in the limited market dealer category from August 14, 2006 to September 28, 2009 and as a dealing representative in the exempt market dealer category from September 28, 2009 to January 31, 2010.

15 Natalie Spork is Otto Spork's daughter. From July 7, 2008 she was registered as Officer and Director (Non-Advising, Non-Trading) and Ultimate Responsible Person in the categories of limited market dealer, investment counsel

and portfolio manager and as Officer and Director (Non-Advising) in the category of commodity trading manager with SCMI. On May 28, 2008, Natalie Spork was given the title of President and Secretary of SCMI.

16 Gary Allen was a trader under the *Commodity Futures Act*, R.S.O. 1990, c. C.20, as amended. He was hired to act as a supervisor of Otto Spork while the latter attempted to obtain his futures trading license.

17 Jamie Spork is Otto Spork's daughter from a previous marriage

18 Robert Levack was a Chartered Financial Analyst and was SCMI's Chief Compliance Officer from February 2006 to July 17, 2009. He was registered under the *Act* as an Officer (Advising, Non-Trading) and Chief Compliance Officer in the categories of limited market dealer and investment counsel and portfolio manager with SCMI from February 1, 2006 until June 5, 2008. As of June 5, 2008 his registration was modified to Officer (Advising and Trading), Chief Compliance Officer and Designated Compliance Officer.

19 The Canadian Fund is a hedge fund in Ontario organized as a limited partnership. The limited partners consist of the investors in the hedge fund.

20 The Hybrid Fund is one of two hedge funds operating as a corporation under Cayman Islands law. The Water Fund is a second hedge fund operating as a corporation under the law of the Cayman Islands. We refer to the Hybrid Fund and the Water Fund as the "Offshore Funds".

21 Sextant GP is the general partner and manager of the Canadian Fund.

22 SCMI is the Investment Adviser for the Canadian Fund. SCMI was registered under the *Act* as an investment counsel, portfolio manager and limited market dealer as of February 1, 2006, until its suspension on December 8, 2008.

23 Sextant Capital Management a Islandi ehf ("Sextant Iceland") is an Icelandic company and was the sub-adviser to the Canadian Fund from July 2008. In addition, Sextant Iceland is the investment adviser to the Offshore Funds.

24 Sextant Capital Management S.a.r.l. ("Sextant Lux") is a Luxembourg company and adviser to the Offshore Funds before June 2008. It was replaced by Sextant Iceland in June of 2008.

25 Iceland Glacier Products ehf ("IGP" or "IGP Iceland") is an Icelandic company in which the Sextant Funds became major investors.

26 iGlobal Water (Canada) Inc. ("iGlobal Water") is located in Toronto, and was controlled by Otto Spork.

27 Riambel Holdings S.A. ("Riambel") and Hermitage Holding A.G., Switzerland ("Hermitage") are two holding companies owned 100% by Otto Spork.

28 Iceland Global Water ehf ("IGW" or "IGW Iceland") is an Icelandic company in which the Sextant Funds became investors.

29 Iceland Global Water 2 Partners S.C.A. ("IGW Lux") is a Luxembourg company which owns 100% of IGW.

30 Iceland Global Water II S.a.r.l ("IGW GP") is a Luxembourg company 100% owned by Otto Spork. IGW GP owns 100% of the "unlimited shares" in IGW Lux, making it akin to a general partner in IGW Lux.

31 Attached to these Reasons is Schedule "A", which the parties agree sets out the various relationships among the various companies identified above. Based on the schedule, we find that Otto Spork owned 100% of SCMI, Sextant GP and Sextant Iceland.

32 We find Otto Spork controlled each of the corporate identities shown on Schedule "A" and owned many of them outright as more particularly shown on Schedule "A". We also find that any third-party transfers to, or investments in, any of the entities on Schedule 'A' fell under the total control of Otto Spork.

V. The Narrative History

A. Formation and Operation of the Sextant Funds

1. Canadian Fund

33 Otto Spork created the Canadian Fund in 2006 and marketed it through a Confidential Offering Memorandum (the "OM") dated February 17, 2006. The Canadian Fund operated under a limited partnership agreement (the "LP Agreement") which bound the investors (the limited partners). Sextant GP was the general partner and SCMI was the investment adviser to the Canadian Fund (together the "Fund Manager").

34 The OM set out the investment objectives and strategies of the Canadian Fund, as well as investment restrictions that applied to its activities. The LP Agreement incorporated the same investment restrictions, which included the following terms:

> The Fund will not engage in any undertaking other than the investment of the Fund's assets in accordance with the Fund's investment objective and subject to the investment restrictions set out below and will engage in such activities as are necessary or ancillary with respect thereto.
>
> . . .
>
> The Fund may not invest more than 20% of its portfolio, based on the Net Asset Value of the Fund at the most recent Valuation Date, in any single class of securities of an issuer, where for the purposes of this restriction a long position is valued as the cost of the securities purchased and a short position is valued as the gross proceeds of the sale of the securities sold short;
>
> . . .
>
> The Fund will not purchase securities from, or sell securities to the Investment Advisor or any of its affiliates or any principal of any of them or any firm in which any principal of the Investment Advisor may have a direct or indirect material interest.
>
> (Ex. 4-1, Tab 2)

35 The OM and LP Agreement also provided for the compensation of the Canadian Fund's General Partner and Investment Adviser. There were two forms of compensation:

> 1. *Advisory Fee.* Initially Sextant GP, later SCMI was entitled to an advisory fee (also referred to as a "management fee") of 2% of the NAV ("Net Asset Value") payable monthly in 1/12 instalments. The NAV was established by Sextant GP with the assistance of Investment Administration Solutions Inc. ("IAS"), located in British Columbia. IAS calculated the values of publicly traded securities as established by reported trades. The value of the IGP (and IGW) shares held by the Canadian Fund was established by Otto Spork. We note the value of the IGW shares was set at their cost or book value throughout the applicable period in calculating the NAV of the Canadian Fund.
>
> 2. *Performance Fee.* Sextant GP was entitled to a performance fee, consisting (in broad terms) of 20% of the increase in NAV in the most recent month. This was subject to a provision which provided that, should the Canadian Fund's NAV decrease, Sextant GP would not collect a performance fee until the Canadian Fund NAV exceeded the "high-watermark" achieved in the prior or current fiscal year.

2. Offshore Funds

36 Both Offshore Funds had substantially identical terms for the compensation of the Fund Manager. In their case, the Fund Manager was Sextant Lux. After June 2008, Sextant Iceland became the Fund Manager. These Fund Managers were owned and controlled by Otto Spork.

37 The Offshore Funds were each offered to investors under the Confidential Private Placement Memoranda dated January 15, 2007.

3. Canadian Fund's Investment Practices

38 The OM portrayed a strategy of taking primarily long positions in equity and equity-related securities, hedged by short positions in commodities. In 2006 and 2007, but to a far lesser degree in 2008, the Canadian Fund traded in a variety of securities.

39 For that purpose, the Canadian Fund maintained a brokerage account with Newedge Canada Inc. ("Newedge"); Newedge served as the fund custodian. Brokerage records from Newedge (which have been reviewed and analyzed by OSC Staff, but not by the Receiver) show the Canadian Fund's trades over the term of its active life. In the case of publicly-traded securities, trading by the Canadian Fund would occur by SCMI instructing Newedge to purchase or sell a particular security.

40 The Canadian Fund also contracted with IAS to serve as its fund accountant. In that role, IAS also served as its NAV calculation agent. Newedge would regularly report to IAS on transactions, so that IAS could maintain a current record of the Canadian Fund's overall holdings, and calculate the NAV of the Canadian Fund weekly and monthly.

41 In the case of publicly traded securities, IAS would use their market price on the relevant NAV calculation date in order to determine the value of those holdings as part of the Canadian Fund's portfolio value. In the case of IGP and IGW, IAS would take instruction from Otto Spork as to the value to assign to the Canadian Fund's holdings in those private companies.

42 The reported NAV of the Canadian Fund is relevant for this case in three ways:

(a) *Investor Reliance.* The NAV of the Canadian Fund was reported to investors, and potential investors, as representing the current market value of the Canadian Fund. This information could influence existing investors in deciding whether to remain in the Canadian Fund or redeem their units and could influence prospective investors in deciding whether to make an investment. The NAV and its historical progression were regularly reported to investors on the website used to promote the Canadian Fund and through monthly mailings to investors.

(b) *Advisory Fees.* The monthly NAV calculation was used, under the terms of the OM, to calculate the Advisory Fee payable to SCMI and Sextant GP based on 1/12 of 2% of the reported NAV of the Canadian Fund.

(c) *Performance Fees.* The month-over-month increase in the NAV was used under the terms of the OM to calculate the Performance Fee payable to Sextant GP, based on 20% of the increase in the reported NAV over the prior month (subject to the provision protecting unit-holders against a decrease in the NAV, as referred to above).

VI. Staff Witnesses

A. Jane Lee

43 Jane Lee became a Chartered Accountant in 1990. After several years experience in finance administration she became the Senior Vice-President for fund accounting with IAS. Ms. Lee's evidence may be found in Tr., Vol. 11, p. 5 and following.

44 SCMI became a client of IAS and IAS assumed certain responsibilities for the Canadian Fund and the two Offshore Funds; IAS did fund accounting and record keeping for the Canadian Fund and only fund accounting for the Offshore Funds.

45 Ms. Lee described the role of IAS, which was to prepare and determine the NAV per unit for a fund. This was done by taking the value of the total assets less the liabilities and then dividing by the number of units outstanding to arrive at a NAV per unit. Ms. Lee's responsibility was that of a senior person who reviewed the file to ensure its accuracy before releasing it to the client for its approval.

46 Ms. Lee said that Otto Spork was the only person who approved the NAV for the Sextant Funds, which he communicated by e-mails (Ex. 4-6, Tabs 7, 8 and 14). The NAV was established for the Canadian Fund on a weekly and monthly basis and at month-end and for the Offshore Funds. Ms. Lee was referred to Ex. 4-4 which contained the portfolio valuation statements for the Canadian Fund from June 2007 to January 2009 separated by tabs into months. She was asked to comment on the portfolio valuation ending April 30, 2008. The portfolio valuation showed total portfolio holdings of $15,427,000 (all dollar figures are rounded and approximate throughout these Reasons). Included in the portfolio holdings were 7,109,750 shares of IGP with a book value of $2,483,000 and a market value of $10,055,000. The IGP shares represented approximately 65% of the total portfolio value. The values of the securities in the portfolio valuations were established in two ways. The market value of the publicly-traded securities was established in the usual manner by referencing public market prices. The value of the private company securities came from Otto Spork. Ms. Lee never received instructions from anyone other than Otto Spork for establishing the value of IGP shares.

47 Ms. Lee's evidence on this point led to the following exchange with the Chair:

> THE CHAIR: You take what Dr. Spork gives you.
>
> THE WITNESS: Because we're — he's in a position to value that particular stock, we're not. It's a private company.
>
> THE CHAIR: Yes. It's not a criticism. I'm trying to understand the methodology.
>
> THE WITNESS: M'hmm.
>
> THE CHAIR: And what I heard you say earlier was he gives you the numbers, you enter them.
>
> THE WITNESS: Yes.
>
> THE CHAIR: No matter what the number is.
>
> THE WITNESS: We review it, but we — again, we're not in a position to say that it's not an incorrect number because again we are not privy to the value of the private company.
>
> THE CHAIR: You accept his instructions.
>
> THE WITNESS: Yes.
>
> THE CHAIR: Thank you.

(Tr. Vol. 11, p. 39 l. 23 - p. 40 l. 17)

48 As for the non-portfolio items (liabilities) identified by Ms. Lee, one in particular stood out. This was an item referenced as "Advanced Payment" of $4,033,000 approximately found at p. 73 of the April 2008 Tab in Ex. 4-4. She explained this sum as an amount actually owing from the Fund Manager. It should be remembered that the "Fund Manager" for these amounts owing included both Sextant GP and SCMI. The figures represent monies already taken by

the Fund Manager as advance payment for management and performance fees. The figure of $4,033,000 was a cumulative balance to April 30, 2008.

49 Ms. Lee was then referred to the securities ledger that listed the individual transactions for the purchases and sales of IGP shares by the Canadian Fund. (Ex. 4-6, Tab 18).

50 Ms. Lee identified two acquisitions of IGP shares on July 31, 2007, one for 320,000 shares seemingly acquired by a transfer of securities, and one for 6,575,350 shares acquired at a price of 0.170820 per share for a cost of CDN $1,758,405. Ms. Lee was then referred to the portfolio valuation for the Canadian Fund as of July 31, 2007 (Ex. 4-4, p. 10) where the market value of IGP shares was set at 0.321 per share. The market value of the shares was shown to be CDN $3,200,000, almost twice as much as their cost.

51 Ms. Lee conducted a similar analysis for the two Offshore Funds. Her attention was drawn to Ex. 4-6, Tab 19, which she identified as the securities ledger for the Hybrid Fund. She was also referred to Ex. 4-5 at the tab for December 31, 2008 at p. 72. She identified that the Hybrid Fund held 14,536,928 shares of IGP as of December 31, 2008 with an average cost of 0.373 per share and a book value of USD $8 million. As of December 31, 2008, the market value was shown at 2.45 per share for a total market value of USD $49,576,000 and represented 92.37% of the Hybrid Fund's portfolio value.

52 The same analysis was carried out for the Water Fund. It held 16,511,323 shares of IGP as of December 31, 2008 with a book value of USD $8,600,000. The market value of the shares at that date was set at 2.45 per share for a total market value of USD $56,310,000 and represented 95.04% of the Water Fund's portfolio value.

53 Ms. Lee's examination-in-chief concluded with a question about how the operating expenses of the funds were paid. Ms. Lee testified that the expenses were accrued on instructions from Otto Spork by referring to Ex. 4-6, Tabs 4, 5 and 15. Ms. Lee said there was no pattern in terms of timing, frequency or amount. She said the amounts were usually in round amounts. IAS was never told what the expenses were for nor did it ever receive supporting documents other than the e-mails with the instructions. She examined the general ledger for the Canadian Fund (Ex. 4-10, Tab 12a, p. 129) as of December 31, 2008. She identified the operating expenses recorded for that year to be $1.8 million. This sum, she said, was fully paid in 2008 over and above the management fees and the performance fees that were paid to the Fund Manager.

54 Ms. Lee's cross-examination began with a question directed to the book value of the IGW shares, held by the two Offshore Funds. After examining the portfolio valuations for each of the funds found at pp. 72 and 144 in Ex. 4-5, Ms. Lee acknowledged that book value was the same in each of the Offshore Funds. Ms. Lee's attention was then drawn to Exhibit 4-4, Tab April 2008, p. 84, an incentive fees report. She confirmed that SCMI, Helen Spork and Robert Spork invested approximately $4 million in the Canadian Fund in April 2008. Ms. Lee was then shown Ex. 5, Tab 8, in which Otto Spork instructed Newedge to carry out certain transactions involving the redemption of the Canadian Fund units purchased by SCMI, Helen Spork and Robert Spork. Ms. Lee said that based on the e-mail at Tab 8, it appeared that the settlement of the redemption would be carried out by the transfer of shares of IGP, the actual number of shares of IGP to be transferred being 1,591,000 plus 1,117,000. Ms. Lee was then shown Ex. 4-6, Tab 18, where on July 21, 2008 the securities ledger for the Canadian Fund shows the exact number of shares previously identified coming out of the fund. She acknowledged that the redemptions were thus carried out without cash payments to the Spork's but rather a transfer of shares of IGP from the Canadian Fund to the Offshore Funds.

55 Further questions to Ms. Lee were put by counsel for the Respondents relating to the correlation between entries in the general ledger and the entry for accrued management fees in the portfolio valuation statements. Several examples were put to Ms. Lee of matching entries with which she agreed. It was put to Ms. Lee that there appeared to be a shortfall of $400,000 between the crystallized performance fee, as used in the portfolio valuation, and the entries indicated in the general ledger. Ms. Lee acknowledged the discrepancy but pointed out for the discrepancy to be accurate the general ledger would have to be correct. Her view was that the general ledger was not correct.

56 Following re-examination, Commissioner Perry asked Ms. Lee to explain what she meant when she said earlier in her testimony that there were areas where Sextant's practices deviated from what Ms. Lee would consider normal. Her response was that as far as she could remember, there were no other clients that advanced or pre-paid their performance or management fees.

B. Supriya Sarin and Andrew Wilczynski

57 Supriya Sarin is a manager in the corporate advisory services group of PricewaterhouseCoopers Inc.

58 Andrew Wilczynski is a partner with PricewaterhouseCoopers LLP and a senior vice-president of the restructuring and insolvency arm of PricewaterhouseCoopers ("PWC").

59 The parties agreed that Ms. Sarin and Mr. Wilczynski could testify as a witness panel, as permitted by s. 15.2 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 ("SPPA"). The procedure is designed to avoid calling two or more witnesses separately with the understanding that the person best qualified to answer a specific question will respond to that question for the panel. Their evidence is found in Tr. Vol. 3, p. 5 and following.

60 PWC was appointed the receiver over SCMI, Sextant GP and the Canadian Fund on July 17, 2009. PWC was not appointed as receiver of the Offshore Funds who were placed under a controllership ("Controllership") pursuant to the laws of the Cayman Islands. PWC and the Cayman controllers share legal counsel in Iceland. PWC had filed two reports to the Ontario Superior Court of Justice and both reports have been approved by the court. (Ex. 4-16, Tabs 1 and 2)

61 The witness panel concluded that the Canadian Fund held 17% of the issued shares of IGP. Their belief was that the two Offshore Funds together held 42% of IGP, split between the two funds.

62 The witness panel described the efforts to serve Otto Spork with a notice of examination pursuant to the receivership. Service was attempted in Canada and PWC has retained a service in Iceland to serve Otto Spork in that location. PWC also attempted to meet with Otto Spork but he has refused to do so. Service was attempted on his counsel in Canada but counsel advised that they had not been retained to accept service on behalf of Otto Spork.

63 The witness panel then described the efforts to carry out the receivership mandate, including obtaining information and gathering in the assets. They obtained the portfolio valuation statements for the Sextant Funds from IAS. They met with Tony Tartaglia, the audit partner in charge of the Sextant account at BDO Dunwoody ("BDO") and gained access to the Sextant books and records for the audit year 2007. BDO Dunwoody no longer had any information for 2008 and the witness panel were told that those documents had been sent back to Sextant. They obtained from the Royal Bank ("RBC") copies of all the bank statements for the three entities, SCMI, Sextant GP and the Canadian Fund.

64 The witness panel explained the difficulties in reviewing the activities of the three entities. The records were incomplete and no staff was available to explain the transactions. PWC therefore shifted their focus and decided to "follow the money". They tried to map what monies came in and what monies went out to try and understand the dynamics of the flow of funds in and out of the Sextant group.

65 During its review of the group's bank statements obtained from RBC for the period January 2007 to December 2008, the receiver noted several transfers by one or more members of the group to non-arms-length individuals and entities. The transfers are identified in the receiver's second report to the court and appear as follows:

Party	Amount ($)
Otto Spork	1,580,681
1035316 Ontario Ltd.	668,300
Dino Ekonomidis	457,544
Helen Spork née Ekonomidis	1,110,147
Natalie Spork	271,506
Jamie Spork	98,617

Sextant Capital Management a Islandi ehf	2,557,267
Riambel Holding S.A.	79,435
Total	6,823,497

(Ex. 4-16, Tab 2, p. 154)

66 We find that the recipients of the $6.8 million are Otto Spork, his relatives or companies which he controls. PWC noted that they were unable to find sufficient supporting information to determine the nature and appropriateness of all these transfers.

67 In addition to the transfers to the non-arms-length's individuals and entities listed above, a significant portion of the credit card expenses of $1.7 million between January 2007 and December 2008 are in respect of personal credit cards held by Otto Spork, Helen Spork, Natalie Spork and others. The credit card expenses covered hotels, meals, other travel costs as well as personal expenditures. The receiver was not able to determine the extent to which the payments were for appropriate business purposes and which were for personal expenses based on the information, or lack thereof contained in the books and records.

68 In paragraph 24 of the receiver's second report is found a revised summary of the group's Consolidated Cash Flow. The summary shows receipts from arms-length third-party investors of $26 million, together with the proceeds from a sale of IGP shares to the Water Fund of $1.4 million, accounting for total receipts of approximately $27 million. The summary shows redemptions by arms-length third-party investors of $5 million, leaving $22 million to be accounted for.

69 In the disbursements, the summary shows monies received from non-arms-length parties of $2.8 million and investments by non-arms-length individuals in the Canadian Fund of $1.6 million. These items were explained by Ms. Sarin as a partial re-classification of receipts. The $2.8 million, in the light of the cancelled cheques, indicated that the money was basically being loaned out by the various companies to those related parties and then reinvested by those related parties as subscriptions for units of the fund. Similarly, the $1.6 million was shown as a negative disbursement because the receiver concluded that the monies were advanced by the companies to the individual related parties and then put back in to the Canadian Fund. The receiver concluded this was not fresh money coming in but rather recycled money. The total of the two entries comes to approximately $4.4 million.

70 It was Ms. Sarin's view that of the original $6.8 million transferred to non-arms-length parties, $4.4 million came back as investment in the Canadian Fund leaving approximately $2.4 million in monies paid to related parties and not repaid to the fund. She pointed out that this was the simple math of the transactions, although the receiver's view was that the entire $6.8 million was owed by the recipients because there was no evidence of the purpose of the transfers.

71 In the course of its mandate, the receiver visited Iceland from January 18, 2010 to January 21, 2010. Its investigation led the receiver to make the following conclusions:

(i) IGP Iceland was formed to sell bottled water, including the possibility of expanding to include large bulk water shipments. IGP Iceland was in the course of constructing a 7,300 sq. ft. bottling facility in Rif, in western Iceland.

(ii) IGP Iceland's principal asset was a contract with the town of Rif that provided it with water rights. Under the contract, IGP Iceland had constructed a pipeline from a glacier-fed spring running to Rif. Approximately US $2,000,000 was spent building the pipeline.

(iii) The proposed building was at the foundation stage. The contract required the facility be completed by April 4, 2010. It was not clear whether IGP Iceland would meet that deadline; indeed, the receiver found that to be unlikely. The receiver estimated that US $8,000,000 to $10,000,000 had been spent on developing and constructing the plant.

(iv) The receiver estimated once the building was erected, it would take six to nine months to make the plant operational, including the installation of a bottling line. The receiver estimated the cost of construction and purchasing and installing two bottling lines to be US $20 million or more. The source of funding was uncertain. Aside from its water contract and capitalized costs, IGP Iceland had no material assets.

(v) The receiver also investigated the then current status of IGW, a vehicle through which medium bulk water was to be sold by shipping in medium-sized bladders of water, loaded on to ships for transport. IGW owned a fully constructed medium bulk water filling facility located on the Westmann Islands off the southern coast of Iceland. The facility consisted of a large hangar with three bay doors from which filled bladders could be loaded on to waiting ships. The facility was approximately 50 yards from a large sea port.

(vi) The water to be shipped was to be obtained from a glacier located in southern Iceland. Water was delivered to the island by pipeline, owned by the municipality.

(vii) The facility was fully constructed but not operational due to the absence of sales contracts. Moreover, certain government approvals were necessary to commence operations. The only remaining material construction was the paving of a roadway from the facility to the seaport.

(Ex. 4-16, Tab 2, pp. 170-172)

IGP/IGW Funding Gap

72 In pursuit of its mandate, the Receiver attempted to understand and reconcile the funds advanced from the Canadian Fund to the IGP/IGW group. Its findings are found in Ex. 4-16, Tab 2, pp. 177-180 reproduced below:

111. The Receiver has attempted to understand and reconcile the funds advanced from the Sextant Canadian Fund to the IGP/IGW Group and the distinction between the funds invested into IGP and IGW and the lesser amounts in turn invested by IGP and IGW into IGP Iceland and IGW Iceland (the "IGP/IGW Funding Gap"). To the extent that not all of the funds invested in IGP and IGW made it into IGP Iceland and IGW Iceland, the Receiver is now attempting to uncover where such funds went (i.e. as they are apparently no longer with IGW and clearly not within IGP given the Liquidation).

112. The Receiver remains concerned with the apparent inability to account for the funds invested by the Sextant Canadian Fund in the IGP/IGW Group. Understanding the IGP/IGW Funding Gap is made more complicated by the exchange rate considerations resulting from dealing in four currencies over different periods of time (i.e. Canadian dollars, US dollars, Euros and Icelandic Kroners (which exchange rate fluctuations have been particularly volatile following the financial collapse of Iceland's principal banks)).

113. As set out above, according to the books and records in the Receiver's possession, approximately $26.4 million was raised by the Sextant Canadian Fund from investor subscriptions, of which only approximately $9.37 million was invested in IGP and IGW, consisting of: (i) $7.37 million in equity subscriptions (as confirmed by both RBC bank records and the IAS statement of December 31, 2008); and (ii) a further sum in the approximate amount of $2 million (as confirmed only by RBC bank records and not by the IAS statement of December 31, 2008), for which no shares have been issued to the Sextant Canadian Fund.

114. Information provided to the Receiver by Mr. Mirakian on February 12, 2010, indicated that the following investments were made by Sextant Canadian Fund and the Cayman Funds:

	Sextant Strategic Opportunities Hedge Fund (CDN)	**Sextant Strategic Global Water Fund (USD)**	**Sextant Strategic Hybrid 2 Hedge Resources Fund (USD)**
IGP Luxembourg	6,131,347	8,602,252	8,015,040

IGW Luxembourg	1,235,125	2,476,167	1,238,083
Total	**7,366,472**	**11,078,419**	**9,253,123**
Total Investment in IGP & IGW (USD){1} 26,346,952			

Notes: 1 Opportunities fund converted from CDN to USD at exchange rate of 1.2246

115. As a result of the comingling of monies obtained from the Sextant Canadian Fund and the Cayman Funds, it is not always possible for the Receiver to separate the uses of the Sextant Canadian Fund's monies by IGP and IGW from the uses of the Cayman Funds' monies by IGP and IGW. However, collectively, the Sextant Canadian Fund and the Cayman Funds transferred approximately US $26.35 million to IGP and IGW.

116. The Receiver was informed via information received from Mr. Mirakian on February 12, 2010, of the following uses of the Sextant Canadian Fund and Cayman Funds' monies:

(i) approximately US $4.7 million was invested in IGW; and (ii) US $21.6 million was invested in IGP, with monies invested in IGP used as follows:

	Sextant Strategic Opportunities Hedge Fund (CDN)	**Sextant Strategic Global Water Fund (USD)**	**Sextant Strategic Hybrid 2 Hedge Resources Fund (USD)**
1 — Purchase of IGP shares	5,535,952	5,386,100	1,371,000
2 — Loan to IGP	404,933	421,263	421,263
3 — Sale & Purchase of shares w/ other subsidiaries	705,351	288,800	4,615,855
4 — Share swap transactions	(834,889)	2,506,290	1,607,022
5 — Adjustments for free shares	320,000	0	0
Total	**6,131,347**	**8,602,253**	**9,253,123**
—			
Sum of Items 1 and 2 (USD){1}		5,807,363	1,792,363
Sum of Items 3,4,5 — no cashflow to IGP		2,794,890	6,222,677
—			
Sum of Items 1 and 2 for 3 funds (USD)			
Sum of Items 1 and 2 for 3 funds (USD) 9,173,097			
Sum of Items 1, 2, 3, 4, and 5 (book value) 21,624,108			

Notes: 1 Opportunities fund converted from CDN to USD at exchange rate of 1.2246

117. According to the audited financial statements for IGP Iceland and IGW Iceland for the year ending December 31, 2008:

(i) in total, approximately US $12.5 million was invested by IGP in IGP Iceland, whether by way of equity or debt. Of this amount, $5.94 million or approximately 47.4% came from the Sextant Canadian Fund and the balance from the two Cayman Funds. All of this money has apparently been spent by IGP Iceland in the course of the construction project as well as interest paid to IGP on its loans and professional costs incurred by IGP Iceland, save for the funds in trust with Mr. Jonsson to fund completion of construction of the second pipeline; and

(ii) In total, approximately US $2 million was invested by IGW in IGW Iceland, whether by way of equity or debt. All of this money has apparently been spent in the course of the construction project as well as interest paid to IGW on its loans and professional costs incurred by IGW Iceland.

118. Accordingly, though US $21.6 million was invested in IGP by the Sextant Canadian Funds and the Cayman Funds, only approximately US $12.5 million was invested by IGP in IGP Iceland. As per the uses of the IGP funds provided by Mr. Mirakian, the balance US $9.1 million has been paid to then existing shareholders in IGP (whose identities are not known to the Receiver) for purchase of their shares in IGP and other share swap transactions in IGP. While no details of the share purchases and share swap transactions have been provided by Mr. Mirakian, this once again raises concerns with respect to possible self-dealing by Dr. Spork and the absence of appropriate corporate governance protocols in IGP. It seems extraordinary that the existing shares of IGP could have been properly valued at over US $9 million, given that IGP had no assets or business at this time, save for the shares of IGP Iceland, which itself was a shell company at the time.

119. Further, though US $4.7 million was apparently invested in IGW by the Sextant Canadian Funds and the Cayman Funds, approximately US $2 million was invested by IGW in IGW Iceland. The Receiver has not determined what has happened to the balance of the funds (amounting to US $2.7 million).

120. The above discussion only considers the transfer of funds by the Sextant Canadian Fund and the Cayman Funds in IGP and IGW. There are many other shareholders in both IGP and IGW and if these shareholders paid anything close to what the Sextant Canadian Fund and the Cayman Funds paid, there should be many more millions of dollars in missing capital. The numbers suggest that the other shareholders perhaps did not pay for their shares or alternatively, did not pay the same value for the shares as the Sextant Canadian Fund and the Cayman Funds.

73 In cross-examination, counsel for Otto Spork referred to a number of documents which Mr. Wilczyanski had never seen. He acknowledged that they appeared to explain "the funding gap" referred to in his evidence but he was unable to conclude that without further analysis.

C. Michael Ho

74 Michael Ho is a Forensic Accountant employed by the Commission. Mr. Ho became a Chartered Accountant in 1988 and obtained his CMA certification in 1999. Mr. Ho's evidence centered on Exhibit 38 (described as Hearing Brief Vol. 20) containing a series of spreadsheets prepared by him or under his supervision. His evidence may be found in Tr. Vol. 12, pp. 76-137.

75 Mr. Ho's attention was first drawn to Ex. 38, Tab 5, which Mr. Ho described as an analysis of the cash-flow of the Canadian Fund from January 1, 2007 to December 31, 2008. It is important to remember his evidence concerned only the Canadian Fund. His analysis was based on documents he received from the various banks and brokers that the Canadian Fund had accounts with, including RBC and Newedge. He also looked at the accounting records of the Canadian Fund as prepared by IAS as described in the evidence of Ms. Lee. A copy of Ex. 38, Tab 5 is attached to these reasons as Schedule "B".

76 Briefly put, a total of $30 million was deposited into the accounts of the Canadian Fund and during that same period $29 million was dispersed from those accounts. Mr. Ho did not take into account any transaction under $10,000. Third-party investors invested $23 million. In addition, Otto Spork and parties related to him invested $4.6 million. SCMI transferred $1 million and the Water Fund transferred $1.5 million to the Canadian Fund.

77 The application of funds included investments and transfers to IGP of $2.9 million. There were transfers to SCMI and Sextant Capital GP totalling $16.3 million, third-party investor redemptions accounted for $3.9 million and net investments in other securities of $3.7 million.

78 Included in the $16.3 million paid or transferred to SCMI and Sextant GP there were various transactions totalling $3.5 million that IAS characterized as investments in IGP. Mr. Ho said it was appropriate to add the $3.5 million to the $2.9 million in the first line of his analysis of application of funds to reflect a $6.4 million investment in IGP by the Canadian Fund.

79 Mr. Ho's attention was drawn to the Receiver's revised summary of the group's consolidated cash-flow found in Ex. 4-16, at p. 151. Mr. Ho explained that the different figures in that revised summary when compared to his summary at Ex. 38, Tab 5 was caused by the Receiver analysing three entities — the Canadian Fund, SCMI and Sextant GP. He added that his analysis looked at source documents that relate to both the bank account with RBC as well as the brokerage accounts, whereas the Receiver's analysis did not cover cash-flow movements that took place within the brokerage accounts for the Canadian Fund.

80 Mr. Ho was then asked about the spreadsheets found in Tab 1 of Ex. 38. Three spreadsheets related to the Canadian Fund, the Hybrid Fund and the Water Fund. Each of the spreadsheets shows the market price per IGP share held by the respective funds for the period July 31, 2007 to December 31, 2008. Each further shows the market price per share, the total market value of investment in IGP, the total NAV, a total market value of the investment in IGP as a percentage of NAV. Mr. Ho took the information from the reports provided by IAS and made the percentage calculations shown in the final column on spreadsheets one, two and three in Tab 1, Ex. 38. Shortly put, the total market value of investment in IGP as a percentage of NAV as at December 31, 2008 for the Canadian Fund was 94%, for the Hybrid Fund 107%, and for the Water Fund 98%.

81 Mr. Ho was referred to Tab 3 of Ex. 38. In this spreadsheet, he extracted all the balances relating the Fund Manager and put them all in one page, coming up with a net balance for all those balances relating to the Fund Manager for each month. The first two columns in the spreadsheet are described as "Due From Fund Manager" and "Advanced Payment to Fund Manager". Taken together, those two columns represent sums the Fund Manager owed to the Canadian Fund for each month in 2008. The next seven columns are the varying sums owed by the Canadian Fund to the Fund Manager. These columns include accrued management fees and GST, operating expenses, crystallized performance fees and GST and accrued performance fees and GST. The spreadsheet shows that as of April 30, 2008 an advance payment of $4 million was paid to the Fund Manager. In Ex. 38, Tab 4, Mr. Ho calculates the total amount paid in 2008 to the Fund Manager was $6.6 million.

D. The Indications of Value

82 During 2007 and 2008, Otto Spork obtained two calculations of value, received a marketing letter from Canaccord and arranged two share purchases by third parties to justify his valuations of the IGP shares held by the Canadian Fund. These five alleged indications of value are discussed below.

1. Hempstead

83 Hempstead & Co. ("Hempstead") is a US company carrying on business in New Jersey. In December 2007, Otto Spork retained Hempstead to perform "an appraisal on the fair market value" of the aggregate equity of IGP as of December 31, 2007. The report dated April 2, 2008 may be found at Ex. 4-18, Tab 32.

84 Hempstead's opinion was that the fair market value of the aggregate equity of IGP at December 31, 2007, on a majority interest basis was $250 million.

85 Attached to the report as Exhibit 1 is a statement of assumptions and limiting conditions. The first three of the assumptions and limiting conditions are as follows:

- Information, estimates and opinions contained in this appraisal are obtained from sources considered reliable; however, no liability for such sources is assumed by the appraiser.

• It is understood that in preparation of this report, Hempstead & Co. Inc., is acting as a service provider and not in a fiduciary capacity.

• We have relied upon the accuracy and completeness of information supplied by the client company without further verification thereof. We have assumed that all financial statements were prepared in conformity with generally accepted accounting principles unless informed otherwise.

86 At page 3 of the report, Hempstead confirms that it conferred with IGP's management and received a copy of the company's business plan, which it incorporated by reference. Hempstead makes it clear that it is assumed that all financial statements were prepared in accordance with general accepted accounting principles and that it relied upon the accuracy and completeness of the material furnished to it and did not independently verify the information contained in that material.

87 Hempstead calculated the value of IGP using an income-based or discounted cash-flow approach. At p. 38 of the report, Hempstead notes that the calculated value of $250 million assumes that the company will remain an ongoing concern and will have the funds necessary to finance the start up of its facility, as well as the operating costs of the company during its formative stages. We find this report cannot be relied upon as an independent valuation of IGP shares. It appears to have been produced by Hempstead accepting Otto Spork's projections without, as the report acknowledges, verifying the information provided by him. Our conclusion extends to any subsequent analysis which relies upon the Hempstead report.

88 Hempstead was also retained by Otto Spork to prepare a second report dealing with the value of IGP's lease rights over the Snæfellsjökull glacier. In a report dated April 2, 2008 Hempstead calculated the value as being $510 million. In effect, the second report is a calculation of the incremental value of the water that IGP itself couldn't use according to its business plan. The second report repeats the qualifications of the first report, rendering it equally unreliable.

2. Spardata

89 Securities Pricing and Research Inc. ("Spardata") is a US company carrying on business in Maryland. It was retained by Otto Spork and issued a report dated January 28, 2008, placing a calculated value on IGP as of December 31, 2007 of US $442,833,500 and a value per share of US $6.50. The report is found in Ex. 4-18, Tab 29. Spardata said the purpose of the report was to perform a calculation of enterprise value of IGP as of December 31, 2007.

90 The report contained the following qualification at p. 7:

> **Calculation of Value.** The reader of this report should be cautioned to the fact that this analyst relied on Client-prepared projections of future revenues, expenses and accounts in this valuation. The analyst relied on the client-provided information at the direction of the client. SPARDATA has not formally reviewed the Client's calculations or the assumptions used in the information provided by the client and cannot opine regarding the likelihood that the projections will indeed be attained. Furthermore, if the analyst had used SPARDATA-prepared projections, the value conclusion would likely have varied significantly from the value conclusion derived from the Client's projections. Therefore, SPARDATA does not express an opinion of value in this report, but provides only a calculation of value based on the Client's assumptions. **SPARDATA strongly cautions the reader that the calculation of value contained herein may be unreliable, and should not be the basis for a debt or equity investment decision.**
>
> [emphasis in original]

91 The report calculates an enterprise value for IGP based on financial projections provided by Otto Spork. We find this report cannot be relied upon as an independent valuation of IGP shares. Our conclusion extends to any subsequent analysis which relies on the report.

3. Steve Winokur (Canaccord)

92 Steven Winokur holds a Master of Business Administration from the University of Toronto, and is a Managing Director in the Investment Banking group at Canaccord Genuity ("Canaccord"). He advises companies on accessing capital through public and private equity markets. Canaccord would generally be compensated with a success-based fee on the completion of a financing transaction. Mr. Winokur's evidence is found in Tr. Vol. 5, p.6 and following.

93 Mr. Winokur was introduced to Otto Spork by Vik Kapoor, a retail broker with GMP. He spoke with Otto Spork by telephone and signed a non-disclosure agreement with IGP on behalf of Canaccord in July of 2008. He then commenced the due diligence process to learn about the company and assess the marketability of a potential initial public offering ("IPO") of IGP. He visited Iceland for 24 hours and observed the IGP facilities at Rif. He observed the construction site of survey stakes in the ground and a pile of pipes in another area. He also visited the port area that was proposed to have bulk quantities of water shipped to prospective purchasers. During the course of his examination-in-chief, Mr. Winokur candidly responded to a question as follows:

> Q. Was there a different focus of water sale that you were looking at, other than bottled?
>
> A. I don't recall. We were looking at — you know, we were basing our analysis off of the forecasts that were provided.

(Tr. Vol. 5, p. 39, ll. 6-11)

94 After a lengthy exchange of e-mails and conversations, Mr. Winokur wrote Otto Spork on September 29, 2008, in a letter headed, "Re: Value Discussions Letter". The letter explained some of the thought processes Canaccord used to determine its recommended valuation range. In short, the letter recommended an initial public offering of IGP to be marketed based on a pre-money valuation of approximately $400 million. Canaccord recommended that the size of the IPO be $100 million. Following this letter, communication between Otto Spork and Canaccord dwindled over the succeeding weeks and months. Sometime in the month of December 2008, Otto Spork and Mr. Winokur had their last conversation.

95 In examination-in-chief, Mr. Winokur was asked the following question:

> Q. and as a proportion of the diligence, the due diligence you would ordinarily do before taking a company to market, are you able to estimate a percentage of the amount of work you completed?
>
> A. You know, probably 5 percent or less or something along those lines.

(Tr. Vol. 5, p. 16, ll. 14-20)

96 In cross-examination, counsel for the Respondents drew Mr. Winokur's attention to the several occasions on which he told Otto Spork how highly he thought of IGP's prospects. Among the examples,

"Guy's, this is why we LOVE what you're doing. Going to be HUGE."

(Ex. 8, Tab 30, p. 1);

"I continue to like IGP a great deal and look forward to the opportunity to work with you."

(Ex. 8, Tab 52)

97 The following exchange took place between Mr. Groia and Mr. Winokur:

> Q. So would it be fair to suggest that even in December of 2008 you remain keen on doing the potential financing?

A. Well, I had no update on the businesses between the two dates, so I think this is a little bit of marketing.

(Tr. No. 6, p. 47, ll. 1-6)

98 Our review of Mr. Winokur's evidence and the documents to which he was referred persuade us that Mr. Winokur was indeed engaged in "a little bit of marketing". We find Mr. Winokur was working diligently to acquire Otto Spork as a client with a view to taking IGP public by way of an IPO. Ordinary life experience and common sense tells us that Mr. Winokur would not do anything other than be enthusiastic about the prospects for IGP in attempting to gain Otto Spork as a client for Canaccord. This, in turn, persuades us to give little weight to the $400 million value suggested by him as the basis to raise $100 million by way of an IPO. The Canaccord letter cannot be relied upon as a valuation of IGP.

4. T.J.

99 T.J. obtained a Bachelor of Arts from McMaster University and passed the Canadian Securities Course. He was employed at BurgeonVest Securities from 1995 through 2009, with a break of one year. He worked at the Hamilton office where he first met Dino Ekonomidis, who was a salesman with the firm. His evidence is found in Tr. Vol. 13, pp. 8-47.

100 T.J. described their relationship as co-workers and friends. They socialized together, lunched together and shared their ideas. T.J. said that Dino Ekonomidis covered a lot of the smaller venture-listed type stocks, a world with which he, T.J., was not familiar. On the advice of Dino Ekonomidis, T.J invested in two junior companies and experienced a doubling or more of his investments and realised a paper profit of over $100,000.

101 In February of 2006, Dino Ekonomidis recommended T.J. invest in a hedge fund that his brother-in-law was starting. This, of course, was Otto Spork. He described the holdings of the fund as commodities and commodity-based type investments. When asked if he was relying on this advice to determine whether to invest, T.J. replied:

> Yes, I mean, to make a long story short, I mean, I had such a big profit in his other recommendations I thought it was only the right thing to do to continue supporting him and so I decided to invest $40,000 dollars into the start-up of this hedge fund.

(Tr. Vol. 13, p. 14, ll. 9-13)

102 Following his investment, T.J. received promotional material from the hedge fund which reported on the success of the fund. Encouraged by the information he received, he invested a further $95,620 on July 6, 2007 and yet another sum of $62,953 on May 2, 2008. He explained the subsequent investments by saying the fund had been doing so well and that Dino had found him and said it was a good time to buy more of the fund and he proceeded to do so. He described his results as a "massive paper gain".

103 Dino Ekonomidis gave T.J. information on IGP. The information included a business plan and other related documents promoting a private equity investment. He was persuaded to invest in IGP because he trusted Dino Ekonomidis and his track record was phenomenal as far as the paper returns were concerned. He said he and Dino Ekonomidis were friends and that he trusted him. T.J. invested $75,000 in IGP and had no idea of the price per share. He explained that the price of the shares was not an important factor to him and he did not negotiate the price, nor did he do any due diligence with respect to the price per share. He said the number of shares he was to receive were not an important factor to him.

104 Staff produced to T.J. an e-mail sent from Otto Spork to Jason Kwiatkowski, a senior manager of BDO. Mr. Kwiatkowski had been looking for documentation to support the consideration of 1.85 per share for T.J.'s purchase. The e-mail response from Otto Spork to Mr. Kwiatkowski reads as follows:

> Tommy wired in $75,000 CDN into the Opportunities Funds' bank account on August 11/08. The conversion rate was approx. $1.56 CDN to the Euro and Tommy received about 25,950 shares. This works out to 1.85 per share.

(Ex. 41)

105 We can only conclude from the evidence of T.J. and the documents referred to in his evidence that the value of 1.85 per share was not established by an arm's length transaction between a willing vendor and a willing purchaser but rather established by Otto Spork himself. We take from T.J.'s evidence that he invested in IGP for two reasons: he trusted Dino Ekonomidis and his paper profits were extraordinary. He was indifferent as to the number of shares he was buying and invested $75,000 at the suggestion of Dino Ekonomidis. Moreover, as this was a small tranche share transaction, we find it to be an unreliable indication of the value of IGP particularly when considering T.J.'s explanation of how he came to pay $75,000 for his shares. The purchase price paid by T.J. we find to be worthless as support for a valuation of 1.85 per IGP share in August 2008.

5. J.G.

106 J.G.'s background education included a Bachelor of Business Administration from York University in 1994, an M.B.A. in 1995 and a CFA designation since 2001. After working for the Toronto Dominion Bank, BC Enterprises and one or two small corporations, J.G., since 2006, has been the President and co-founder of F.M.I. His evidence is found in Tr. Vol. 13, pp. 48-90.

107 He described F.M.I. as an investment bank operating in the exempt market that seeks to finance private companies and help them to go public. His co-founder is A.S., a securities lawyer. J.G. expanded on the activities of F.M.I. and described how it worked with junior mining and oil and gas private companies who want to move towards going public. Typically F.M.I. would do two or three rounds of financing for these companies on a private placement basis through its established connections and networks, primarily high net worth individuals and small institutions.

108 J.G. then described F.O.I., an entity established by F.M.I. to invest in early stage companies F.M.I hoped to take public.

109 J.G. became familiar with SCMI and Otto Spork in 2007 while F.M.I. was working with one of its first clients, a resource company. The Canadian Fund and the Hybrid Fund each invested on three occasions in that company and three other companies promoted by F.M.I. for a total of $1,175,000. (Ex. 42)

110 J.G. and his partners became aware of IGP through their connections with Otto Spork. Otto Spork told them he was interested in taking IGP public at some time and was looking for brokers and for investors. They received a copy of the IGP business plan which may be found in Ex. 4-8-B, Tab 21. J.G. said they were looking at the business plan for two reasons — as a possible investment but also as an opportunity to work with Sextant and Otto Spork to assist the company in eventually going public. After various proposals were discussed and considered, a draft letter of engagement was put together by F.M.I in July, 2008. J.G. described the document as something that was intended to advance discussion (Ex. 4-8-B, Tab 23). He acknowledged that F.M.I. never entered into an engagement with IGP.

111 Nevertheless, F.O.I. invested in IGP shares, a decision that was taken about 10 days or so after Otto Spork informed J.G. he was closing a financing and was offering F.O.I. a chance to participate as an investor.

112 On August 22, 2008, F.O.I. purchased 100,000 shares in IGP for 150,000, a price per share of 1.50. J.G. said that there was no negotiation with respect to the price of the shares. The explanation was that the financing had already been arranged, there was no opportunity to negotiate and the price of 1.50 was simply presented to F.O.I. He confirmed that F.O.I. made no attempt to negotiate a different price nor had it done any due diligence to determine whether or not it was an appropriate price, other than some preliminary review of information they had at the time. He also confirmed that when they made the investment there was still a possibility that F.M.I. would act for IGP in taking it public.

113 J.G. said the decision to invest in IGP was partially prompted by an attempt to maintain a decent relationship with Otto Spork with the prospect of participating in an IPO for IGP.

114 In October of 2008, F.M.I. began pursuing Otto Spork for completion of subscription agreements committed to by Otto Spork's companies which remained outstanding and for which payments had not been made. The funds were never delivered.

115 We find that F.O.I.'s purchase of IGP shares cannot be relied upon as a valuation of IGP. There was no negotiation of price and limited due diligence performed - every indication was that F.M.I/F.O.I. hoped to get something in return from Otto Spork by way of acting as an underwriter in a prospective IPO for IGP. Moreover, while F.O.I. could be considered a sophisticated investor, this was a small tranche share transaction and thereby an unreliable indication of the value of IGP.

6. Antonio Tartaglia (BDO)

116 Mr. Tartaglia is a Chartered Accountant since 1982 and joined BDO in 1988. He is a partner in the Hamilton office and first met Otto Spork in 2005. His evidence is found in Tr. Vol. 8, p. 35 and following.

117 BDO were auditors for the Canadian Fund, for SCMI and produced tax returns and financial statements for Sextant GP He described SCMI as a very small entity with limited resources and unsophisticated from an accounting perspective. Its records were not well maintained, there were errors in their work; BDO always had difficulty in completing its audits.

118 Mr. Tartaglia described IGP as a company in which the Canadian Fund had invested. He understood IGP to be in the business of obtaining water from a glacier in Iceland and bottling and selling it, as well as selling through bulk means. He was familiar with IGP's business plan found at Ex. 4-18, Tab 26, a document to which reference has been made throughout this hearing.

119 He believed that Mr. Spork had an ownership in IGP as of December 31, 2007 indirectly through his holding company, Riambel. He thought Riambel owned 20% of IGP. He was aware that the Offshore Funds had an interest in IGP and believed at December 31, 2007 the three funds owned roughly 30% of IGP. He believed Otto Spork was the directing mind of IGP and managed it.

120 In July of 2008, Mr. Tartaglia and his wife went to Iceland, their expenses paid by SCMI. He was part of a group that went to the town of Rif where he observed a large flat area that looked like it had been recently prepared for construction. He said the site was not ready to produce product at that point.

121 Mr. Tartaglia visited Westmann Island where it was proposed that IGW capture water from a glacier for the purpose of bulk sales. He was familiar with IGW's business plan found at Ex. 4-19, Tab 1. He assumed that Otto Spork was the directing mind of IGW. He described the site on Westmann Island as more developed than the IGP site but didn't think it could produce product economically in July 2008.

122 Mr Tartaglia was asked about the reports prepared by Hempstead and Spardata and the letter written by Canaccord. He described the reports as an estimation of value based on certain assumptions. He confirmed that the reports used management's (i.e. Otto Spork's) projections and calculated values based on those projections. Mr. Tartaglia concluded the Hempstead and Spardata reports were not sufficient for purposes of an audit. He said the Canaccord letter was not a valuation and was not sufficient to support BDO's audit.

123 Mr. Tartaglia confirmed the retention of Cole & Partners, specifically Scott Davidson, by Otto Spork. Cole & Partners was to carry out a valuation of the IGP shares for the purposes of the December 31, 2007 audit. Mr. Tartaglia described the report prepared by Cole & Partners as unfinished and one that did not come to a conclusion. It was of no assistance to BDO in preparing its opinion for the 2007 audit of the Canadian Fund.

124 Mr. Tartaglia was asked if BDO considered whether to keep the Sextant group of companies as a client, following the publicity surrounding the Commission's allegations. The identified reasons why the audit was continued included

the difficulty of finding an alternative auditor, how that would affect investors and the possibility of being sued by Otto Spork. The delay in the audit might cause the Commission to appoint a receiver for the fund which in turn would result in negative consequences to the investors. In any event the decision was taken to finish the audit engagement, if possible. The internal view of the audit as reported by Mr. Tartaglia was as follows:

> The 2007 engagement will be rated at high risk and therefore will require concurring partner review. In addition, we will reexamine all the audit evidence to ensure that reliance on related party evidence and representations are minimized whenever possible.
>
> (Tr. Vol. 8, p. 76, ll. 4-9)

BDO ultimately decided to do "an assessment of the reasonableness of the value" of the IGP shares. This was done on the instruction of Mr. Tartaglia.

125 In an internal memo approved by Mr. Tartaglia, the projections prepared by management and relied upon by Hempstead and Spardata were declared, "to be reasonable". Mr. Tartaglia agreed that this was a significant assumption. He further agreed that "...if the assumptions are incorrect then this work is incorrect." (Tr. Vol. 8, p. 83 ll. 12-13)

126 Mr. Tartaglia spent considerable time attempting to describe "the Riambel transaction". BDO discovered a payment made by the Canadian Fund to Riambel. Initially Otto Spork told BDO that it was an additional investment in IGP made by the three Sextant Funds even though only one fund made the payment initially. However, instead of the money being invested directly, it went to Riambel who, in turn, was being repaid for money it had advanced to IGP. He then amended his view, stating that it was the Water Fund that made the payment, roughly US $1.2 million. An argument ensued about how this action should be recorded from an accounting point of view. Otto Spork insisted that there was no loan to Riambel. Mr. Tartaglia never saw any payments from Riambel to IGP. Ultimately the payments were treated by BDO as a loan receivable from IGP. The end result was that, for accounting purposes, the Sextant Funds assumed a debt owed by IGP to Riambel.

127 Mr. Tartaglia then described the difficulty BDO had in obtaining from Otto Spork evidence to support the increases in the market values of IGP shares that were used to established the Canadian Fund's NAVs during 2007. Various explanations were provided by Otto Spork which were ultimately accepted by BDO.

128 BDO completed its review of "the reasonableness of the value of IGP shares" on February 26, 2009. The 2007 audited financial statements for the Canadian Fund were dated February 17, 2009, some nine days earlier. Mr. Tartaglia reported to Otto Spork on May 19, 2009 that the audited financial statements had been "recently filed." (Ex. 4-9, Tab 11)

7. Scott Davidson (Cole & Partners)

129 Scott Davidson was a partner with Cole & Partners during its interaction with Otto Spork. He is both a Chartered Accountant and a Chartered Business Valuator. His evidence may be found at Tr. Vol. 9, pp. 10-144.

130 Mr. Davidson described how in May 2008, Mr. Tartaglia called him and explained BDO's requirement for a valuation of the IGP interest held by the Canadian Fund as of December 31, 2007. Mr. Davidson was referred to documents contained in Ex. 4-7 and 7A, which contain documents created by the engagement of Cole & Partners.

131 Cole & Partners was asked to prepare "an estimate valuation report", which Mr. Davidson described as lying somewhere between a calculation and a comprehensive valuation report. He described the aims of such a report as follows:

> ... I think what you're trying to do is you're trying to understand the financial position of the subject business as at or about the valuation date; you are trying to understand the operational, financial outlook for the business as at or about that date; you're trying to understand the market into which the business is selling, its competitors and the like.

(Tr. Vol. 9, p. 19, ll. 12-18)

132 Cole & Partners and Otto Spork signed an engagement letter dated May 15, 2008, which Mr. Davidson described as contemplating two phases in the preparation of the report. The first phase was to include a review of information, some research, and a preliminary analysis to develop a range of value, to be followed by a meeting to discuss progress to that date. The second phase would have involved a more detailed review and analysis leading to an estimate report. In late May 2008, Mr. Davidson received IGP's business plan and financial projections, the Hempstead and Spardata reports and a copy of an agreement between IGP and the town of Rif in Iceland.

133 Mr. Davidson noted the projections showed the business growing from a "very small number, if not, zero" revenue to over $500 million after five years. He also noted that the projections used by Hempstead and Spardata were out by a year because of delay in getting the business started. Mr. Davidson felt that there was significant risk around the projections and testified that "the projections were very aggressive".

134 In late June of 2008 Mr. Davidson e-mailed Otto Spork seeking a meeting with him and asking for IGP's current financial statements. Nothing of note was received from Otto Spork and Mr. Davidson e-mailed Otto Spork again on August 21, 2008.

135 Mr. Davidson did describe in considerable detail the difficulties he was having with arriving at a valuation for the IGP interest held by the Canadian Fund:

> I had little indication or understanding as to the what the milestones were, what traction had been gained, what was happening, what the distribution plan was, what the marketing plan was, what had been arranged, what was in place, who were the management. I hadn't spoken to anyone. So I was going to at some point wrestle with the issue of did this projection make any sense?
>
> (Tr. Vol. 9, p. 68, ll. 11-18)

136 Subsequent interactions with Otto Spork included Otto Spork's emphasis on the Hempstead and Spardata reports, the Canaccord letter, and the transactions involving T.J. and F.O.I. described earlier in these Reasons. Mr. Davidson said Otto Spork conveyed to him the idea that he had a business and it was going to progress as projected. Subsequently in late November 2008, Mr. Davidson received the financial statements for IGP for the 2007 year-end.

137 Finally, Mr. Davidson sent an e-mail to Mr. Tartaglia on December 5, 2008. The third paragraph states:

> Based on the scope of our review to date, it appears that the fair market value of Sextant's interest in IGP at the valuation date is uncertain, if not speculative, and likely lies within a very wide range of potential values.
>
> (Ex. 4-7, Tab 22)

138 In his testimony, Mr. Davidson developed his explanation for his conclusion in the e-mail to Mr. Tartaglia:

> I think the speculative part really goes into the question of whether this business was going to turn out the way it had been projected. It was a — in my mind, based on what I knew, based on what had not occurred in 2008 up to that point in time, based on a very cursory and limited understanding, virtually no explanation from management, as to what operationally had been done and what milestones had been hit and where they were at in terms of going to market, it was speculative as to whether or not they were going to be able to achieve that projection in the time frame in which it was projected.
>
> (Tr. Vol. 8, p. 95, ll. 5-16)

139 Mr. Davidson prepared a draft report dated December xx, 2008 titled "Comments in Respect of The Possible Value of Sextant's Interest in IGP as at December 31, 2007" that can be found at Ex. 4-7, Tab 22. Mr. Davidson heard nothing further from Otto Spork. In a conversation with Mr. Tartaglia in January of 2009 it became clear that Mr. Davidson was unwilling to accept the projections provided by Otto Spork as the sole basis for determining an estimate of IGP's value.

140 We find Mr. Davidson's evidence to confirm our own reaction to the business plan and financial projections of IGP. To Mr. Davidson's credit, his firm prepared a detailed analysis of the materials advanced by Otto Spork and was not coerced into providing a valuation opinion that would validate the IGP market values set by Otto Spork.

141 The Cole & Partners report is of no assistance to us, other than to confirm our analysis of the reports prepared by Hempstead and Spardata and the share purchase transaction by T.J. and F.O.I.

8. Jason Kwiatkowski (BDO)

142 Mr. Kwiatkowski is employed by BDO. His evidence is found in Tr. Vol. 4, p. 5 and following. Mr. Kwiatkowski has a Chartered Accountant designation, a Chartered Business Valuator designation, an Accredited Senior Appraiser designation and a Certified Exit Planning Adviser designation. He is a Senior Manager with BDO in the valuation and litigation support group.

143 Early in 2009, he was asked to review the reasonableness of management's valuation of Sextant's investment in IGP as at December 31, 2007. The information was required so that BDO could complete its audit of the Canadian Fund for the year ending December 31, 2007. Mr. Kwiatkowski explained that where management has provided a value or representative value to BDO, BDO would conduct a review of how that value was determined so that it could conclude whether or not the value represented was reasonable. It is clear that the audit staff of BDO was having difficulty in justifying the values ascribed to the IGP shares held by the Sextant group. For this reason Mr. Kwiatkowski and his colleagues with valuation expertise became involved. Mr. Kwiatkowski described in some detail how he arrived at his determination of the reasonableness of Otto Spork's valuation of the IGP shares held by the Sextant group.

144 Jason Kwiatkowski and his colleagues in the valuation and litigation support group of BDO prepared a report on the "reasonableness of the value of Sextant's investment in Icelandic Glacier Products as at December 31, 2007" that met the needs of the audit group responsible for the Canadian Fund. The result is found in a memorandum dated February 26, 2009. (Ex. 4-18, Tab 1) Page one of the memorandum states the following conclusion:

> Based on the scope of our review, we are of the view that the value of Sextant's investment in IGP as at December 31, 2007 as represented by management is reasonable. See attached analysis' and memorandums for supporting commentary.

145 The report states that it is not a valuation report and does not provide any conclusion as to value. The document was not to be circulated outside of BDO as it did not contain all the disclosures required by the Canadian Institute of Chartered Business Valuators, when providing a critique or a review of values provided by others. The memorandum points out a number of assumptions made underlying the various valuation reports referred to in the memorandum that significantly influenced the conclusions reached in those valuations. One such important assumption was the reliance on certain projections provided by management.

146 On page two the report states the authors have reviewed and relied on the reports prepared by Hempstead and Spardata. Curiously, a footnote on page eight of the report states the authors have not considered the Spardata valuation because the discount rates apply therein may not accurately reflect the risk associated with the projections and because the Spardata valuation does not consider the value of the incremental water capacity.

147 The authors assumed for the purposes of their analysis that management had made available all information requested and all information that management believed was relevant to the preparation of the memorandum.

148 On page four of the memorandum, the authors note that Otto Spork valued Sextant's investment in IGP as at December 31, 2007 at 0.80 or US $1.17 per share. This indicated a value of US $23.3 million for the 19,955,000 shares or 30% of IGP held by the Sextant Funds at that time.

149 In order to test the reasonableness of management's valuation of Sextant's interest in IGP as at December 31, 2007, BDO compared management's valuation (US $23.3 million) to:

(1) A probability-weighted sensitivity analysis based on the two Hempstead reports and applying discounts to reflect the then shareholder dispute and to reflect the minority interest in IGP and its illiquidity; and

(2) Subsequent transactions in 2008 (F.O.I.., T.J., G.P.) and the Canaccord letter. BDO chose not to include the purchase by the Sextant Funds in May 2008 of a 2/3 interest in IGP at 0.07 per share.

150 In cross-examination, Mr. Kwiatkowski acknowledged that throughout the course of his engagement he became aware of some actions that had been taken by the Commission. At the time he wrote his report he knew that Tony Tartaglia, the lead person on the audit, had declared the audit of the Canadian Fund to be a "high-risk audit". He had no reason to doubt what Otto Spork, Sergiy Kaznadiy, Shahen Mirakian or Gunnar Jonsson told him. He told Respondents' counsel that he had no reason to question or doubt the conclusions contained in the memo. Mr. Kwiatkowski confirmed that he stood behind BDO's work as of the date he testified.

151 At the conclusion of Mr. Kwiatkowski's evidence, the following exchange took place:

> Commissioner Perry: Okay, so my final question, then, is on page 8, in terms of your analysis or probability-weighted analysis, I have to tell you, and I would like to hear your response, I was struck by the exactness of your analysis being US $23.3 million, exactly equal to what was being carried by management in the books. I just — it just struck me very odd to guess.
>
> The Witness: It is weird, it is odd, it is sort of like, whoa, but it is purely coincidental.

(Tr. Vol. 4, p. 93 l. 17 - p. 94 l. 2)

152 We agree it is both "weird" and "odd". We don't agree that it was "purely coincidental." We find the figure was arrived at to allow BDO to complete an audit that had gone off the rails.

153 BDO found management's valuation of the IGP shares held by the Canadian Fund as at December 31, 2007 to be reasonable. We disagree. Given our finding that the Hempstead reports cannot be relied upon for such a valuation, BDO's reliance on those reports cannot justify the BDO conclusion as to the reasonableness of IGP's stated market value as of December 31, 2007. Similarly, its reliance on certain subsequent transactions in 2008, two of which we have found to be unreliable indications of IGP's value, cannot justify BDO's conclusion as to the reasonableness of the value represented by management.

E. Robert Levack

154 Mr. Levack was named as a respondent in this matter and entered into a settlement agreement with Staff that was approved on June 1, 2010. His evidence is found in Tr. Vol. 9, p. 146, and Tr. Vol. 10, pp. 5-31.

155 Mr. Levack completed a Bachelor of Arts degree in history, a Masters degree in history and a Bachelor of Education degree. At the time of his testimony, Mr. Levack was a Certified Financial Adviser and formerly had been a Certified Financial Planner. He had taken the Officers, Partners and Directors course and the Canadian Securities Course. From 1986 forward Mr. Levack worked as a portfolio manager, a client service representative and in portfolio management.

156 He was hired by SCMI in February 2006 and remained there until July 17, 2009. SCMI was registered with the Commission as an investment counsel portfolio manager and limited market dealer for the province of Ontario. Mr. Levack's role with Sextant was Chief Compliance Officer and portfolio manager. He said his duties were largely on the administrative side in terms of keeping track of purchases and sales of client's subscriptions, and generally looking after the back office. He was responsible to ensure that the trades carried out by SCMI were in compliance with offering memoranda and with securities law. Although Otto Spork was not registered as a portfolio manager, Mr. Levack said that, in essence, Otto Spork carried out that role. Quite often Mr. Levack learned that Otto Spork made decisions on portfolio purchases about which Mr. Levack would find out after the fact. He said Otto Spork made all the investment decisions at Sextant.

157 Mr. Levack described Otto Spork's role as out of the ordinary in the sense that Otto Spork's obligation was to report to Mr. Levack in the latter's role as Chief Compliance Officer. On occasion, Mr. Levack would receive a call looking for money to settle a particular purchase, a purchase he knew nothing about. He confronted Otto Spork with these situations and reminded him of his obligations; it "kind of went in one ear and out the other". Mr. Levack said that this attitude was consistent with his analysis of Otto Spork's personality as being somewhat grandiose in nature and perhaps a little too overly confident.

158 Mr. Levack was invited to review his settlement agreement. In it he acknowledged that on more than one occasion there was insufficient working capital in terms of the regulations. When he brought this to the attention of Otto Spork, Otto Spork said: "No, we're not going to report it, and in any case, there's more than enough money here to cover any capital deficiency." (Tr. Vol. 9, p. 171, ll. 22-24) Mr. Levack did not report the deficiencies to the Commission.

159 Mr. Levack was asked about the second matter covered in the settlement agreement, that of exceeding 20% exposure in any one investment as limited by the terms of the offering memorandum. Mr. Levack acknowledged that he received the portfolio valuation statements which had to be approved by Otto Spork. When he drew the over-concentration to Otto Spork's attention, Otto Spork made some reference to a potential IPO where he was thinking about taking IGP public and also that he was thinking of directing future cash flow into non-water areas. At the time the Canadian Fund was invested almost 90% in IGP, calculated on its NAV. Mr. Levack did not report this to the Commission.

160 Mr. Levack was asked if he ever knew that Otto Spork had an ownership interest in IGP or IGW. Mr. Levack said he learned that in the latter part of 2008 that Otto Spork owned virtually all of IGP. This contravened the terms of the offering memorandum which provided that the Canadian Fund would not purchase securities from or sell securities to the Investment Adviser or any of its affiliates or any principal of any of them. Since Otto Spork was affiliated with the Investment Adviser and was selling shares of IGP to the Sextant Funds, his activities contravened the offering memorandum. Mr. Levack did not report this matter to the Commission.

161 When asked about Otto Spork's attitude regarding compliance issues, Mr. Levack replied: "I almost got the impression, that, you know, the attitude was one of, well, yes, there are rules but somehow those rules don't seem to apply to me". (Tr. Vol. 9, p. 189, ll. 22-25)

162 Asked about Dino Ekonomidis, Mr. Levack recalled that he joined Sextant in May of 2006 as VP of Corporate Development. He would assist with the marketing and sales of the Sextant Funds and was in charge of a group of, perhaps three or four, who worked to sell the Canadian Fund. He recalled that Dino Ekonomidis was out of the office traveling for periods of time both in London and in western Europe generally.

163 Mr. Levack was asked about Natalie Spork. She joined the office in 2006 on an intermittent basis and was there full time starting sometime in the middle of 2007. Her job description was that of marketing assistant but Mr. Levack's recollection was that she did little marketing and that he was unsure of what her responsibilities were. He remembers receiving an e-mail from a law clerk at McMillan Binch saying that Natalie Spork had been approved as president and

secretary of the company as of early July of 2008. This coincided with Otto and Helen Spork's departure for Europe. He said Natalie Spork's role changed in a sense that she was on the telephone much more of the time, speaking to Otto Spork as far as Mr. Levack could determine. She made no investment decisions in Mr. Levack's opinion. In Mr. Levack's opinion, Natalie Spork was not qualified for the roles of president and secretary of the company and he had the distinct impression that she didn't really want to be there. Her attendance at the office was sporadic and two or three days might pass and "you wouldn't see her". His impression was that the office was effectively run from afar by Otto Spork. Mr. Levack remembered that it was about this time that the Canadian Fund holdings of Otto and Helen Spork were transferred to their holding companies, one being Arctic Preservation and the other, Eleni Holding. At this point the hearing adjourned to October 5, 2010.

164 On the resumption of the hearing, Mr. Levack was asked to describe the circumstances surrounding his departure from SCMI. Mr. Levack said that on May 17, 2009 the landlord, accompanied by security, came up to the office and informed them that they had 10 minutes to vacate the premises. He was asked why he stayed at SCMI as long as he did. He replied:

> That's a good question. I guess by the end of '07, I was certainly thinking about leaving. But, frankly, I think I was torn. Part of me, I think, wanted to leave and didn't — was starting to feel quite seriously that, you know, the business did not have long-term viability, but, I think, part of me wanted, you know, to see it succeed. And I felt like I needed to, for some reason, I needed to be there to help it succeed.
>
> (Tr. Vol. 10, p. 6, ll. 5-12)

165 In cross-examination, Mr. Levack confirmed that he received a copy of the "detailed portfolio valuation reports" that IAS produced. He acknowledged reviewing them on a weekly and monthly basis. He confirmed that at all the time he was at Sextant he never declined to approve a trade. If he objected it was approved over his objection. However, he took no steps to cancel it. He acknowledged receiving and reviewing the Canadian Fund's monthly bank statement accounts. He either authored or approved the written portion of the performance charts that were published or sent to investors. He reviewed and approved the newsletters which were sent to investors on an interim basis.

166 We accept Mr. Levack's evidence as it relates to the conduct of Otto Spork, and the roles played by Dino Ekonomidis and Natalie Spork in the operation of SCMI. Mr. Levack showed no overt animus towards Otto Spork and indeed, was almost tentative in his description of some of Otto Spork's activities. His evidence was uncontradicted in cross-examination and is consistent with the documents filed in this hearing. His conduct is but one example of many found in this proceeding where the force of Otto Spork's personality overbore the attempts of third parties to rein him in and regulate his conduct.

F. Gary Allen

167 Gary Allen was a portfolio manager with many years experience dating back to 1964. Beginning in 1994 and leading up to 2006, Mr. Allen was a portfolio manager with Crystal Wealth where he was a 15% shareholder. Crystal Wealth invested $1.5 million in two of the Sextant Funds, as did Mr. Allen in the amount of $200,000. His evidence is found in Tr. Vol. 7, p. 132 and following.

168 In August of 2006, Otto Spork was looking for a way to trade futures through his funds. He was unlicenced at the time and needed someone who could act as his supervisor while he obtained his futures trading licence. To obtain a licence, a person must have two years of direct supervision by a registered trader. Mr. Allen was hired by Otto Spork for a salary of $36,000 a year to carry out this function.

169 When Mr. Allen joined SCMI, he described the office as "quite small" involving Otto Spork, Helen Spork, Dino Ekonomidis, Natalie Spork, Robert Levack and Christine Gan. He described Dino Ekonomidis as the chief salesperson and second-in-command to Otto Spork. There was no question that Otto Spork was the Chief Executive Officer and Chief Operating Officer. Mr. Allen confirmed other witness testimony to the effect that in 2008 Otto Spork spent more

and more time in Europe and eventually moved to Iceland in June or July of that year. He confirmed that Natalie Spork became president of SCMI although Dino Ekonomidis continued to be very much in charge of the sales function and Otto Spork was still in control of the operation by telephone from Iceland. He considered Natalie Spork unqualified to act as president of the company.

170 He was asked about the Hybrid2Hedge strategies and described them as a marketing tool "devised" by Otto Spork. When Mr. Allen first arrived at SCMI, the Canadian Fund might have carried out 4 to 6 trades a week but that tailed off in 2008. He thought the explanation for this was the increased interest in the water companies. Mr. Allen later learned that Otto Spork was actively involved in the water companies and went from being an investor to taking control and using the Sextant Funds and his personal funds to control them.

171 When Mr. Allen joined the company and met Robert Levack, he inquired when he would get to see the Canadian Fund's portfolio. It was then he learned that he would never be able to see the portfolio, that only Otto Spork or Dino Ekonomidis had that information. He was asked if this was a problem for him as commodities trading manager. He replied that it would be preferable to have seen the portfolio because he would have known the appropriateness and the size of the positions. We find his ability to act as the supervisor of Otto Spork's trading was compromised.

172 Mr. Allen then described the efforts of the principals of Crystal Wealth to obtain more information about the operation of the Sextant Funds including obtaining the 2007 financial statements. He related a series of events that can only be described as the principals of Crystal Wealth being given the runaround by Dino Ekonomidis who cancelled scheduled meetings and refused to expose the difficulties that BDO was having in completing the 2007 audit of the Canadian Fund. Mr. Allen did his best to obtain the information for the shareholders of Crystal Wealth and for his efforts was discharged by Dino Ekonomidis on November 27, 2008.

G. Sergiy Kaznadiy

173 Sergiy Kaznadiy has considerable experience in international sales. After acting as brand manager in Australia for Nestle and TetraPak Canada, Mr. Kaznadiy worked for the Cliffstar Corporation from 2006 to 2008 selling juices under private labels to five or six countries. Mr. Kaznadiy began working for iGlobal Water in February 2008 with the title of Sales Manager. He resigned almost exactly two years later in 2010. His evidence is found in Tr. Vol. 7, p. 14 and following.

174 About two months after he started work, Natalie Spork told Mr. Kaznadiy that Otto Spork promoted him to Vice-President, Corporate Development. He was given a business card to that effect but none of the responsibilities that would go with such a position. In fact, he remained as Sales Manager with most of his job involving making sales and marketing iGlobal Water as best he could. Most of his activity centered on promoting IGP and IGW, focusing on bottled water and medium bulk water sales respectively.

175 Mr. Kaznadiy described the state of readiness for the sale of bottled water and medium bulk water. As late as May 2008, the filling station for medium bulk sales was unfinished and there were no bottles available for the sale of bottled water. In his experience he said it would take a minimum of one year, sometimes a year and a half to bring a new brand to production.

176 Mr. Kaznadiy described the difficulty in establishing a realistic timetable for obtaining bottles. He felt that most of the months of February and March, 2008 were practically lost for any development of the bottled water business or for any other effort. Otto Spork directed Mr. Kaznadiy to find a company with bottling experience with a view to establishing a business partnership. Mr. Kaznadiy attempted to do so but no agreement was reached with either Corona or Heineken.

177 Mr. Kaznadiy described the office space provided for iGlobal Water as he found it in early 2008. It was very small and inadequate for a full-fledged operational water company. For seven months, three or four iGlobal Water employees shared part of a long table in the Sextant office.

178 Also early in 2008, Mr. Kaznadiy was called by Otto Spork from a Starbucks in the Royal Bank Tower. He was summoned to a meeting about which he had no prior knowledge. Present were two men from Empire Valuation Consultants and Otto Spork directed Mr. Kaznadiy to tell them about his sales efforts and his work history. He described to them what he saw as the basic sales strategy for concentrating on bottled water and also possibly medium bulk and big bulk water. After the meeting, he learned that the men were actually valuation consultants.

179 From April to September 2008, Mr. Kaznadiy concentrated on a design for the bottle that would be sold to consumers. Considerable work was done on the design of the bottle but Otto Spork noted that nothing had been done for bulk water and that there should be a focus on that as well. Mr. Kaznadiy found this strange because with only three people working for iGlobal Water it would be very tough to develop the big bulk and medium bulk water businesses as well the bottled water business. Otto Spork was anxious to have a price established for a cubic meter of water. Despite Mr. Kaznadiy's view that maritime engineering consultants should be hired to define how to bring bulk water in tankers to the market, Otto Spork refused to take any steps in that direction. Otto Spork opined that defining how much one cubic meter in a tanker would cost was a relatively easy task. During this period Mr. Kaznadiy consulted widely with people in the tanker industry and in the softdrink industry and also attempted to hire people in Europe. He attended trade conferences in effort to develop sales contracts.

180 Staff produced to Mr. Kaznadiy the Sales Plan which Otto Spork had given to Canaccord (Ex. 7). The figures in the Sales Plan were news to Mr. Kaznadiy, particularly the projected sale of 3.2 billion litres of water in 2009 rising to 32 billion litres in 2014. He described the price of $0.50 per litre rising to $0.90 per litre in 2014 which was "obviously too high". (Tr. Vol. 7, p. 71, l. 6)

181 Mr. Kaznadiy was asked to estimate the total revenues of all the water sales during his two years of employment as the person responsible for IGP sales. He estimated total sales at 5,000 for bottled water sales only. He said no medium or large bulk water sales took place during his employment at iGlobal Water.

182 We took from Mr. Kaznadiy's evidence that his usefulness to Otto Spork consisted mainly of telling investors and valuators of Mr. Kaznadiy's qualifications to validate the IGP business plan and financial projections.

H. J.P.L.

183 J.P.L. is normally resident in Geneva, Switzerland. His evidence is found in Tr. Vol. 12, pp. 6-74. He was examined by way of video teleconference from a hotel in Crete.

184 In 1960 J.P.L. became a partner in a family bank and remained with it until 1997. The bank was mainly involved in fund and asset management for clients.

185 From 1997 until 2008 J.P.L. was chair of an asset management company which had $53 billion under management with approximately 75 to 100 different funds.

186 Also in 1997 J.P.L. started his own company. This latter company started managing assets for customers, for clients and mainly for friends. At its peak it had $100 million under management. He described the companies' clients as friends of a certain age who asked him to take care of them and he basically invested their funds in hedge funds and bonds. He had full authority to make decisions on behalf of the clients.

187 J.P.L. first heard about the Sextant Funds in 2006. He had been seeking information on funds that were invested in water and resources. He met with Otto Spork three times before he invested in the Offshore Funds in May 2007, November 2007 and April 2008. Meetings took place in the Sextant offices in Toronto and Dino Ekonomidis was also present. Messrs. Spork and Ekonomidis talked about many potential investments they were thinking of making, not restricted to investments in water companies. Reference was made to the two Offshore Funds based in the Cayman Islands.

188 J.P.L. testified that based upon the representations of Messrs. Spork and Ekonomidis and after reviewing the performance charts provided by Otto Spork, he decided to invest USD $1 million and 4.4 million of his clients' money in the two Offshore Funds.

189 Subsequent to the investment, J.P.L. attempted to learn from Dino Ekonomidis details of the two Offshore Funds' assets. A series of e-mails were produced to him which outline in detail his repeated attempts to obtain information from Dino Ekonomidis. Finally after several exchanges, Dino Ekonomidis provided information which we find to have completely misrepresented the actual state of affairs of the two Offshore Funds. He misstated the number of holdings by the Water Fund as 15 when they were actually six. He overstated the assets in the Water Fund as being $90-108 million when the actual figure was $40 million in July 2008. He misstated the percentage split of publicly-listed to private companies held by the Water Fund in July 2008 as 70:30 when the actual split was 6:89. With respect to the Hybrid Fund, Dino Ekonomidis misstated the assets under management as somewhere between $90 million to $103 million when the actual figure was approximately $35 million in July 2008. He told J.P.L. that the percentage split of publicly-listed to private companies held by the Hybrid Fund in July 2008 was 70:30 when the actual split was 20:80.

190 We find these misrepresentations were intentionally made by Dino Ekonomidis to dissuade J.P.L. from pursuing his investigations of the two Offshore Funds. J.P.L.'s attempt to redeem the units purchased on behalf of his clients were frustrated by Dino Ekonomidis finally advising him that the board of directors had not approved the redemptions. It was at that point that J.P.L. sought and obtained a mareva injunction against the two Offshore Funds in the Superior Court of Justice (Ontario) in February 2009.

I. W.G.

191 W.G. is a retail broker with a securities firm. He services approximately 200 client households to whom he gives financial advice. One of his clients was J.G., a witness in the hearing.

192 W.G. learned of the Canadian Fund while having lunch with Dino Ekonomidis in late 2006 or early 2007. He learned that the fund was going to be positioned largely as a resource-oriented fund with diversification into different kinds of companies. There was no discussion at that point about the water industry. W.G. did not invest in the Canadian Fund at that point.

193 In August 2008, W.G. became aware that the Canadian Fund had been awarded the "hedge fund of the year" prize. In late August, he spoke with Dino Ekonomidis who told him that about a third of the fund was in some private water companies, a third in public and/or private placements in the mining resource area and another third in commodities which were hedged using Hybrid2Hedge, a proprietary tool. Dino Ekonomidis also told him that a third party valuation of the Canadian Fund's units was done independently by IAS. Further, he was told that "nobody in Sextant would even touch the valuations." As we have learned, that was not the case. Dino Ekonomidis also told him that there were plans to take IGP public. W.G. put family members and clients into the Canadian Fund for a total investment of approximately $2 million. He said he was horrified to learn that 95% of the fund was invested in one private water company. He then described his efforts to get an explanation for the events which led to the loss of the investment.

VII. The Constitutional Motion

A. Overview

194 Otto Spork submits that s. 126.1 of the *Act* is unconstitutional. Both the Ministry of the Attorney General of Ontario and the Attorney General of Canada were served with Notice of a Constitutional Question, but neither appeared.

195 In Addition, Otto Spork submits that the tripartite structure of the Commission gives rise to a reasonable apprehension of institutional bias or lack of independence which violates s. 11(d) of the *Charter* or constitutes a denial of natural justice and procedural fairness under the common law.

B. The Mens Rea Argument

196 Otto Spork submits that since *mens rea* is an essential element to make a finding of fraud before the Commission under s. 126.1, the proceeding is penal in nature since fraud is by definition a "criminal offence" or a "true crime." For this proposition, reliance is placed on *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 (S.C.C.) ("*Wholesale Travel*"), *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 (S.C.C.) ("*Wigglesworth*") and *R. v. Shubley*, [1990] 1 S.C.R. 3 (S.C.C.) ("*Shubley*").

197 We reject this submission. *Wholesale Travel* is authority for the proposition that "there is a rational basis for distinguishing between crimes and regulatory offences". (*Wholesale Travel*, above, para. 128)

198 *Wigglesworth* and *Shubley* established that proceedings are characterized as criminal or penal when they either: (1) are penal in their very nature or, (2) involve the imposition of true penal consequences. However, it is the nature of the proceeding, not the nature of the conduct (fraud), which governs the applicability of s. 11(d) of the *Charter*:

> Applying the double test set forth in *Wigglesworth*, the first question in whether the proceedings in question are, by their very nature, criminal proceedings.
>
> ... The question of whether proceedings are criminal in nature is concerned with, not the nature of the act which gave rise to the proceedings, but the nature of the proceedings themselves. Section 11(h) provides protection against the duplication in proceedings of a criminal nature. It does not preclude two different proceedings, one criminal and the other not criminal, flowing from the same act.
>
> (*Shubley*, above at paras. 33 and 34)

199 Otto Spork's submission rests on the nature of the conduct (fraud) in order to characterize Commission proceedings as penal or criminal. Our highest court finds this to be an error:

> ... it is true that ascertained forfeiture is intended to produce a deterrent effect. This is completely understandable in a self-reporting system. Fraud must be discouraged, and offences punished severely, for the system to be viable. However, actions in civil liability and disciplinary proceedings, which are also aimed at deterring potential offenders, nevertheless do not constitute criminal proceedings.
>
> (*Martineau v. Canada (Minister of National Revenue)*, [2004] 3 S.C.R. 737 at para. 38 ("*Martineau*"))

200 It is open to the Commission to take proceedings under s. 126.1 both before the Commission and before the Ontario Court of Justice. Section 126.1 can be involved in either a regulatory or a criminal forum with different legal consequences. This was explained in *Martineau* where the Supreme Court cited the Saskatchewan Court of Appeal judgment in *Wigglesworth*:

> ... the fact that the false statements could result in criminal prosecution does not in itself mean that a notice of ascertained forfeiture can properly be characterized as a penal proceeding. The fact that a single violation can give rise to both a notice of ascertained forfeiture and a criminal prosecution is irrelevant. The appropriate test is the <u>nature of the proceedings</u>, not the <u>nature of the act</u>.
>
> . . .
>
>> A single act may have more than one aspect, and it may give rise to more than one legal consequence. It may, if it constitutes a breach of the duty a person owes to society, amount to a crime, for which the actor must answer to the public. At the same time, the act may, if it involves injury and a breach of one's duty to another, constitute a private cause of action for damaged for which the actor must answer to the person he injured. And that same act may have still another aspect to it: it may also involve a breach of the duties of one's office or calling, in which event the actor must account to his professional peers.

(*R. v. Wigglesworth* (1984), 31 Sask. R. 153, at para. 11)

(*Martineau, above* at paras. 31 and 32)

201 *Martineau* is conclusive — conduct amounting to "fraud" may attract non-criminal proceedings without depriving them of their regulatory and administrative nature. (*Martineau*, above at para. 38)

202 The regulatory nature and mandate of securities acts in Canada was underscored in *Pezim*:

> It is important to note from the outset that the [British Columbia Securities] Act is regulatory in nature. In fact, it is part of a much larger framework which regulates the securities industry throughout Canada. Its primary goal is the protection of the investor but other goals include capital market efficiency and ensuring public confidence in the system...
>
> (*Pezim v. British Columbia (Superintendant of Brokers)*, [1994] 2 S.C.R. 557 ("*Pezim*"), at para. 59)

203 The Commission in *Rowan, Re* (2009), 33 O.S.C.B. 91 (Ont. Securities Comm.) (aff'd *Rowan, Re* (2010), 103 O.R. (3d) 484 (Ont. Div. Ct.)) has considered the issue of the characterization of its proceedings and came to the conclusion that Commission proceedings are regulatory in nature. The Commission relied on *Wigglesworth*, which also recognized that Commission proceedings have a regulatory objective and are not subject to s. 11 *Charter* protections generally:

> Proceedings under section 127 of the Act are "intended to regulate conduct within a private sphere of activity". In reviewing examples of such regulatory proceedings, the *Wigglesworth* decision itself cites two cases involving securities commissions, including the Commission. Both of these cases affirmed that securities commission proceedings are regulatory in nature and are therefore not subject to section 11 of the Charter (See: *Re Malartic Hygrade Gold Mines (Canada) Ltd. and Ontario Securities Commission* (1986), 54 O.R. (2d) 544, (H.C.J.); and *Barry v. Alberta (Securities Commission)* (1986), 25 D.L.R. (4th) 730 (Alta. C.A.)).
>
> (*Rowan*, above at para. 37)

204 We find a hearing held pursuant to s. 127 of the *Act* which includes allegations of fraud under s. 126.1 of the *Act* is fundamentally regulatory and does not meet the "criminal by nature" test.

C. Commission Proceedings — Criminal or Penal Consequences?

205 In oral argument counsel for Otto Spork submitted that the imposition of an administrative penalty leads to penal consequences, particularly where the funds are paid into the Consolidated Revenue Fund pursuant to s. 3.4(2) of the Act.

206 Otto Spork takes the position that since disgorgement and administrative penalties may be ordered as sanctions and that since, according to Otto Spork, these funds are paid into the Consolidated Revenue Fund pursuant to s. 3.4(2) of the *Act*, this demonstrates that the purpose of these sanctions is to redress harm to society done at large and thus entails a penal or criminal consequence. Mr. Spork relies on *Wigglesworth* at paragraph 33, which states that:

> ... the possibility of a fine may be fully consonant with the maintenance of discipline and order within a limited private sphere of activity and thus may not attract the application of s. 11. It is my view that if a body or an official has an unlimited power to fine, and if it odes not afford the rights enumerated under s. 11, it cannot impose fines designed to redress the harm done to society at large. Instead, it is restricted to the power to impose fines in order to achieve the particular private purpose. One indicium of the purpose of a particular fine is how the body is to dispose of the fines that it collects.

207 While s. 3.4(2) of the *Act* provides that funds ordered by the Commission be paid to the Consolidated Revenue Fund, there is an exception to this stipulated in s. 3.4(2)(a) and (b) of the *Act*, which provides that any funds ordered may

reimburse the Commission for costs or be designated to or for the benefit of third parties. In fact, monetary orders made by the Commission refer to s. 3.4(2)(b) of the *Act*. As explained in *Rowan, Re* (2009), 33 O.S.C.B. 91 (Ont. Securities Comm.) at paras. 58 and 59:

> In the case of the Commission's administrative penalty, subsection 3.4(2) of the Act provides that the sums collected as administrative penalties may be designated to or for the benefit of third parties. Only if there is no specific designation would the funds collected go to the Consolidated Revenue Fund.
>
> Administrative penalties that have been imposed by the Commission to date have contained a clause providing that the administrative penalty funds be distributed to or for the benefit of third parties (See for example: *Re Crombie* (2009), 32 O.S.C.B. 1628; *Re Research in Motion Ltd., supra*; *Re Biovail Corp.* (2009), 32 O.S.C.B. 563; *Re McCaffrey* (2009), 32 O.S.C.B. 827; *Re Devendranauth Misir* (2009), 32 O.S.C.B. 1807; *Re Limelight Entertainment Inc., supra*; *Re First Global Ventures, S.A.* (2008), 31 O.S.C.B. 10869; *Re Duic* (2008), 31 O.S.C.B. 8551; *Re Leung* (2008), 31 O.S.C.B. 6759; *Re Lee* (2008), 31 O.S.C.B. 8730; *Re Stern* (2008), 31 O.S.C.B. 4029; *Re Momentas Corp.* (2007), 30 O.S.C.B. 6674; *Re Melnyk* (2007), 30 O.S.C.B. 4695 (Order); *Re Griffiths* (2006), 29 O.S.C.B. 9529; *Re Bennett Environmental Inc.* (2006), 29 O.S.C.B. 9527; *Re Mountain Inn at Ribbon Creek Limited Partnership* (2005), 28 O.S.C.B. 9489; and *Re Wells Fargo Financial Canada Corp.* (2005), 28 O.S.C.B. 1062 (Order)).

208 Based on the finding in *Rowan, Re* (above), which has been upheld by the Divisional Court, we find that the possibility that a monetary sanction may be imposed (such as an administrative penalty or disgorgement) does not create a penal or criminal consequence. Therefore, s. 11(d) of the *Charter* is not invoked.

D. Institutional or Structural Bias

209 Otto Spork submits that he faces what is, in nature, a criminal proceeding with respect to the fraud charges in the Act. He says the very structure of the Commission and the nature of the hearing afforded to him give rise to a reasonable apprehension of bias and therefore offends s. 11(d) of the *Charter*. He further submits that s. 126.1 of the Act can only be considered by a tribunal that does not have the tripartite structure of the Commission.

210 In support of his submissions, Mr. Spork continues to refer to this hearing as a "criminal proceeding" or is "criminal in nature". He repeats his submission that s. 126.1 creates a "penal offence" to which the *Charter* applies. These allegations of "criminal" proceedings and "penal" consequences have already been dealt with earlier in these Reasons. We have found the proceedings to be administrative and regulatory in nature.

211 This issue has been settled by the Commission in *Norshield Asset Management (Canada) Ltd., Re* (2009), 32 O.S.C.B. 1249 (Ont. Securities Comm.) ("*Norshield*") and the Supreme Court of Canada in *Barry v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301 (S.C.C.) ("*Brosseau*"). The Commission's tripartite structure does not give rise to a reasonable apprehension of bias.

212 Otto Spork also claims that the proceedings have been subject to structural bias as a result of a motion brought by him that required a mid-hearing ruling. Otto Spork's motion was denied by the Panel.

213 The rightness or wrongness of the mid-hearing ruling has no connection with structural bias. Were this so, every ruling in an administrative proceeding that went against a particular party could be the subject of an allegation of structural bias. If Otto Spork is dissatisfied with the ruling, his course is clear.

214 We find no merit in the submission that Otto Spork has been denied natural justice and procedural fairness by virtue of the tripartite structure of the Commission.

215 Given our previous findings, we find in unnecessary for us to address s. 1 *Charter* arguments. We find no need to apply the "*Oakes*" test.

216 We find our task is to consider and apply s. 126.1 of the *Act* in the context of an administrative proceeding where the Commission must decide on a balance of probabilities, based on clear and cogent evidence, whether the section has been breached.

VIII. The Allegations

217 The foregoing conduct engaged in by the Respondents constituted breaches of Ontario securities law and/or was contrary to the public interest:

(a) by engaging in the conduct described above, Otto Spork, SCMI and Sextant GP perpetrated a fraud on investors contrary to s. 126.1 of the *Act*;

(b) by engaging in the conduct described above, all of the Respondents breached their duties as investment fund managers contrary to s. 116 of the *Act*;

(c) by engaging in the conduct described above, SCMI, Otto Spork, Dino Ekonomidis and Natalie Spork, breached their duties pursuant to Rule 31-505;

(d) by engaging in the conduct described above, SCMI and Sextant GP failed to maintain proper books and records contrary to s. 19 of the *Act*; and

(e) by engaging in the conduct described above, all of the Respondents acted contrary to the public interest.

A. Fraud (s. 126)

218 Staff allege that Otto Spork, SCMI and Sextant GP contravened s. 126.1 of the Act which provides as follows:

126.1 A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities or derivatives of securities that the person or company knows or reasonably ought to know,

. . .

(b) perpetrates a fraud on any person or company. 2002, c. 22, s. 182.

219 In several recent cases the Commission has accepted the definition of fraud established by the British Columbia Court of Appeal in *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7 (B.C. C.A.) at para. 27 [*Anderson v. British Columbia (Securities Commission)*], leave to appeal denied (S.C.C.):

... the *actus reus* of the offence of fraud will be established by proof of:

1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and

2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.

Correspondingly, the *mens rea* of fraud is established by proof of:

1. subjective knowledge of the prohibited act; and

2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).

220 It is important to note that in Ontario, as it is in British Columbia, the legislature has chosen to impose liability under the *Act* where a person "ought reasonably to know ... that their conduct perpetrates a fraud on any person or company". Commission cases adopting the definition of fraud in *Anderson* include *Al-Tar Energy Corp., Re* (2010), 33 O.S.C.B. 5535 (Ont. Securities Comm.); *Lehman Cohort Global Group Inc., Re* (2010), 33 O.S.C.B. 7041 (Ont. Securities Comm.); and *Global Partners Capital, Re* (2010), 33 O.S.C.B. 7783 (Ont. Securities Comm.)

1. The Actus Reus of Fraud

221 The *actus reus* requires proof of (a) a dishonest act involving "deceit, falsehood or other fraudulent means" which (b) causes a detriment or deprivation to the victim. A "deprivation" includes circumstances where a mere "risk of prejudice" is caused to the victim's economic interests. (*R. v. Théroux*, [1993] 2 S.C.R. 5 (S.C.C.), at paras. 16 and 27)

222 To find "deceit" or "falsehood" the trier of fact must determine whether there was an actual representation that a situation was of a certain character, when, in reality, it was not. (*Théroux*, above, para. 18)

223 "Other fraudulent means" include all other dishonest situations which cannot be characterized as "deceit" or "falsehood". The issue is "determined objectively, by reference to what a reasonable person would consider to be a dishonest act." It describes underhanded conduct which has the effect, or which creates a risk of depriving others of their property. If the wrongful use of someone else's property results in the loss of that property or creates a risk of such a loss, the conduct is wrongful if it constitutes conduct which reasonable decent persons would consider dishonest and unscrupulous.

224 Courts have found "other fraudulent means" to include the concealment of important facts, the unauthorized diversion of funds and the unauthorized taking of funds or property. (*Théroux*, above, at paras. 17-18)

225 The unauthorized use of an investor's funds constitutes "other fraudulent means." (*R. v. Currie*, [1984] O.J. No. 147 (Ont. C.A.) pp. 3-4)

226 The element of "deprivation" is satisfied on proof of: (i) actual loss to the victim; (ii) prejudice to a victim's economic interest; or merely (iii) the risk of prejudice to the economic interests of a victim. (*Théroux*, above, at paras. 16-17)

227 "Prejudice" may be established by proof that a victim faced a risk of economic loss even if no loss took place. If through an act of dishonesty, someone makes an investment or borrows money, even if that action did not cause an actual loss, it constitutes prejudice.

2. The Mens Rea of Fraud

228 The *mens rea* of fraud requires a person to be aware of the risk posed to another's interests. The subjective awareness can be inferred from the evidence. It may also be established by evidence showing that the perpetrator was "wilfully blind" or "reckless" as to the conduct and the truth or falsity of any statements made. (*Théroux*, above, at paras. 26 and 28)

229 A sincere belief or hope that no risk or deprivation would ultimately materialize does not establish an absence of fraud:

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

(*Théroux*, *above*, at paras. 24, 35, 36)

230 For a corporation, it is sufficient to show that its directing minds know or reasonably ought to have known that the corporation perpetrated a fraud to prove a breach of subsection 126.1(b) of the *Act*. (*Al-Tar*, above, para. 221); (*Lehman*, above, para. 99); (*Global Partners*, above, para. 245)

231 We find Otto Spork, SCMI and Sextant GP to have committed several acts of fraud for the following reasons.

(i) Inflation of IGP Market Values

232 We reject any suggestion that Otto Spork was over his head, unsophisticated or disorganized, as suggested by his counsel in cross-examination of witnesses. We do so for three reasons:

• First, Otto Spork was an experienced investor and had been a registrant with the Commission.

• Second, Otto Spork created a web of inter-related companies designed more to conceal than reveal his financial operations. A cursory look at the Sextant organization chart annexed to these Reasons as Exhibit "A" is enough to dispel any suggestion that Otto Spork was a neophyte in the investment business.

• Third, Otto Spork's self-description in the OM and newsletters to investors could leave no doubt in the reader's mind of his talents as a trader and investment manager.

233 On a consistent and regular basis Otto Spork inflated the value of IGP from 0.321 per share on July 31, 2007 to 2.45 per share on November 30, 2008. Counsel submits on his behalf that was reasonable for him to do so based on the "valuations" he obtained and other factors. While the explanations for his valuations vary from time to time, the pattern of increases remained constant. Starting in 2008 formal board minutes were prepared to record the rationale of the Fund Manager for its continued increases in the market values ascribed to IGP shares from 0.80 per share as at December 31, 2007 to 2.45 per share by November 30, 2008. The explanations included:

• Repeated reliance on the reports prepared by Spardata and Hempstead. They are referred to as a basis for the "market price quotes" of IGP in all of the 2008 minutes dealing with that issue. We have found those not to be independent valuations but rather calculations of values based on financial projections provided by Otto Spork and adopted by Spardata and Hempstead without verification.

• Repeated claims that IGP continued to meet and make progress in its business plan. We find this statement to be unsupported by any evidence to that effect.

• The reliance on the sale of 100,000 shares of IGP to F.O.I at 1.50 per share in August 2008. As found earlier in these Reasons found that sale to be an unreliable indication of the value of IGP.

• In August 2, 2008 reference is made to the sale of 25,950 shares of IGP to TJ at 1.85 per share. We found this sale to be an unreliable indication of the value of IGP.

• In October of 2008, the market price of IGP shares was raised from 1.85 to 2.15 per share, the increase being attributed to the "valuation" of Canaccord. We earlier found that the Canaccord letter was not a valuation.

• Despite representations to the contrary, at no time up to and including December 31, 2008, was IGP in a position to carry on business as contemplated by the business plan and financial projections. There were no "significant water contracts pending". The "attainment of internal milestones" was nothing more than employee hirings. Sergiy Kaznadiy estimated total revenues of perhaps 5,000 during his two-year employment head of sales ending in February of 2010. No medium or large bulk water orders were received during his time at Sextant. The Receiver's evidence confirmed that only one of two planned pipelines from the glacier to the bottling facility site had been prepared. No bottling facility had been constructed. There was no apparent source of funds to complete the necessary construction estimated to cost US $20 million. Beyond its glacier contract with the town of Rif and its capitalized costs, IGP had no material assets.

234 We find that Otto Spork knew or ought to have known that the increases ascribed to IGP's market value were totally unreasonable and were not based on any formal independent valuations. Otto Spork set those values and directed IAS to use those values to calculate the Canadian Fund's NAV. He thereby committed an act or acts of fraud.

235 Reports were distributed monthly to investors showing the NAV and historical performance of the Canadian Fund. None of the performance reports disclosed to investors the holdings of the Canadian Fund nor the concentration of IGP shares in the portfolio. The performance report for July 2008 underlines how Otto Spork's inflation of IGP's market value and the Canadian Fund's NAV allowed him to mislead investors and enrich himself. In the July 2008 report the NAV was shown as having increased to $57.95 per unit, 73% higher than the prior month. A return of 479% was reported for those investors who invested $10 per unit at the inception of the Canadian Fund in February 2006. Investors were invited to add "to your existing position" or "initiate an investment now". It was in July 2008 that Otto Spork increased the market price of the IGP shares held by the Canadian Fund by 50% from 1.00 to 1.50 per share. His justification for the 1.50 market price was the 100,000 share purchase transaction arranged with F.O.I. This 50% price increase, combined with the purchase in July 2008 of more than 5 million shares of IGP at 0.07 per share, had the effect of increasing the "market value" of the IGP investment held by the Canadian Fund from $11 million to $25 million. The corresponding month-to-month increase in the NAV was $12 million on which Otto Spork, through the Fund Manager received performance and management fees.

236 As a result of the wrongful inflation of the "market price" of IGP, Otto Spork, SCMI and Sextant GP received significant economic benefits. Compensation to the Fund Manager in the form of management fees was calculated as 2% of the NAV paid monthly in 1/12th instalments. Performance fees were calculated at 20% of the month-to-month increase in the NAV subject to a "high-water mark" provision to protect investors against a decrease in the NAV.

237 In the period from July 31, 2007 to December 31, 2008, the Canadian Fund paid management fees totalling $602,831 and performance fees totalling $6,331,356, which Otto Spork benefitted from directly or indirectly. We find Otto Spork knew or ought to have known that the payments were unreasonable. We find that these payments made to Otto Spork through SCMI and Sextant GP constitute acts of fraud.

(ii) Advanced Payments

238 To make matters worse, SCMI repeatedly took advances against the performance fees it anticipated receiving and did so at Otto Spork's direction. These fee advances were tracked by IAS and recorded variously as "advanced payments" or "due from Fund Manager".

239 As of March 2008 there was a zero balance owing from the Fund Manager to the Canadian Fund since SCMI had "caught up" on the advances by submitting performance and management fee calculations. However in April 2008 SCMI took advances of $4,033,599 when only $28,411 of management fees had been earned by the Fund Manager. On April 30, 2008 the Fund Manager owed the Canadian Fund $4,027,135. At June 30, 2008 the Fund Manager owed the Canadian Fund $4,880,744. During the balance of 2008, this latter amount was largely offset by performance and management fees and operating expenses allegedly incurred by the Canadian Fund. Ms. Lee testified it was Otto Spork who instructed IAS to offset the advances by crystallized management and performance fees from time to time. (Tr. Vol. 11, p. 77)

240 There is no evidence to support the actions of the Fund Manager in taking advances from the Canadian Fund. The OM does not authorize advances or loans from the Canadian Fund to the Fund Manager, nor do the terms of the LP Agreement. Ms. Lee had no other clients that advanced or pre-paid their performance or management fees. Otto Spork's own counsel, Shahen Mirakian, was of the view that the advances on the fees was "a prohibited loan." (Ex. 4-18, Tab 52, p. 306)

241 We agree with Staff's submission that these advances were prohibited loans taken by Otto Spork for his benefit to the detriment of investors in breach of s. 126.1 of the Act. We find that he knew or ought to have known there was the risk of prejudice to the economic interests of the investors in the Canadian Fund who lost the use of their money during the period when it was advanced to SCMI and Sextant GP, that is to say, to Otto Spork. We find by taking these advances Otto Spork committed acts of fraud.

242 Pursuant to the authority noted above in para. 230 we find SCMI and Sextant GP have committed fraud contrary to s. 126(1)(b) of the Act in that Otto Spork, their directing mind, knew or reasonably ought to have known that the two corporations were committing a fraud.

(iii) The Riambel Payment

243 During its audit of the 2007 financial statements for the Canadian Fund, Katie Girimonte of BDO discovered that on October 24, 2007, the Water Fund had paid 881,576 (US $1,258,000) to Riambel Holdings S.A., Otto Spork's private holding company. Ms. Girimonte determined that in fact this payment had been made on behalf of all three Sextant Funds and subsequently the Canadian Fund and the Hybrid Fund each transferred US $414,975 to the Water Fund for their share. Otto Spork instructed IAS to record the payment as an investment by the three Sextant Funds in IGP although none of the funds received any additional shares in IGP. When BDO requested an explanation for this transaction Otto Spork explained that the payment was a reimbursement of certain expenses incurred by Riambel on behalf of IGP. An argument ensued between Mr. Spork and BDO over the characterization of the payment. Ultimately, BDO determined to treat the payment as a loan owed by IGP to the Sextant Funds although there were no terms, due date or interest rate. The result was that the three Sextant Funds were now owed the sum previously owed to Riambel, a sum which IGP could not pay. Riambel got paid and the Sextant Funds were left with a worthless IOU, as matters turned out.

244 We find that Otto Spork knew or ought to have known that this action was prejudicial to the economic interest of the unitholders by creating a risk of economic loss. This action was a fraud contrary to s. 126(1)(b) of the *Act*.

(iv) Failure to Testify

245 Otto Spork did not testify. In non-criminal cases, an unfavorable inference may be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party (Sopinka Letterman and Bryant, *The Law of Evidence in Canada*, 3rd Ed. (Markham: Lexis Nexis Canada 2009), p. 337, para. 6.449).

246 Otto Spork chose not to testify, provided no affidavit evidence, nor did he call any witnesses. We have found him guilty of fraud earlier in these Reasons. In addition to those stand-alone findings, we draw an adverse inference from his failure to testify, as confirmatory of those findings.

B. Breaches of s. 116 of the Act and Rule 31-505

247 Staff submit that all of the Respondents (including Natalie Spork and Dino Ekonomidis) breached their duties to investors under s. 116 of the *Act* and Rule 31-505. Section 116 of the *Act* establishes duties of investment fund managers as follows:

> 116. Standard of care, investment fund managers — Every investment fund manager,
>
> (a) shall exercise the powers and discharge the duties of their office honestly, in good faith and in the best interests of the investment fund; and
>
> (b) shall exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.

248 Section 2.1 of Rule 31-505 provides as follows:

> 2.1 General Duties - (1) A registered dealer or adviser shall deal fairly, honestly and in good faith with its clients.
>
> (2) A registered salesperson, officer or partner of a registered dealer or a registered officer or partner of a registered adviser shall deal fairly, honestly and in good faith with his or her client.

249 Rule 31-505, s. 1.3 as it was enforced at the applicable times in this matter sets out the duties and responsibilities of the Ultimately Responsible Person of a registered adviser:

> 1.3 Designation of Compliance Officer or Chief Compliance Officer and Ultimately Responsible Person
>
> (2) (a) A registered adviser shall designate an executive officer as the individual who is ultimately responsible for discharging the obligations of the registered adviser under Ontario securities law.
>
> . . .
>
> (c) The ultimately responsible person designated under paragraph (a) shall ensure that policies and procedures for the discharge of the obligations of the registered adviser under Ontario securities law are developed and implemented.

250 We find it unnecessary to decide whether s. 116 imposes a fiduciary duty to investors on investment fund managers. The words employed "honestly, in good faith and in the best interests of the investment fund" can be applied to the conduct of the Respondents using their ordinary, every-day meaning. Also, the words describing the duty of care on an investment fund manager "to exercise the care, diligence and skill that a reasonably prudent person would exercise in the circumstances" may be applied in the circumstances of this case using their ordinary, every-day meaning.

251 Staff and the Respondents take the view that the nature of the duties under Rule 31-505 are essentially similar or substantially overlap with the duties under s. 116 of the *Act*. We agree with this view.

1. 20% Restriction

252 Staff submit that at all material times various revised versions of the Canadian Fund's OM established the following restriction on the concentration of the Canadian Fund's investments:

> The Fund may not invest more than 20% of its portfolio, based on the Net Asset Value of the Fund at the most recent Valuation Date, in any single class of securities of an issuer, where for the purposes of this restriction a long position is valued as the cost of the securities purchased and a short position is valued as the gross proceeds of the sale of the securities sold short.

The Respondents submit that the book value (purchase price) of the IGP shares paid by the Canadian Fund never exceeded 20% of the NAV. They submit "cost of the securities purchased" divided by the NAV is the proper manner to interpret the investment concentration restriction.

253 In July 2007, according to the securities ledger for the Canadian Fund (Ex. 4-6, Tab 18) IAS recorded two transactions relating to the purchase of IGP shares by the Canadian Fund:

> (a) first, 320,000 shares at a unit price of?, a unit cost of CDN $0.00 and a cost of amount of CDN $0.00; and
>
> (b) second, 6,575,350 shares at a unit price of 0.17082, a unit cost of CDN $0.267 and a cost amount of CDN $1,758,405

This CDN $1,758,405 cost amount was shown on the portfolio valuation statements as of July 31, 2007 as the book value for the 6,895,350 shares of IGP acquired in the two transactions. This would indicate the average cost of the IGP shares held by the Canadian Fund was CDN $0.255 per share as at July 31, 2007.

254 The NAV as at July 31, 2007 was calculated by IAS as CDN $5,521,887.08. Dividing the $1,758,405 cost of the 6,575,350 shares by the NAV as at July 31, 2007 indicates the fund invested approximately 32% of its portfolio in shares of IGP.

255 Even using the average cost of CDN $0.255 per share as the cost of the 6,575,350 shares purchased would only lower the percentage to approximately 30%.

256 Counsel for the Respondents argued that the Canadian Fund held as at June 29, 2007, 320,000 shares of Icelandi PLC having a book value of £1.0 per share that, says counsel, equated to a book value of approximately CDN $682,656. It was argued that this amount should be deducted from the CDN $1,758,405 book value and thereby decrease the percentage to 19.48%. We find no merit in this argument.

257 T he portfolio valuation statements prepared by IAS as of June 29, 2007 show that the holding of 320,000 shares of Icelandi PLC had a book value of CDN $320,000 (CDN $1.00 per share). This is consistent with the information Mr. Mirikian provided to PWC (refer to table in para. 116 of the Receiver's report in para. 73 above) which showed a non-cashflow adjustment of CDN $320,000 to the Canadian Fund's book value for "free shares". It is presumed the 320,000 shares of Icelandi PLC were exchanged 1:1 for IGP shares in July 2007.

258 The most favourable analysis to Otto Spork would be to deduct CDN $320,000 from the CDN $1,758,405 book value as at July 31, 2007 and treat the resulting amount of CDN $1,438,405 as the cost of the 6,575,350 shares purchased. Even this calculation only lowers the percentage to 26%.

259 No explanations were provided as to the inconsistencies in the entries relating to the Icelandi PLC/IGP shares shown in the securities ledger and the portfolio statements. We are also not satisfied that the NAV as at July 31, 2007 was the "most recent Valuation Date" for purposes of calculating the investment concentration percentage at the time of investment. This NAV includes a market value for the IGP shares of CDN $3,232,638, almost double their purchase cost and representing 59% of the NAV. By using this month-end NAV which was calculated after the share purchase transaction, the resulting investment concentration percentage is skewed significantly downwards.

260 We find Otto Spork contravened the restriction on investment concentration in the Canadian Fund. In doing so, he failed to act in the best interests of the investment fund and failed to exercise the degree of care that a reasonably prudent person would exercise in the circumstances. We find he contravened s. 116 of the Act and s. 2.1 of Rule 31-505.

2. Otto Spork's Self-Dealing

261 The OM of the Canadian Fund established the following restrictions on self-dealing in the Canadian Fund's investments:

> The Fund will not purchase securities from, or sell securities to the Investment Advisor or any of its affiliates or any principal of any of them or any firm in which any principal of the Investment Advisor may have a direct or indirect material interest.

Contrary to this restriction the Canadian Fund held shares of IGP and IGW in which Otto Spork and Spork-related parties had an ownership interest. (see Schedule "A")

262 Counsel for Otto Spork submits that the term "material interest" is not defined in the OM nor is it defined in Ontario securities law. Since Riambel was an 18% shareholder of IGP on July 31, 2007 (below the deemed control position under Ontario securities law) and Otto Spork was only one of four directors, the 18% interest was not material.

263 We note IGP's business plan given to T.J. identified Otto Spork as President and CEO of IGP, and as a holder of stock options in IGP. Following the Sextant Funds' purchase of Eurofran's 2/3 interest in IGP in May 2008, Otto Spork directly controlled 37% of IGP through Riambel and Hermitage.

264 We agree with Staff's submission that in a small, closely-held company, an 18% shareholding interest, a seat on the four-person Board of Directors and holding an executive position fixes Otto Spork with a material interest in IGP. The purpose of self-dealing restrictions is to prevent the fund manager from making decisions in its own interests rather than those of the investors. Otto Spork did just that — he made decisions in his own interest rather than those to his investors, to the ultimate detriment of those investors. In doing so he failed to exercise the powers of his office in the best interests of the investment fund and failed to exercise the degree of care that a reasonably prudent person would exercise in the circumstances. We find he contravened s. 116 of the *Act* and s. 2.1 of Rule 31-505.

3. Dino Ekonomidis

265 Staff alleges that Dino Ekonomidis breached his duties as an investment fund manager as set out in s. 116 of the *Act* and his duties as set out in s. 2.1 of Rule 31-505.

266 Counsel for Dino Ekonomidis submits that he was not an investment fund manager within the meaning of the *Act*, that is to say, "a person who directs the business operations or affairs of an investment fund."

267 We reject this submission. Dino Ekonomidis was the vice-president of SCMI responsible for Corporate Development and was registered under the *Act* as a salesperson for SCMI. A corporate investment fund manager acts through human beings who occupy the offices of directors, officers and employees. Dino Ekonomidis had the responsibility of selling units in the Canadian Fund and was a qualified registrant in order to do so. In the absence of Otto Spork he assisted in the operation of the affairs of SCMI. Gary Allen described Dino Ekonomidis as the chief salesperson and second-in-command to Otto Spork. He further testified that although Natalie Spork became president of the Canadian Fund, Dino Ekonomidis continued to be very much in charge of the sales function and Otto Spork was still in control of the operation by telephone from Iceland. We find Dino Ekonomidis to have been an investment fund manager within the meaning of s. 116 of the Act and breached his duties as described in that section.

268 Staff alleges that Dino Ekonomidis also contravened s. 2.1(2) of Rule 31-505 which requires a registered salesperson, officer or partner of a registered dealer or adviser shall deal fairly, honestly and in good faith with his or her clients. Counsel for Dino Ekonomidis submits that the unitholders of the Canadian Fund cannot be found to be clients of Dino Ekonomidis by virtue of his positions with SCMI. He further submits that it is important to distinguish between references to "the funds" and the "Canadian Fund". Only the latter, it is submitted, is the subject of the allegations made by Staff. Nevertheless, the Canadian Fund was a client of SCMI and Dino Ekonomidis contravened s. 2.1(2) of Rule 31-505 by failing to deal fairly, honestly and in good faith with the Canadian Fund.

269 Staff allege that Dino Ekonomidis misrepresented the state of affairs of the Canadian Fund to W.G. when he told the latter that about 1/3 of the Canadian Fund was in private water companies, 1/3 in public and/or private mining companies, and the other 1/3 invested in commodities and futures which were hedged pursuant to a proprietary investment tool. Counsel for Dino Ekonomidis submits that these statements are consistent with the book value of the portfolio. We reject this submission. W.G. was invited to purchase units of the Canadian Fund, based on its market value, not knowing the high concentration of IGP shares in the portfolio. Dino Ekonomidis concealed the high concentration of IGP in the portfolio from W.G. contrary to s. 2.1 of Rule 31-505.

270 Staff further allege that Dino Ekonomidis misstated the composition of the Offshore Funds to J.P.L. Counsel for Dino Ekonomidis submits that he owed no duty of care to J.P.L. as the latter had no connection with the Canadian Fund. Assuming without deciding this analysis is correct, nevertheless we find, in effect, that Dino Ekonomidis lied to J.P.L. as to the composition of the Offshore Funds. We find in doing so he acted contrary to the public interest. Officers

and registrants of companies subject to Ontario securities law must be held to account when guilty of egregious acts contrary to the public interest.

271 We find Dino Ekonomidis acted contrary to the public interest in misstating the state of affairs in the Canadian Fund to W.G. and the state of affairs in the Offshore Funds to J.P.L. We adopt the following statement from paragraphs 382 and 383 of *Biovail Corp., Re* (2010), 33 O.S.C.B. 8914 (Ont. Securities Comm.):

> In our view, where market conduct engages the animating principles of the Act, the Commission does not have to conclude that an abuse has occurred in order to exercise its public interest jurisdiction. That is no doubt one of the reasons why the Commission concluded in *Re Standard Trustco Ltd.* (1992), 15 O.S.C.B. 4322 (Ont. Securities Comm.) that the issue of a misleading news release is itself injurious to capital markets. We should not interpret or constrain our public interest jurisdiction in a manner that condones inaccurate, misleading or untrue public disclosure regardless of whether that disclosure contravenes Ontario securities law. The issues raised by this matter directly engage the fundamental principle recognized in the Act for timely, accurate and efficient disclosure.
>
> There should be no doubt in the minds of market participants that the Commission is entitled to exercise its public interest jurisdiction where any inaccurate, misleading or untrue public statement is made, whether or not that statement contravenes Ontario securities law. It is, of course, a separate question whether the Commission should exercise its public interest jurisdiction under section 127 of the Act in any particular circumstances.

272 We have disregarded Dino Ekonomidis' compelled testimony and not taken it into account.

4. Natalie Spork

273 Staff allege that Natalie Spork failed in her duties to act in good faith towards investors in the Canadian Fund, thereby breaching s. 116 of the *Act* and Rule 31-505.

274 Counsel for Natalie Spork submits that she was not an investment fund manager because she did not fall within the definition of fund manager under s. 1 of the *Act* as "a person or company that directs the business operations or affairs of an investment fund." We would agree with a submission that Natalie Spork did not actually direct the business, operations or affairs of the Canadian Fund. Nevertheless, on May 28, 2008, Ms. Spork was given the title of President and Director of SCMI. The OSC approved her as an Officer and Director (non-advising, non-trading) and as the Ultimate Responsible Person in the categories of commodity trading manager, limited market dealer, investment counsel and portfolio manager with SCMI on July 7, 2008. Dino Ekonomidis, Mr. Allen and Mr. Levack all confirm that Natalie Spork was singularly unfit to carry out the responsibilities assigned to her by her father.

275 We reject the submission that Natalie Spork was not an investment fund manager. We specifically reject the submission that in order to be an investment fund manager, one must actually exercise the power and authority that goes with the position in order to attract the duties that also go with the position. The submission is apparently based on the notion that someone could be found to be a *de facto* officer of a company if they act as though they are an officer and that therefore, the converse must be true that you can't be an officer unless you actually carry out the functions of that officer. We agree with Staff's submission that a person assuming the title of President and the responsibilities of an Ultimately Responsible Person, holds themselves to the world as being an investment fund manager and should be bound by the obligations that go with the office.

276 Natalie Spork did nothing to either learn about her obligations or to discharge them. She was the person responsible for ensuring that there were policies and that they were implemented and followed. She failed to do so. To permit the use of phantom or nominal officers and directors would work considerable mischief in the securities industry. Persons sanctioned by the Commission might seek to use others who were prepared to take on roles of responsibility only in name. To permit such a tactic would be contrary to the public interest.

277 We find Natalie Spork to have been an investment fund manager and that she failed in her duties to act in good faith towards investors in the Canadian Fund contrary to s. 116 of the *Act*. We further find that she contravened s. 1.3 of Rule 31-505 as it was in force at the applicable time in that she did not take any steps to discharge her obligations as the Ultimately Responsible Person.

278 We have disregarded Natalie Spork's compelled testimony and not taken it into account.

5. SCMI and Sextant GP

279 SCMI and Sextant GP were investment fund managers for the Canadian Fund and had duties pursuant to s. 116 of the *Act*. In addition, as a registered adviser and dealer, SCMI had a duty pursuant to s. 2.1(1) of Rule 31-505 to deal fairly, honestly and in good faith with the Canadian Fund. We find they both contravened s. 116 and SCMI also contravened s. 2.1(1) of Rule 31-505.

C. The Breach of s. 19 (Books and Records)

280 Registrants are obliged to keep and maintain proper books and records as required by s. 19(1) of the *Act*:

> **(1) Record-keeping** — Every market participant shall keep such books, records and other documents as are necessary for the proper recording of its business transactions and financial affairs and the transactions that it executes on behalf of others and shall keep other books, records and documents as may otherwise be required under Ontario securities law.

281 Sextant GP was obligated pursuant to s. 19 of the *Act* to keep or cause to be kept appropriate books and records with respect to the Canadian Fund and to issue audited financial statements for the Canadian Fund no later than March 31 of the following year. SCMI was contractually obligated to maintain accounting records for the Canadian Fund and to arrange for the preparation of the annual audited financial statements.

282 Both Sextant GP and SCMI were obligated to keep such books and records as were necessary for the proper recording of their business transactions and financial affairs.

283 A representative for PWC testified that the Receiver could not rely on the books and records of SCMI, Sextant GP and the Canadian Fund in preparing its report. Having examined the books and records the Receiver found that the information for the fiscal year ending 2008 was "minimal, draft, or incomplete". There was virtually no financial information available for the 2009 fiscal year. In Tr. Vol. 3 at pp. 54-66, PWC's representative set out in detail the shortcomings of the books and records.

284 We find SCMI and Sextant GP contravened s. 19 of the Act.

IX. Conclusion

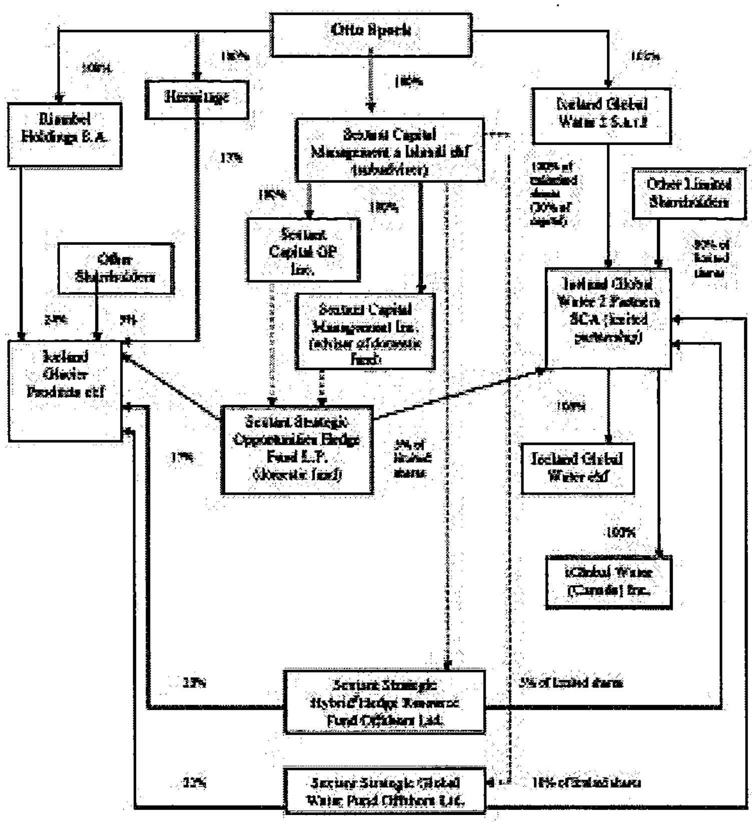
285 We find:

> (a) by engaging in the conduct described above, Otto Spork, SCMI and Sextant GP perpetrated a fraud on investors contrary to s. 126.1 of the Act;
>
> (b) by engaging in the conduct described above, all of the Respondents breached their duties as investment fund managers contrary to s. 116 of the Act;
>
> (c) by engaging in the conduct described above, SCMI, Otto Spork, Dino Ekonomidis and Natalie Spork, breached their duties pursuant to s. 2.1 of Rule 31-505;

(d) by engaging in the conduct described above, SCMI and Sextant GP failed to maintain proper books and records contrary to s. 19 of the Act; and

(e) by engaging in the conduct described above, all of the Respondents acted contrary to the public interest.

Schedule "A"



Graphic 1

Schedule "B"

Sextant Strategic Opportunities Hedge Fund L.P. (the "Sextant Canadian Fund")

Source and Application of Funds

January 1, 2007 to December 31, 2008

Scope: All transactions over $9,999. (Coverage: 99% of total cash flow.)

Source of Funds (Note 1)		
Subscriptions by investors (Note 2)	$	22,998
Subscriptions by parties outlined in Note 2		4,681
Sextant Capital Management Inc. ("*SCMI*")		979
Sextant Strategic Global Water Fund Offshore Ltd. (the "*Sextant Water Fund*") (Note 3)		1,510
Other		75

Total		*$*	*30,243*

Application of Funds (Note 1)		
Investment and transfers Iceland Glacier Products ("*IGP*")		$2,907
SCMI	10,715	
Sextant Capital GP Inc. (Note 4)	5,648	16,363
Otto R. Spork (Note 5) and Otto J.		350
Sextant Strategic Hybrid Hedge Resource Fund Offshore Ltd.		1,399
Sextant Water Fund		416
Investor redemptions (Note 6)		3,912
Investments in other securities	7,934	
Less: Proceeds from sale of other securities	(4,154)	3,780
Other		228
Total		*$29,355*

Notes:

1 Includes transactions in the following accounts:

RBC 140-611-5

NBCN 26BB11E, V

NBCN 26BB11U

Newedge 198K3327

2 "Subscriptions by investors" excludes subscriptions received from the following:

Otto and/or Johanna Spork	700,000.00
1035316 Ontario Ltd	131,000.00
Dino Ekonomidis	70,000.00
Helen Ekonomidis	1,060,000.00
SCMI	2,600,000.00
J'Aime Spork	45,000.00
Natalie Spork	75,000.00
	4,681,000.00

3 Includes proceeds from the sale of Iceland Glacier Products shares to the Water Fund, on or about August 22, 2008, in the amount of $1,409,534.80.

4 Includes the following payments in the total amount of approximately $3.5 million which were reflected as an investment in IGP in the fund's accounting records:

	CAD	USD
25-Jul-2008	1,200,000.00	
25-Jul-2008		613,600.00
08-Aug-2008	12,675.00	
15-Sep-2008		357,550.00
16-Sep-2008	750,000.00	
25-Nov-2008		470,000.00
	1,962,675.00	1,441,150.00
Converted to CAD		1,572,325.02

Total in CAD	3,535,000.02

5 Includes a $300,000 redemption payment to Otto John Spork on October 7, 2008.

6 Excludes a $300,000 redemption payment to Otto John Spork on October 7, 2008.

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ONTARIO SECURITIES COMMISSION and **CRYSTAL WEALTH MANAGEMENT SYSTEM LIMITED, *ET AL.***

Applicant | Respondents

Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceedings commenced at Toronto

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