ALBERTA SECURITIES COMMISSION

DECISION
(Sanction)

Citation: Workum and Hennig, Re, 2008 ABASC 719 **Date: 20081218**

Theodor Hennig, Peter Jay (or J.) Workum, Cheshire Capital Inc. and Strategic Investments Fund

Panel:	Glenda A. Campbell, QC Jerry A. Bennis, FCA Stephen R. Murison
Representation:	D. Young for Commission Staff
	J. Groia and K. Richard for Peter Workum
	J. Phillips and R. Finn for Theodor Hennig
	R. Normey for the Intervener, the Attorney General of Alberta
Final Submissions:	26 November 2008
Date of Decision:	18 December 2008

I. INTRODUCTION

[1] This decision concludes a lengthy two-part hearing into allegations made by staff ("Staff") of the Alberta Securities Commission (the "Commission") against six respondents. In the first part of the hearing we considered the merits of those allegations. That segment of the hearing ended with our decision on 7 June 2008 (the "Merits Decision", cited as *Re Workum and Hennig*, 2008 ABASC 363). For the reasons set out therein, we found that four of the respondents – Peter Jay (or J.) Workum ("Workum"), Theodor Hennig ("Hennig"; we sometimes refer to Workum and Hennig together as the "Individual Respondents"), Strategic Investments Fund ("Strategic") and Cheshire Capital Inc. ("Cheshire") – had in several respects contravened Alberta securities laws or acted contrary to the public interest, or both, as outlined below. We made no findings against the other two respondents, Lexington Capital Corp. ("Lexington") and Ashland Holdings Corp. ("Ashland").

[2] Staff's allegations were set out in two notices of hearing, both amended on 19 September 2003 (the "First Notice of Hearing" and the "Second Notice of Hearing"; together, the "Notices of Hearing"). Staff alleged conduct contrary to the public interest or contraventions of Alberta securities laws. The allegations in the First Notice of Hearing related to alleged improprieties in certain financial statements of Proprietary Industries Inc. ("PPI"), misrepresentations through further use of that financial statement information, and misrepresentations to Staff. The allegations in the Second Notice of Hearing centred on alleged "Secret Commissions", "Market Manipulation", failures to file reports of insider trades, and misrepresentations to Staff.

[3] As discussed below, we found in the Merits Decision that the Individual Respondents bore responsibility for improper financial disclosure and associated misrepresentations by PPI, and for PPI's failure to disclose to the public certain financial benefits received by the Individual Respondents from PPI. Also as elaborated upon below, we found that the Individual Respondents contrived to manipulate the market price of certain shares, which resulted in artificial prices for those shares during two periods in 2000, and that Strategic and Cheshire also bore responsibility for these manipulations. Finally, we concluded that each of the Individual Respondents contravened insider trade reporting requirements and made misrepresentations to Staff.

[4] The second and final part of this proceeding involves an assessment of what, if any, orders ought to be made in the public interest given our findings in the Merits Decision. We received written submissions from each of Staff, Workum and Hennig. Along with their submissions on sanction and costs, Workum and Hennig each brought forward a "Notice of Constitutional Question", stating their intention "to question the constitutional validity of the application" here of section 199 of the *Securities Act*, R.S.A. 2000, c. S-4 (the "Act"). The Attorney General of Alberta made written submissions as an intervener. Staff and Workum also made oral submissions.

[5] This decision should be read together with the Merits Decision. The facts and findings set out in the Merits Decision are in no way altered by this decision. For convenience in this decision, we use certain capitalized terms that were defined in the Merits Decision and we refer to provisions of the Act using its current section numbering and current wording. Except for the maximum administrative penalty available (discussed below), there have been since the period under consideration in the Merits Decision no other changes to the sanctioning provisions of the Act relevant to the decision below.

[6] For the reasons set out in this decision, we are ordering sanctions and payment of costs against each of Workum, Hennig, Strategic and Cheshire under sections 198, 199 and 202 of the Act, as follows:

- in respect of Workum: permanent cease-trade, denial-of-exemptions and director-and-officer banning orders; a $750 000 administrative penalty; and a $200 000 costs order;

- in respect of Hennig: 20-year cease-trade and denial-of-exemptions orders; a permanent director-and-officer ban; a $400 000 administrative penalty; and a $175 000 costs order; and

- in respect of each of Strategic and Cheshire: permanent cease-trade and denial-of-exemptions orders; a permanent ban on any trading in their securities and exchange contracts; and a $25 000 costs order.

II. MERITS DECISION

A. Summary of Findings

[7] Our Merits Decision made findings in five areas, summarized as follows (Merits Decision at paras. 1300-07):

> **A. Financial Disclosure**
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> We found that PPI's 1998 Financial Statements, 1999 Financial Statements and 2000 Financial Statements – specifically in respect of the reporting of gains attributed to the Newmex, Orion and Azterra Transactions, respectively – were not prepared in accordance with GAAP [generally accepted accounting principles] and thus were contrary to Alberta securities laws. We also found that those financial statements contained misrepresentations.
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> We further found that in making additional, related inaccurate disclosure in other documents, PPI made further misrepresentations.
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> The issuance of non-GAAP compliant financial statements, and the making of misrepresentations as described, we found to be conduct contrary to the public interest.

We found that the Individual Respondents each bore responsibility for this improper financial disclosure and the associated misrepresentations. We therefore found that they each contravened Alberta securities laws and acted contrary to the public interest.

B. Undisclosed Financial Benefit

We found that the Individual Respondents each obtained financial benefits, from or through the Four Trading Accounts and the Mandolin Offshore Bank Account, which were funded by commission payments made by PPI on private placements and other transactions. Although this was not in itself necessarily improper, the arrangement was not disclosed as required, and this was contrary to the public interest. We found that the Individual Respondents bore responsibility for this and thereby both acted contrary to the public interest.

C. Market Manipulation

We found that the Individual Respondents, Strategic and Cheshire each bore responsibility for securities trading that resulted, or could reasonably be expected to have resulted in, an artificial price for such securities. Their conduct we found to have been contrary to Alberta securities laws and to the public interest.

D. Insider Trade Reporting

We found that the Individual Respondents contravened the insider trade reporting requirements of Alberta securities laws.

E. Misrepresentations to Staff

We found that the Individual Respondents each made misrepresentations to Staff, so numerous as to constitute a pattern of conduct. We found that, in so doing, they each acted contrary to the public interest.

B. Elaboration on Findings

[8] We recapitulate briefly here some of our specific findings in these areas.

Financial Disclosure

[9] We were in no doubt that PPI's defective financial statements were intended to mislead readers as to the financial state of PPI.

[10] We also concluded that a PPI news release and four PPI take-over bid circulars (the "TOB Circulars") contained misrepresentations, which were contrary to the public interest because "[t]he manner in which, and the purpose for which, these additional misrepresentations were made were clearly incompatible with the protection of investors and (in the case of the TOB Circulars) the fairness of the take-over bid process" (Merits Decision at para. 677).

[11] We reproduce certain of our observations and findings on the Individual Respondents' roles in respect of PPI's flawed financial disclosure (Merits Decision at paras. 695-700):

> The Individual Respondents knew the reality of the Newmex, Orion and Azterra Transactions – they designed them and, as time went on, they refined or revised them. They knew what was really happening and what was not, and they therefore knew that in none of the transactions had PPI truly realized a profit on a genuine disposition, as and when it was recorded. This by itself, in our view, suffices for us to conclude – as we do – that Workum and Hennig each knew that PPI's financial disclosure materially misrepresented PPI's financial position and results of operations.
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> Moreover, we conclude that Hennig, as a chartered accountant, knew that PPI's reported results were contrary to the purpose of GAAP and the Handbook's objective of fair presentation and the underlying concept of "representational faithfulness".
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> Workum, not being a chartered accountant, was likely unfamiliar with the details of accounting practice and may indeed never have read the Handbook. We would be disinclined to attribute to Workum responsibility for contravention of a particularly technical requirement of GAAP. The contraventions here, though, were not mere technicalities. We find nothing so obscure or esoteric in the notions of fair presentation or representational faithfulness that it would surprise or confuse a non-accountant who had even a passing acquaintance with financial information. Workum would have been acquainted with the typical form of auditor's report that refers explicitly to fair presentation of an issuer's financial position and results of operations. We conclude that he knew that the financial statements at issue here could not be said to have been prepared in accordance with GAAP.
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> . . . the Individual Respondents apparently withheld information from [PPI's auditor] . . . .
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> We do not accept that anyone in a senior management position with a public company could reasonably consider it proper to withhold information from the company's auditor. We believe that Workum and Hennig apprehended that a more fully informed auditor would not give a favourable opinion on the financial statements at issue.
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> . . . Moreover, [the Individual Respondents] allowed [PPI's auditor] to operate on the basis of an understanding of the facts that the Individual Respondents knew did not reflect reality. We find that they misled [PPI's auditor], certainly by omission.

[12] In the result, we found that Workum and Hennig each contravened Alberta securities laws and acted contrary to the public interest, and concluded that they (Merits Decision at paras. 720, 730):

> . . . bore a full measure of responsibility for PPI's improper disclosure relating to the Newmex, Orion and Azterra Transactions in its 1998, 1999 and 2000 Financial Statements and other documents, and the associated contravention of Alberta securities laws and conduct contrary to the public interest. . . .

Undisclosed Financial Benefit

[13] We found in the Merits Decision that the Individual Respondents exercised control and direction over the securities trading accounts of Strategic, Cheshire, Lexington and Ashland (the "Four Trading Accounts", mentioned earlier) and the offshore bank account

of Mandolin Inc. ("Mandolin"; its bank account was the "Mandolin Offshore Bank Account" mentioned earlier) and thus benefited personally from commission payments made by PPI to those five companies (the "Offshore Companies" – Strategic, Cheshire, Lexington, Ashland and Mandolin). We further found that PPI was obliged to disclose the arrangements for paying commissions to the Offshore Companies for the benefit of one or both of the Individual Respondents, but PPI failed to fulfil that obligation; the Individual Respondents bore responsibility for that failure; and the Individual Respondents "deliberately concealed the arrangement from the public" and from Staff and caused PPI instead to issue inaccurate and materially misleading disclosure (Merits Decision at para. 1082).

[14] The amounts involved were significant. PPI paid a total of at least $5 148 750 in commissions under this arrangement. We concluded that the Mandolin Offshore Bank Account and the Four Trading Accounts "were operated to funnel money from PPI to the Individual Respondents" (Merits Decision at para. 1062), at least $2 million passing in this way from PPI to the benefit of the Individual Respondents, primarily Workum.

[15] As a result, we found that the Individual Respondents acted contrary to the public interest.

Market Manipulation

[16] We found in the Merits Decision that trading in shares of PPI subsidiary Newmex Minerals Inc. ("Newmex") during two intervals in 2000 was not motivated by genuine investment intent, but rather by the desire to move the price of those shares (the "Newmex Shares") to certain target levels on certain target dates. We found that the resulting prices were artificial.

[17] We also found that Strategic and Cheshire each contravened the Act because they could not disavow responsibility for this improper trading of Newmex Shares in their respective securities trading accounts. We made similar findings against the Individual Respondents (Merits Decision at para. 1252):

> In sum, the evidence (circumstantial though it was) was clear, convincing and cogent. We find, on the balance of probabilities, that the Individual Respondents enlisted Olnick [a Vancouver securities broker who handled securities trading and money for accounts of Strategic and Cheshire, among others, and who dealt at various times with each of the respondents] to undertake trading to raise the market price of the Newmex Shares to the prices targeted on the dates targeted. With and through Olnick, the Individual Respondents contrived to manipulate the market price of Newmex Shares in a manner that not only may have resulted but, we find, did result, in artificial prices for the Newmex Shares during (in particular, at the end of each of) the February Period and the September Period.

[18] We therefore found that Workum, Hennig, Strategic and Cheshire each contravened Alberta securities laws and acted contrary to the public interest.

Insider Trade Reporting

[19] We found in the Merits Decision (at para. 1273) that the Individual Respondents, although aware of their obligation under Alberta securities laws to report securities trades made as insiders:

> . . . did not fulfil their individual obligations to file reports of being or becoming insiders of Reportable Issuers [PPI, Newmex, Rocky Mountain and Invader] in respect of holdings through the Four Trading Accounts, and reports of purchases and sales of Reportable Securities in the Four Trading Accounts made when they were insiders of the corresponding Reportable Issuers.

[20] In this respect, also, we found that Workum and Hennig each contravened the Act.

Misrepresentations to Staff

[21] In the Merits Decision, we surveyed several oral and written misrepresentations made to Staff by the Individual Respondents. As we said there (at para. 1294), this was "a pattern of conduct. Stated bluntly, the Individual Respondents repeatedly lied to Staff". We concluded that in this way, too, Workum and Hennig each acted contrary to the public interest.

C. Issues of Sanction and Costs to Be Determined

[22] It remained to be determined in this concluding part of the proceeding whether, in light of our findings in the Merits Decision, it is in the public interest to make orders against any of Workum, Hennig, Strategic or Cheshire and, if so, what order or orders would be appropriate. Also to be determined is what costs orders, if any, would be appropriate.

III. POSITIONS OF THE PARTIES

A. Staff

[23] Staff characterized the misconduct of Workum and Hennig as serious, deceptive and long-term. Staff contended that "the scope, pervasiveness and deceptive nature of the misconduct is of such magnitude that it demands the highest range of possible sanctions" and urged that we order the following:

- against each of Workum and Hennig, permanent bans on trading and purchasing securities or exchange contracts, the use of any exemptions under Alberta securities laws, and acting as a director or officer of any issuer, all coupled with a significant administrative penalty ($1 million against Workum and $500 000 against Hennig); and

- against each of Strategic and Cheshire, permanent bans on trading and purchasing securities or exchange contracts and on the use of any exemption under Alberta securities laws, and a permanent ban on any trading in their respective securities.

[24] Staff also sought orders that the respondents pay a total of $575 000 of the costs of the investigation and hearing, allocated as follows: Workum – $350 000; Hennig – $175 000; Strategic – $25 000; and Cheshire – $25 000.

[25] Staff argued that the sanctions they sought were consistent with sanctioning principles enunciated and applied in other Commission decisions. These include the objectives of specific and general deterrence and the assessment of appropriate sanction in light of factors summarized in *Re Lamoureux*, [2002] A.S.C.D. No. 125 at para. 11 (affirmed on other grounds 2002 ABCA 253).

B. The Respondents

1. General Approach

[26] Although Workum and Hennig did not necessarily accept our findings in the Merits Decision, Workum, in addressing the issues of sanction and costs, made submissions on the basis of the findings in the Merits Decision. Hennig appeared to take a somewhat different approach: he seemed to suggest that some of our Merits Decision findings – which he indicated he disagreed with and might challenge in an appeal – should not form the basis of our assessment of sanction. This suggestion notwithstanding, we base our assessment of sanction, costs and the public interest on our findings in the Merits Decision. In so doing, we acknowledge that neither Individual Respondent's submissions on sanction should be construed as affecting any rights of appeal or any arguments that might be made on appeal.

[27] Strategic and Cheshire did not make any submissions on sanction or costs.

[28] We turn now to the more specific positions taken by Workum and Hennig.

2. Workum

[29] Workum contended that it would be inappropriate for the panel to consider whether any respondent at this stage of a proceeding "accepts findings and/or is remorseful" because, in his submission, that would interfere with a respondent's right to appeal. He stressed that he acknowledged the seriousness of the panel's findings, but rejected Staff's analysis and proposed sanctions – the latter on the basis that they "would be punitive and thus clearly beyond the duties imposed upon the [Commission]".

[30] Workum also framed his position on sanction as an issue of "parity", making comparisons to the outcomes of other enforcement proceedings (including a settlement between Staff and PPI approved on 10 September 2003 (the "PPI Settlement" – see *Re Proprietary Industries Inc.*, [2003] A.S.C.D. No. 1207)) and referring to others – in oral submissions the focus was on PPI and Olnick – involved in this matter who were not subject to a hearing, findings or sanction. Workum contended that, in such circumstances, imposing sanctions on him beyond certain interim orders to which he has

been subject for some six years "would be a breach of the fundamental principles of justice and would significantly risk diminishing the public's confidence in the Alberta capital markets".

[31] Workum characterized himself as having borne only secondary responsibility for certain of the conduct considered in the Merits Decision, notably that relating to financial disclosure by PPI (the primary responsibility for which, he argued, rested with PPI). This distinction, he urged, should be reflected in any sanction orders. Workum also disputed Staff's characterization of the Merits Decision as having found that the Individual Respondents received substantial illegal financial benefits from their misconduct. Workum stressed that the hearing panel focused on whether the financial benefits "were adequately disclosed" and that receiving such benefits was not "in and of itself . . . illegal or improper" (citing the Merits Decision at para. 1064).

[32] Workum also raised a "Constitutional Question", which we discuss separately below. Seemingly in conjunction with this, he emphasized that an administrative penalty is available only in response to a contravention of Alberta securities laws, not other acts contrary to the public interest, so that only actual breaches can properly be considered when determining an appropriate administrative penalty. To illustrate his point, Workum argued that "it would be improper . . . to impose an administrative penalty . . ., particularly a significantly large penalty, where there has been a finding of a *de minimus* breach of the [Act]" in combination with findings of serious conduct contrary to the public interest.

[33] As to what specific sanctions might be appropriate, he suggested that, based on the Merits Decision findings, an appropriate duration of market-access bans against him would be ten years, but that he should be given "additional credit" for the fact that interim cease-trade and director-and-officer bans have been in place against him since 2002. These orders, he suggested, have already provided considerable general and specific deterrence. Accordingly, he argued that the interim orders should be rescinded and no further market-access bans imposed. He suggested that an administrative penalty of $40 000 would be appropriate – $20 000 relating to market manipulation and $20 000 relating to insider trade reporting. Workum disputed Staff's claimed costs on many grounds and contended that an appropriate costs award against him would be $46 000.

3. Hennig

[34] Hennig's submissions focused primarily on a "Constitutional Question" similar to Workum's. He objected to Staff's position on the ground that the quantum of the administrative penalty they sought exceeded what was permissible at the time of his misconduct found in the Merits Decision. He also contended that the sanctions sought by Staff were "excessive and inappropriate" in light of accepted sanctioning factors. In the alternative (apparently to the former point), Hennig urged the Panel to refrain from making any sanction decision "until such time as constitutional questions related to the

operation of [s]ection 199 of the [Act], and currently under consideration by . . . the Court of Queen's Bench [in a matter unrelated to this proceeding], are finally determined".

[35] Hennig disputed the applicability of many of the *Lamoureux* factors and contended that sanction hearings "ought to be conducted on as highly an individualized basis as possible".

[36] Hennig did not argue for any specific duration for any market-access bans, nor propose any specific quantum of administrative penalty. He contended more generally that the sanctions sought by Staff were too onerous (including for constitutional reasons). He characterized himself as only "a secondary figure" in most of the misconduct found in the Merits Decision and urged therefore that any sanction against him "ought to recognize his diminished role in the conduct alleged and temper the severity of the penalty or penalties imposed". Hennig did not make any submissions on costs.

IV. CONSTITUTIONAL QUESTIONS

[37] As noted, Workum and Hennig each raised Constitutional Questions. Both called into question our authority to order an administrative penalty applying section 199 of the Act as it currently reads – with its prescribed maximum administrative penalty of $1 million per contravention of Alberta securities laws rather than the $100 000 cap that applied prior to Act amendments in 2005. Staff and the Attorney General of Alberta (as intervener) countered that we do have authority to order the new maximum administrative penalty. We discuss the merits of the Individual Respondents' positions on this issue and our conclusions later in this decision.

[38] We address here a point with procedural consequences raised by Hennig. As noted, he referred to similar questions currently under consideration in an unrelated matter before the Court of Queen's Bench of Alberta and submitted that we should refrain from making any decision on sanction here until a final determination in that matter.

[39] We disagree. Hennig seeks what amounts to a stay of proceedings pending the resolution of an unrelated matter in another forum. He did not, however, adduce evidence that would justify a stay or delay. In particular, it is not apparent to us what prejudice he (or any of the other respondents) would suffer were we to proceed now with an uninterrupted consideration of sanction and render our decision. His appeal rights would be unaffected by our proceeding now. Moreover, if the merits portion of this hearing were fundamentally flawed as he suggested in his constitutional submissions, a mere delay would not be a cure.

[40] In our view, the appropriate course of action – in the interests of all parties and the public (which has an interest in seeing enforcement proceedings brought to a conclusion) – is for us to proceed on the basis of the submissions and our understanding of the law,

and to render a final decision. Hennig or any other respondent may then, if they so choose, challenge any and all of our conclusions by way of appeal. Accordingly, we conclude that it is appropriate for us to deal with this matter now, and we do so.

[41] Our analysis and conclusions on the other aspects of the Constitutional Questions are discussed below, in connection with our discussion of administrative penalties generally.

V. SANCTIONS

A. The Law – Sanctioning Principles and Factors

[42] The Commission is responsible for the administration of securities laws in Alberta. In furtherance of that mandate, we act in the public interest to protect investors, the integrity of the Alberta capital market and confidence in that market. In the context of enforcement proceedings, if we determine that the public interest requires that sanctions be ordered, our orders are to be protective and preventative, not punitive or remedial. Therefore, in determining whether sanctions should be imposed in response to a finding of misconduct, we consider first whether it is necessary to prevent a recurrence of the misconduct and, if so, what sanction or combination of sanctions would best achieve that result. In so doing we consider both specific deterrence (directed at deterring a repetition of misconduct by the particular respondent) and general deterrence (directed to others who might be tempted to act similarly) – see, for example, *Re Cartaway Resources Corp.*, 2004 SCC 26 at paras. 52-62; and *Re Podorieszach*, 2004 ABASC 567 at para. 17.

[43] In our assessment of appropriate sanction, we are guided by the principles set out by this Commission in *Lamoureux* and refined in later decisions. These factors include:

- the seriousness of the findings against the respondent and the respondent's recognition of that seriousness;
- characteristics of the respondent, including capital market experience and activity and any prior sanctions;
- any benefits received by the respondent and any harm to which investors or the capital market generally were exposed by the misconduct found;
- the risk to investors and the capital market if the respondent were to continue to operate unimpeded in the capital market or if others were to emulate the respondent's conduct;
- decisions or outcomes in other matters; and
- any mitigating considerations.

[44] The Act contemplates – and Staff here seek – an array of possible sanctions, including various types of capital market access restrictions and direct monetary administrative penalties. In determining what, if any, sanctions against a particular respondent are appropriate (in nature and quantum), we consider the contemplated sanctions as a package, rather than in isolation. Our objective is to ascertain what

combination of orders best achieves our deterrent (protective and preventative) aims and fulfils our public interest mandate.

B. Consideration of Sanctioning Principles and Factors

[45] We turn now to our analysis of the principles and factors relevant to sanction, applied to our findings in the Merits Decision as a whole. Although we do not repeat those findings here, we outline some that are particularly relevant to our decision on sanction. As will be seen, significant sanctions are called for here.

[46] We refer to positions expressed by Workum, Hennig and Staff; as mentioned, Strategic and Cheshire made no submissions.

1. Seriousness and Recognition of Seriousness

(a) Serious Misconduct

[47] Each of Workum, Hennig, Strategic and Cheshire contravened Alberta securities laws and acted contrary to the public interest. Their actions clearly included serious misconduct, as we now discuss.

(i) Financial Disclosure

Importance of Disclosure

[48] Disclosure by public companies to investors is central to our securities regulatory system. Alberta securities laws do not purport to tell investors what investment decisions to make or what risks to take, but rather are designed to give investors information with which to make informed decisions as to whether, given their own investment objectives and risk tolerances, to buy, sell or continue to hold a particular security of a particular issuer. Public companies are therefore required to make periodic and timely disclosure of information that is material to investors. That disclosure must, above all, be truthful. Untruthful disclosure and failures to make required disclosure can obviously hinder particular investors' abilities to make sound investment decisions and, more broadly, undermine the efficient working of the capital market (which depends on timely and reliable information) and investor confidence in that market.

Financial Disclosure

[49] Financial statements are a key component of public company disclosure. The importance attributed to these statements is highlighted by the requirement that the annual financial statements be audited by an independent professional, whose report attests to their fair presentation of the company's financial position and results of operations. Here, PPI's 1998, 1999 and 2000 Financial Statements failed to satisfy legal requirements as they were not prepared in accordance with GAAP. They also presented a misleading picture. Consequently investors contemplating an investment regarding PPI securities were deprived of the ability to make an informed investment decision – "[t]his could have affected investment decisions of those who relied on the improper financial statements" (Merits Decision at para. 673). Not only were those investors directly

exposed to harm, but the integrity of the capital market as a whole, and confidence in that market, were put in jeopardy.

Serious Misconduct

[50] This sort of misconduct cannot but undermine investor confidence. In our view, it represents a betrayal not only of PPI's investors at the time but also more broadly of all who participate honestly and honourably in the Alberta capital market. This was undoubtedly serious misconduct.

Individual Respondents' Role in the Serious Misconduct

[51] The Individual Respondents – the two most senior officers of PPI – each bore responsibility for this misleading PPI financial disclosure and, indeed, developed and sustained a scheme with that very end in mind. This was, in our view, a disturbing example of misconduct – some of the most egregious misconduct imaginable on the part of individuals entrusted with the stewardship of a public company. The troubling nature of the Individual Respondents' role in this was compounded by their having, as we found, "certainly allowed [PPI's auditor] to operate on the basis of partial or misleading information" (Merits Decision at para. 690).

[52] Workum presented an interesting argument to the effect that Workum (and by extension, Hennig), whatever their role in PPI's financial statement disclosure, could not be said themselves to have contravened the relevant provision of Alberta securities laws (then section 144 of the *Alberta Securities Commission Rules* (the "Rules"); an equivalent provision is now found in National Instrument 52-107 *Acceptable Accounting Principles, Auditing Standards and Reporting Currency* at section 3.1(1)). Workum's argument was that the provision:

> . . . required PPI to prepare its financial statements in accordance with GAAP. It is clear that PPI could and it was found to have breached Alberta securities law. . . . However, it is not apparent how a director or officer could breach [the provision] and it is submitted that a director or officer could not breach [it]. . . .

[53] This argument was not persuasive. The provision does not so clearly impose responsibility on one actor or class of actors that others cannot be found to have breached the provision. Before its repeal in 2006, section 144(1) of the Rules stated that "[t]he financial statements permitted or required by the Act or these Rules shall be prepared in accordance with [GAAP]". In context, that provision should be read in conjunction with section 149 of the Act which stated (before its 2006 repeal): "A reporting issuer shall file financial statements (a) prepared, reviewed and approved as provided for under the regulations, . . . ".

[54] Workum's argument is flawed in two respects. First, the obligation under section 144 of the Rules is a clear requirement, but contains neither clear attribution nor

exclusion of responsibility for any class of actors. Any person or company to whom the preparation of non-GAAP-compliant financial statements is attributable might on a plain reading of the provision be found to have contravened it. This can certainly be said of directors and officers, as here.

[55] Second, even related section 149 of the Act – which does clearly impose a duty on a reporting issuer – cannot reasonably be read as shielding all others from responsibility. A company, after all, acts through individuals. Among such individuals, the authority and responsibility of officers and directors in respect of financial statements is obvious and has long been an integral part of Alberta securities laws. It is clear to us that individuals, not solely a reporting issuer, can be found to have contravened section 149 of the Act (and by extension section 144 of the Rules) when those individuals bear responsibility for the reporting issuer's own breach of those provisions. To conclude otherwise would have a perverse effect, clearly not intended by the Legislature.

(ii) Undisclosed Financial Benefit

[56] Another area of our findings in the Merits Decision, as noted, was PPI's failure – and the Individual Respondents' role in that failure – to inform investors of the arrangements under which commissions were paid to the Offshore Companies for the benefit of the Individual Respondents (primarily Workum). As we stated in the Merits Decision (at paras. 1080-82, 1084):

> The picture thus painted was at odds with reality. PPI's disclosure concealed not only the actual compensation arrangements enjoyed by the Individual Respondents, but with it the associated potential for real conflict with the interests of PPI's shareholders. This failure to disclose ran counter to the very purpose of reporting issuer disclosure obligations discussed above. We conclude that this was thus contrary to the public interest.
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> **D. Responsibility**
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> As the most senior officers of PPI, the Individual Respondents were among those charged with responsibility for ensuring that PPI fulfilled its disclosure obligations under Alberta securities laws. As discussed, on this basis alone they bore responsibility generally for PPI's failure to disclose the compensation arrangements at issue.
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> More directly, the Individual Respondents – as the orchestrators and beneficiaries of the arrangement – needed to do no due diligence to appreciate the chasm between the disclosure and the reality. We conclude that the Individual Respondents deliberately concealed the arrangement from the public and caused PPI instead to issue inaccurate and materially misleading disclosure.
>
> . . .
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> In all of this, the Individual Respondents behaved in a manner incompatible with the responsibilities of directors and senior officers of a public company. Their conduct was clearly contrary to the public interest. We so find.

[57] It follows that this also was serious misconduct on the part of the Individual Respondents. However, given the centrality of financial statements to the disclosure regime for public companies, this misconduct was less serious than the financial disclosure misconduct discussed above.

(iii) Market Manipulation

[58] As we noted in the Merits Decision, the objectives of investor protection and an efficient capital market (at para. 1141):

> . . . require that those engaged in securities trading act with integrity, and that market participants have access to adequate, reasonably reliable information on which to base trading and investment decisions. Essential to this is that trading activity involve real transactions reflecting genuine supply and demand and genuine assessments of value. Trading that creates a false impression about the price or value of, or level of interest in, a security is fundamentally incompatible with fair and efficient market operation. . . .

[59] The role of each Individual Respondent in contriving to manipulate the market price of Newmex Shares to produce artificial prices, and the roles of Strategic and Cheshire through whose securities trading accounts the manipulative trading was primarily effected, were "fundamentally incompatible with fair and efficient market operation". The manipulation was an assault on one of the fundamental premises of a fair and efficient market and therefore on both market integrity and investor confidence.

[60] The market manipulation here, for which the Individual Respondents, Strategic and Cheshire all bear responsibility, was misconduct of a most serious nature.

(iv) Insider Trade Reporting

[61] Failures to report insider trades are significant because they deny investors the opportunity to see what insiders' holdings are and what transactions insiders are conducting. Such failures also make it more difficult for regulators to monitor potentially manipulative activity.

[62] This type of misconduct by itself can be very serious. Here, however, it appeared to arise largely or wholly as an adjunct to the Individual Respondents' scheme of utilizing the Four Trading Accounts. Although not a negligible breach, when viewed against the backdrop of their other misconduct, these reporting contraventions were among the less serious.

(v) Misrepresentations to Staff

[63] Making misrepresentations, or lying, to Staff – as we found the Individual Respondents to have done – is extremely serious. Such misrepresentations hinder Staff's ability to perform their designated functions as part of the Alberta securities regulatory system. As we commented in the Merits Decision (at para. 1297):

> The Individual Respondents' communications to Staff were of a character wholly incompatible with what is appropriate, expected and required of participants in the Alberta capital market. . . .

(vi) Conclusion on Seriousness

[64] Each of Workum, Hennig, Strategic and Cheshire engaged in serious misconduct.

[65] The Individual Respondents' misconduct spanned a range of responsibilities imposed on capital market participants, particularly on public company officers and directors. We reiterate our comments in the Merits Decision concerning the exceptional and persistent nature of the deceptions, concealments and manipulations in this case (Merits Decision at paras. 1308-09):

> The Individual Respondents, who held the most senior positions with PPI, a public company, engaged in numerous contraventions of Alberta securities laws involving: structuring and public reporting of transactions to produce a misleading impression of PPI's financial position and results; instigating market manipulation to create an artificial price in securities of another public company (Newmex); and failing to report trades as insiders of various reporting issuers. They also bore responsibility for the concealment of financial benefits they derived from commissions paid by PPI on financings and other transactions, which should have been publicly disclosed, and they made numerous misrepresentations – they lied – to Staff. All of these activities we found to be contrary to the public interest. . . .
>
> This was, from start to finish, a story of deception, concealment and manipulation. This web of impropriety persisted over a period of years. Little if any of it, in our view, involved obscure or merely technical aspects of law and capital market conduct. In our view, the Individual Respondents not only fell profoundly short of fulfilling their respective responsibilities as directors and senior officers of PPI – responsibilities to their shareholders and to the investing public generally – but their conduct was the very antithesis of what is expected, and demanded, of participants in the Alberta capital market.

[66] The activities of each of Workum and Hennig involved misconduct in several areas, some (contraventions of fundamental requirements and prohibitions under Alberta securities laws) by themselves egregious, even viewed in isolation. The aggregation of these several areas of their respective misconduct made it even worse.

(b) Recognition of Seriousness

[67] Hennig argued that using "recognition" of seriousness as a sentencing factor is "wholly inappropriate" because he disagrees with the Merits Decision findings. Workum, taking a different approach, acknowledged that "assuming that the findings of this panel are upheld, they are ones involving serious misconduct", although he did not admit that he committed that serious misconduct.

[68] Staff argued that "a respondent is entitled to deny allegations made; however, maintaining a position that is clearly false in order to avoid a finding of misconduct is entirely inconsistent with any recognition of that misconduct".

[69] We were not persuaded by the suggestions that the extent of a respondent's recognition of the seriousness of certain findings is an inappropriate or unworkable sanctioning factor. The fact that a hearing panel, if and when it reaches the point of considering sanction, may consider this as a factor does not affect parties' ability during the merits phase of a hearing to present their respective positions concerning the merits of allegations; it neither limits the ability of a respondent to make full answer and defence to the allegations nor lifts from Staff the burden of proving the allegations. Nor does this sanctioning factor affect a respondent's rights of appeal; Workum's approach – basing sanctioning argument on merits findings while reserving his right to appeal both – is the correct one.

[70] A respondent's recognition of the seriousness of its misconduct is relevant and potentially important in determining appropriate sanction in large measure because it can assist the hearing panel in assessing the respondent's understanding of what was wrong about the conduct in issue and the likelihood of the respondent acting similarly in future. The relevance to specific deterrence is obvious.

[71] The most effective way for a respondent to demonstrate such recognition can be to testify on this point. In this case we did not have the benefit of such testimony by any of the respondents. We must rely instead on written submissions and, in Workum's case, also the oral submissions of his counsel.

[72] Workum's submissions did include statements indicating his awareness and acknowledgements that what we found against him in the Merits Decision (although not admitted) was serious misconduct. We are prepared to accept these acknowledgements at face value. We are not, however, able to go further and conclude from this that Workum has abjured a repetition of his misconduct. Accordingly, this factor offsets to only a limited extent the seriousness of his misconduct and thus reduces only slightly the need for significant sanction.

[73] Hennig neither acknowledged nor recognized the seriousness of his misconduct, stating that the Merits Decision was "as yet unchallenged" and that "he dispute[d] the finding that any misconduct occurred in the first instance". He also stated that "the implied subjectivity of any assessment of the 'seriousness' of the misconduct found in this (or any other) circumstance render[s] the factor valueless as a sentencing guideline". However, it appeared to us that Hennig misunderstood the relevance of this factor to the question of sanction and its relationship to appeal rights (discussed above). We thus are prepared to view his quoted comments in that light rather than as an outright demonstration that he does not recognize the seriousness of his misconduct. However,

we can reach no conclusion as to the extent of such recognition; nor are we thereby assisted in assessing the likelihood that he would repeat his misconduct. For Hennig, therefore, this is a neutral factor.

[74] Strategic and Cheshire, as noted, made no submissions and there was nothing to indicate whether they recognized the seriousness of their misconduct.

(c) Conclusions on These Factors

[75] In short, Workum, Hennig, Strategic and Cheshire each committed serious misconduct. This by itself argues in favour of significant sanction against each.

[76] As discussed, we concluded that Workum's acknowledgement of the seriousness of our findings against him offsets only slightly the seriousness of his misconduct. We concluded that the recognition factor for Hennig was merely neutral. There was no indication that Strategic or Cheshire recognized the seriousness of their respective misconduct. On balance, these two factors (seriousness and recognition of seriousness) call for significant sanctions against all four of these respondents.

2. Characteristics

[77] Staff did not refer to any conduct of Workum, Hennig, Strategic or Cheshire predating their activities discussed in the Merits Decision, and did not suggest that any of these respondents had previously been sanctioned.

[78] There was, however, considerable evidence as to each of Workum and Hennig that is relevant to the issue of sanction.

(a) Workum

[79] As he himself acknowledged, Workum was an experienced capital market participant. He was active in managing businesses and raising money from institutions here and abroad. He held himself out – not unfairly – as a sophisticated businessman and market player.

[80] He served as a director and president of public companies notably PPI and Newmex. He was, we found, "PPI's guiding mind", "aware [and] fully in charge" (Merits Decision at paras. 715, 708).

[81] Workum was not a chartered accountant. Despite that, as we found in the Merits Decision, his experience – including his position and responsibilities at PPI – made him familiar enough with the fundamentals of financial reporting to be aware that PPI's 1998, 1999 and 2000 Financial Statements were not prepared in accordance with GAAP.

[82] Moreover, we found that he (and Hennig) knew enough to know that it was improper to withhold information from PPI's auditor, and we believe that they knew such

withholding could affect the auditor's opinion on the flawed financial statements. We stated (Merits Decision at para. 699):

> We do not accept that anyone in a senior management position with a public company could reasonably consider it proper to withhold information from the company's auditor. We believe that Workum and Hennig apprehended that a more fully informed auditor would not give a favourable opinion on the financial statements at issue.

[83] In the result, we are in no doubt that Workum possessed and applied knowledge, experience, acumen and confidence to give effect to the schemes discussed in the Merits Decision involving sham transactions, related improper financial disclosure, manipulative trading and concealment of financial benefits. As found in the Merits Decision, he did this knowingly and deliberately. This is, in our opinion, a significant aggravating factor militating in favour of severe sanction.

(b) Hennig

[84] Hennig asserted that he "had little or no experience as a capital market participant prior to 1993, when he became an officer and director of PPI". He also contended that he "did not make his living as a capital market participant at the same material time" and should not be treated as such for sanction purposes. Hennig stated that he "did not personally conduct, or direct others to conduct, specific trades in the securities of [publicly] traded companies". These comments were unhelpful and some were even contrary to findings in the Merits Decision. We do not consider Hennig's lack of capital market participation before joining PPI to be determinative of his level of experience and sophistication at the time of his misconduct at issue here.

[85] Hennig, unlike Workum, was a chartered accountant. This gave Hennig associated professional knowledge and experience directly relevant to important areas of the misconduct we found, notably relating to PPI's financial disclosure. He was PPI's chief financial officer, secretary and treasurer for approximately nine years and also, for a time, a director. Additionally, he was a director and vice-president, finance at Newmex. We are in no doubt – and found – that Hennig had sufficient knowledge to have borne his full share of responsibility for the various schemes and misconduct discussed in the Merits Decision. His protestations notwithstanding, Hennig was neither inexperienced nor unsophisticated in areas relevant to the misconduct we found.

[86] More specifically, as discussed above in connection with Workum, we do not accept that Hennig, given his position, could reasonably have considered it proper to withhold information from PPI's auditor, and we believe Hennig apprehended that a more fully informed auditor would not have given favourable opinions on the flawed PPI financial statements. We found in the Merits Decision that Hennig's accounting experience enabled him to recognize that his actions were improper and, worse, he deliberately used that experience to further his and Workum's improper goals: "Hennig

disregarded or deliberately evaded the informational purposes of financial statements and, with them, the most basic principles of GAAP" (Merits Decision at para. 729). He also "used his accounting background to buttress the false portrayals and to persuade PPI's auditor to accept the Individual Respondents' desired accounting outcomes" (Merits Decision at para. 727).

[87] Although he was clearly Workum's subordinate at PPI, Hennig was not passive. We are convinced that Hennig had and applied knowledge and professional experience to join Workum, knowingly and deliberately, in effecting the schemes discussed in the Merits Decision. This we consider an important aggravating factor warranting strong sanction.

(c) Conclusion on Characteristics

[88] We conclude that Workum and Hennig were both sufficiently experienced and sophisticated to have effected the manipulative schemes, and to have appreciated that those schemes were improper and in certain instances, as found in the Merits Decision, contrary to Alberta securities laws and the public interest. This argues for significant sanction against both Individual Respondents.

[89] The absence of prior sanctioning against them does not, in the circumstances, lessen the case for significant sanction here. Similarly, we do not consider the fact that Strategic and Cheshire have apparently not been previously sanctioned an important factor in the circumstances of this case.

3. Benefits to Respondents; Harm to Investors or the Capital Market

(a) Benefits

[90] Staff averted to "significant financial benefits enjoyed by Workum and Hennig" in support of Staff's position on sanction. Staff suggested that there was clear evidence of "quantifiable financial benefit" – examples cited involved funds that originated in PPI commission payments – that was attributable (by implication at least) to the Individual Respondents' misconduct and applied by them for their respective personal use, including "to pay for various of Workum's personal hobbies or pursuits".

[91] Hennig submitted that we should not consider the "benefit" factor, as there was "little or no evidence" on this point. Workum disputed Staff's characterization of benefits received by the Individual Respondents. He emphasized that the Merits Decision concluded that payments made to the Offshore Companies' accounts were not illegal or improper in themselves, noting that senior officers of public companies often command significant compensation. However, Workum acknowledged that we had found that the Individual Respondents had not disclosed their financial benefits from PPI commission payments and that such non-disclosure was contrary to the public interest.

[92] We find merit in Workum's position on this point. Staff's position was not fully supported by the Merits Decision. There was no doubt that Workum and Hennig benefited financially from their association with PPI. In the Merits Decision we found specifically that at least $2 million paid by PPI as commissions went to the benefit of the Individual Respondents, primarily Workum. To that extent it might be said that the benefits were quantified. However, the essential point here is not whether or to what extent the Individual Respondents profited from their association with PPI but, rather, whether and to what extent they derived benefit attributable to misconduct. We did not find – and we do not find here – that all these commission amounts themselves were illegal or improper. Our finding was that these payments were not properly disclosed.

[93] That said, we are in no doubt that the Individual Respondents intended their schemes and accompanying concealment to redound to their financial benefit. In connection with the commission payments, the non-disclosure prevented PPI shareholders (and others) from learning the true extent to which the Individual Respondents were being indirectly compensated by the company (PPI's public disclosure suggested falsely that Workum and Hennig received relatively little compensation). As a result, they avoided debate about the potential conflict of interest inherent in their benefits having flowed from commissions paid on PPI financings, or about the quantum of the Individual Respondents' compensation; they thus avoided the prospect that properly-informed shareholders might object to the arrangement and, if so, that the flow of funds to the Individual Respondents might be jeopardized.

[94] Other areas of the Individual Respondents' misconduct were also, in our view, done with intent to benefit personally. For example, the flawed financial disclosure, the related sham transactions and the market manipulations of Newmex Shares helped present a false picture of impressive and sustained earnings growth at PPI. This could not but reflect well on the company's principals – Workum and Hennig. There was thus a clear reputational benefit. That unquantifiable reputational benefit could conceivably also be transformed into tangible future financial benefit (for example, it could do them no harm were they to seek from PPI direct monetary compensation, share grants or stock options).

[95] In short, both Workum and Hennig intended to benefit, and did benefit, from their misconduct.

[96] There was no evidence that Strategic or Cheshire benefited from their respective market manipulation misconduct. Their securities trading accounts were essentially tools used by others. Moreover, rather than retaining money, Strategic and Cheshire appear to have served as conduits for passing money to others (notably, the Individual Respondents).

(b) Harm

(i) Position of Staff

[97] Staff acknowledged a lack of direct evidence that the misconduct of the Individual Respondents, Strategic and Cheshire caused harm to any particular market participant. Staff argued, however, that it was not incumbent on them to adduce such evidence because the Commission must also consider the possibility of harm to investors generally and the capital market.

[98] In any event, Staff stated that harm to individual investors was "obvious from the nature of the misconduct". For example, Staff contended, it can be inferred that individual investors who purchased Newmex Shares at the highest artificially-inflated prices would have suffered financially when the Newmex Share price quickly declined. Staff argued that market manipulation also harms the capital market generally through what we referred to in the Merits Decision as interference with "genuine supply and demand and genuine assessments of value" (Merits Decision at para. 1141). Staff also pointed to our comments in the Merits Decision concerning the harm attributable to PPI's flawed financial disclosure and, in respect of misrepresentations made to Staff, the effect on Staff's ability to perform their functions because "[e]vasion, obfuscation and untruth in responding to Staff queries . . . are an obstacle to effective capital market regulation" (Merits Decision at para. 1296).

(ii) Individual Respondents' Position

[99] Workum agreed that harm to the capital market might be inferred in some cases, but submitted that such an inference was inappropriate here. Focusing on our Market Manipulation findings, he noted that Olnick – a discredited witness – or Olnick's clients were on the other side of the "Market Manipulation" trades. Workum implied that Olnick – not the Individual Respondents – caused any resulting harm to individual investors in that context.

[100] Hennig contended that there was no evidence that "would suggest that harm of any kind was suffered by individual investors or the capital market generally".

(iii) Discussion of Harm

[101] Bearing in mind the fundamental objectives of securities regulation – protecting investors and fostering a fair and efficient capital market that has the confidence of investors – we naturally consider whether, or to what extent, a respondent has exposed investors and the capital market as a whole to the risk of harm. Evidence of direct, quantified harm to identified investors can obviously be helpful in that task. It is not, however, essential. We may also reach conclusions on this factor by drawing reasonable inferences based on the factual evidence and our knowledge of the capital market.

[102] Staff were correct in asserting that they need not always adduce direct evidence of harm. As this Commission said in *Re Ironside*, 2007 ABASC 824 at paras. 117-18:

> A sound and reliable disclosure system is fundamental to the operation, integrity and strength of the capital market. High disclosure standards for public issuers foster investor confidence and thereby contribute to a fair and efficient market. Disclosure also assists the market in valuing accurately a public issuer's share price. However, the disclosure standards will provide inadequate protection if investors are unable to trust in and rely on the integrity and honesty of those who are appointed to serve as directors or occupy senior management positions within a public issuer. The public rightly depend on directors and senior executives to comply with regulatory requirements and to be honest and truthful in the public disclosure they make. It is serious when an officer or director of a public issuer causes it to fail consistently in complying with disclosure requirements.
>
> Misconduct like [those respondents'] therefore damages investor confidence and, ultimately, the capital market's credibility. When investors are not willing to invest in the capital market, investment capital and liquidity are lost.

[103] In this case there is ample evidence from which we can – and do – infer that the misconduct here exposed investors and the Alberta capital market certainly to the risk of harm and possibly to actual financial loss. We discuss key areas of that misconduct and the resulting risk of harm.

[104] First, in respect of PPI's flawed financial disclosure, we reiterate our comments from the Merits Decision (at paras. 658-59):

> . . . Disclosure by public companies serves, among other things, to assist investors in making investment decisions. They do so on the basis of the information available at the time. Their decisions have consequences for them, sometimes quite immediate ones. It follows that timing errors in disclosure can have significant implications and serious consequences, even if after a period of time the error is reversed or corrected. The subsequent adjustment does not erase what happened during the interval – when investors were exposed to and may (foreseeably) have acted in reliance on incorrect information.
>
> . . . the effect of PPI's reporting was to show a sequence of large and growing annual net earnings in 1998, 1999 and 2000. This could have indicated to a reasonable investor that PPI was operating profitably and with increasing success in those years. This, of course, was not true. Backing out the misstated results of the Orion and Azterra Transactions for 1999 and 2000 would have left PPI showing much-diminished net earnings (or losses) for those years and thus have conveyed a very different impression of its results, its then-current financial position and, quite likely, its prospects. An investor considering such information as the basis for an investment at the time could reasonably be expected to reach different conclusions and, possibly, to make a different decision. The investor so acting, at the time, in the face of the financial disclosure actually made by PPI in its 1999 and 2000 Financial Statements would have been misled. It is no answer to that investor to say that the misreported 1999 and 2000 profits did show up later, in 2001.

[105] For these reasons, we think it very likely that investors who made investment decisions concerning PPI would have been disappointed when the reality of PPI's circumstances became known, and also likely that many of them who bought or held

shares of PPI based on the misleading disclosure would have realized gains smaller than they had anticipated or suffered actual losses. It is unnecessary to determine whether this actually occurred; it suffices that the Individual Respondents' misconduct clearly exposed investors to that risk.

[106] Second, in respect of the market manipulation, we found in the Merits Decision (at para. 1252) that Workum and Hennig effected the manipulation "[w]ith and through Olnick". One who manipulates a securities trade cannot disclaim any responsibility for the consequences to investors and the capital market on the basis that the manipulator was not one of the parties to that trade. Strategic and Cheshire (whose accounts were used in the manipulation) also bore responsibility for the manipulation and any resulting harm.

[107] We agree with Staff's contention that the manipulation of Newmex Share prices exposed investors to the risk of financial loss had they bought Newmex Shares on the basis of the artificial prices set by the manipulation – prices which promptly dropped significantly once the manipulation had served the Individual Respondents' purposes. We also consider that this market manipulation put in jeopardy the integrity, fairness and efficiency of the capital market generally. As we said in the Merits Decision (at para. 1141), "[t]rading that creates a false impression about the price or value of, or level of interest in, a security is fundamentally incompatible with fair and efficient market operation".

[108] Third, in respect of the undisclosed financial benefits that the Individual Respondents enjoyed, the fact that we did not find their receipt of benefits from PPI in itself improper does not mean that no harm was done. Nor need we reach any conclusion as to how Workum or Hennig applied those benefits. The important point here was the concealment of those benefits (and their potentially conflictive source in PPI commissions). That concealment deprived PPI shareholders of the ability to consider and react to those facts. Had they been properly informed they might have sought changes in PPI's operation or altered their investment in the company. As we said in the Merits Decision (at paras. 1069, 1075):

> . . . These disclosure obligations, like others, are intended to provide information to assist investors in making investment and other decisions (notably, decisions on how to vote at shareholder meetings and decisions on whether or how to respond to a take-over bid). The information just mentioned is potentially important for these purposes. It can, for example, assist an investor in assessing the extent to which those responsible for running a company have their interests aligned with those of its shareholders, and in assessing how the company deals with related parties. The resulting assessments might in turn be factors in the investor's decision whether to make or retain an investment in the company.
>
> . . .

> The potential for conflicts of interest does not inevitably lead to bad decisions made for improper reasons, but we consider that reasonable investors would want to know the facts so as to be able to make their own assessment.

[109] Irrespective of whether PPI shareholders – or other market participants – might have objected to the quantum or manner of the Individual Respondents' financial benefits from PPI, the sole fact that the information was concealed hindered informed decision-making by investors and put at risk investor confidence in the fairness and integrity of the Alberta capital market.

[110] In short, we conclude that the misconduct of each of Workum, Hennig, Strategic and Cheshire exposed those who were investors in, or who might have considered investing in, Newmex or (in relation to the Individual Respondents' misconduct) PPI – and participants in the capital market generally – to the risk of harm and, possibly, actual financial loss. That misconduct also jeopardized the fairness, efficiency and integrity of the Alberta capital market and investor confidence in that market.

(c) Conclusion on Benefits and Harm

[111] For the reasons given, we conclude that Workum and Hennig each intended to benefit from their respective misconduct and indeed that this was in all likelihood the reason for their respective misconduct. Moreover, we believe that they did benefit from their misconduct, reputationally at least (from the false impression given of PPI's success) and quite possibly also financially.

[112] We are unable to conclude that Strategic and Cheshire benefited from their misconduct.

[113] As stated, the misconduct of each of these four respondents exposed investors and the Alberta capital market to harm.

[114] These factors militate in favour of significant sanction against all of these respondents – more so against the Individual Respondents than against Strategic and Cheshire.

4. Future Risk to Investors and the Capital Market – Need for Deterrence

[115] Consideration of future risk to particular investors or to the capital market generally is germane to our assessment of whether specific deterrence or general deterrence, or both, are necessary in the public interest.

[116] As stated by Supreme Court of Canada in *Cartaway* at paras. 52, 60-61 (referring to comparable provisions in the British Columbia *Securities Act*, R.S.B.C. 1996, c. 418 (the "BC Act")):

> Deterrent penalties work on two levels. They may target society generally, including potential wrongdoers, in an effort to demonstrate the negative consequences of wrongdoing. They may also target the individual wrongdoer in an attempt to show the unprofitability of repeated wrongdoing. The first is general deterrence; the second is specific or individual deterrence: see C.C. Ruby, *Sentencing* (5th ed. 1999). In both cases deterrence is prospective in orientation and aims at preventing future conduct.
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> . . .
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> . . . it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative. . . .
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> . . . A penalty that is meant to deter generally is a penalty that is designed to keep an occurrence from happening; it discourages similar wrongdoing in others. In a word, a general deterrent is preventative. It is therefore reasonable to consider general deterrence as a factor, albeit not the only one, in imposing a sanction under s. 162 [of the BC Act]. The respective importance of general deterrence as a factor will vary according to the breach of the [BC Act] and the circumstances of the person charged with breaching the [BC Act].

[117] The Individual Respondents' deliberate, prolonged and, for a time, successful schemes involving deceit, multiple contraventions of Alberta securities laws and other conduct contrary to the public interest persuade us that Workum and Hennig must each be restrained from repeating their misconduct by a strong measure of specific deterrence that denies them access to the Alberta capital market and includes a direct financial impact. But for the investigation that culminated in this proceeding, we think it entirely conceivable that the schemes would have continued, perhaps to this day. Without strong specific deterrence, we perceive a real risk of the Individual Respondents repeating their misconduct should the opportunity present itself. Strategic and Cheshire must similarly, in our view, be denied access to the Alberta capital market.

[118] The temporary success that the Individual Respondents enjoyed with their schemes also leads us to conclude that strong measures of general deterrence are necessary to dissuade others from trying to emulate the Individual Respondents' misconduct.

5. Precedent and Parity

(a) Workum's Position

[119] Workum argued forcefully that, in our assessment of what, if any, orders to make here, we must give great weight to the consequences suffered – or not – by others involved in this matter. He contended that any orders we make against him must "[reflect] the orders that have already been made and the decisions that have already been made by [Staff] with respect to PPI and Olnick". He urged us to apply what he termed a "principle of parity of sentences".

[120] More particularly, Workum contended that there were others involved in the matters considered in the Merits Decision – specifically other PPI directors and officers, PPI's various auditors, PPI itself and Olnick – and that we must consider their treatment in determining what orders, if any, to make against Workum. Workum argued that no PPI directors or officers (other than himself and Hennig) and none of its auditors were held culpable in this or, apparently, any other Commission enforcement proceeding. He noted that PPI itself, although named as a respondent in this proceeding, paid only $125 000 in costs under the PPI Settlement but suffered no market-access bans, administrative penalty or other sanction. He also noted that Olnick – who was deeply involved with the Individual Respondents' market manipulation and undisclosed financial benefits – struck a "sweetheart deal" with Staff under which Olnick agreed to assist in their investigation and voluntarily cease acting as a registrant, but was not named as a respondent in this or any other enforcement proceeding nor otherwise subjected to any sanctions. Workum's position was that any orders against him that do not provide parity of treatment with these others would both be unfair to Workum and call into question the integrity of the Commission's regulation of the Alberta capital market.

(b) Analysis

(i) Relevance of Other Proceedings or of Settlements Generally

[121] Orders made in other proceedings for comparable misconduct may, or may not, assist a hearing panel in determining what types of orders, or extent or range of sanction, might be appropriate in the case before it. Much depends on the facts and circumstances. Even if the factual background appears similar, less apparent factors may have guided decision-makers in other proceedings. By way of example, many considerations go into settlements; the very fact that parties thereby bring a proceeding to a more prompt conclusion than might follow from a full hearing can in itself serve the public interest and warrant lesser – possibly much lesser – sanction than might otherwise be ordered. Given the centrality of facts and circumstances to any decision on sanction, the outcomes of other proceedings and, even more so, settlements (in another or even within the same proceeding) will rarely provide more than the most general guidance to a hearing panel. As this Commission stated in *Re Stewart*, 2005 ABASC 91 at para. 25:

> Caution is called for in part because of the fact that parties to any legal proceeding, if they are endeavouring to arrive at a negotiated settlement, may conduct themselves very differently than if they are pursuing contentious litigation through to a hearing and decision. To achieve a broadly acceptable negotiated conclusion, a party might make admissions or concessions, and advance or abandon particular legal positions, that would be handled very differently in the course of a contested hearing.

(ii) Relevance of Treatment of Others Involved

[122] Turning now to the treatment of others involved in the matters that are the subject of this proceeding but who were never or are not now respondents, Workum's argument on this point essentially questioned Staff's conduct of the investigation and their exercise

of what amounts to prosecutorial discretion. It would not be surprising for respondents in any proceeding to be disappointed in finding themselves the subject of an enforcement proceeding or possible sanctions when others, in the respondents' perception, also played a role – even perhaps a greater role – in the same events. One might even have a degree of sympathy for such respondents. However, we do not consider this a useful or even relevant factor in our task of determining whether or to what extent the public requires the protection of sanctions in the case before us.

[123] A hearing panel does not direct, conduct or critique an investigation; our task is to determine whether Staff, after having conducted an investigation and enforcement proceeding as they see fit, have made a convincing case on the merits and on sanction against the respondent or respondents named by Staff. If Staff's investigation is incomplete or deficient – if, for example, they have targeted the wrong person – or if they fail to adduce sufficiently clear and cogent evidence to support their allegations, their case will fail. If Staff, for whatever reasons, do not name all persons involved in a matter as respondents, or do not prove their case against one of multiple respondents or settle with one or more of the respondents, they are not thereby precluded from pursuing other or remaining respondents. Nor does the absence of another potential respondent preclude a hearing panel from fulfilling its duty of determining the facts from the evidence presented to it and assessing whether or what orders are appropriate in the public interest.

PPI

[124] Addressing the specific examples cited by Workum, we deal first with PPI. We discern no useful guidance from the terms of the PPI Settlement. We reject Workum's argument that PPI was primarily liable for disclosure failures and he (and Hennig) only secondarily responsible – and that hence, in his contention, the outcome for PPI makes the sanctions sought by Staff here disproportionate and unfair. Responsibility for corporate actions can be, and here was, shared. PPI acted as it did through and at the instance of Workum and Hennig. As noted above, Workum and Hennig acted for their own benefit. We do not accept that their responsibility was less than PPI's nor, therefore, that the outcome of the PPI Settlement set any sort of "benchmark" for sanction here.

[125] In any event, there are important differences in circumstances. First, PPI was a corporation owned by its shareholders, whom we found to have been deceived. PPI was in a sense both culprit and victim; more important, sanctions on PPI would be borne indirectly by the undisputed victims, those very shareholders. That is reason alone to be untroubled by differences between outcomes for the company and its guiding mind, Workum. Second, by the time the PPI Settlement was reached, PPI had undergone immense changes, including new management and restated disclosure. The facts had changed and so, therefore, had the nature and extent of protection required. Third, this was a settlement and, as mentioned above, that fact alone might possibly have justified a very different outcome for the company. Moreover, we do not know the considerations leading to that settlement. It is unnecessary to speculate what they were beyond noting

that they might, with perfect propriety, have persuaded Staff that the public interest required no sanction.

PPI's Directors, Officers and Auditors

[126] As to other PPI directors and officers, and its auditors, we find no relevance in the fact that they are not respondents before us, nor apparently in any other proceeding. As mentioned, our task is to deal with what is before us, not what is absent. The evidence was clear that Workum was PPI's guiding mind and that Hennig was heavily involved in the most serious areas of misconduct – playing an active, central part in some of it. They both bore responsibility for the misconduct we found. The absence of proceedings against their colleagues and PPI's auditors tells us nothing at all about what protective responses are necessary for the Individual Respondents' misconduct.

Olnick

[127] Much the same reasoning applies in respect of Olnick. He clearly was involved in some of the misconduct found here, in a not insignificant way. Despite that, Staff reached an accord with him for reasons we do not know, although the written evidence certainly indicated that Staff expected he would assist in the investigation of this matter; we observe that such an arrangement is not necessarily uncommon or improper. Workum suggested that Olnick effectively faced no consequences for his conduct. That is not strictly true: Olnick's arrangement with Staff obliged him to give up his livelihood as a securities broker – a significant outcome. More important – and irrespective of how lightly Workum might believe Olnick was treated – the absence of proceedings against Olnick tells us nothing at all about what protective responses are necessary in the face of the misconduct we found on the part of four of the respondents. Our task is to assess whether or how the public interest requires protection from them. For that purpose, what matters is the conduct of Workum, Hennig, Strategic and Cheshire, not how Staff interacted with Olnick.

(c) Conclusion

[128] In short, we found the decisions and outcomes presented by the parties to be of little or no assistance in determining appropriate sanctions in this case.

6. Mitigating Factors

[129] Workum, as noted, submitted that he has already been subject to orders restricting his access to the Alberta capital market and these should be taken into account to offset or reduce the duration of orders we might otherwise make. We infer that Workum is referring to interim orders imposed by this Commission before the hearing commenced. These interim orders barred him from trading in securities and using securities law exemptions until further order and from acting as a director or officer until the completion of the proceeding. Hennig is subject to similar interim orders and therefore the same argument would apply to him.

[130] Interim orders of this type are not issued as sanctions but merely, as their description implies, as interim protective measures to forestall the continuation of prima facie improprieties while an investigation and hearing proceed. Sanctioning orders, by contrast, are prospective in nature and intended to afford prevention and protection following the conclusion of an enforcement hearing. It follows, and we conclude, that interim orders against any of Workum, Hennig, Strategic and Cheshire neither serve a sanctioning purpose nor constitute mitigation of wrongdoing found in the merits portion of this hearing. We find no basis to apply such interim orders to offset or reduce the duration of orders we otherwise consider appropriate to protect the public interest.

[131] We find no mitigating factors in this case.

7. Conclusion on Factors

[132] For the reasons given we conclude that sanctions providing strong specific and general deterrence are appropriate and necessary in the public interest against each of Workum, Hennig, Strategic and Cheshire. Given differences in the types of misconduct found against each and given the absence of evidence that Strategic and Cheshire benefited or intended to benefit from their misconduct, we consider the degree of deterrence necessary for Strategic and Cheshire to be less than that required for the Individual Respondents.

C. Types of Sanction Appropriate

1. Market-Access Bans

[133] To achieve the requisite protective and deterrent effects, we conclude that the appropriate sanctions against each of the Individual Respondents must greatly restrict their respective access to the Alberta capital market. Market-access bans of the types sought by Staff are appropriate here. For the Individual Respondents – reflecting the roles in which they have acted in the past – these would include: orders denying them the ability to buy and sell securities and to use exemptions (notably those necessary for prospectus-exempt securities distributions); and bans on serving as directors or officers.

[134] The latter category of ban is inappropriate for Strategic and Cheshire as they are incapable of serving as directors or officers. However, the former category is appropriate for them. In addition, we consider that there should be no future trading in or purchasing of securities or exchange contracts of Strategic or Cheshire by anyone.

2. Administrative Penalty

(a) Nature of Administrative Penalty

[135] An administrative penalty involves the direct payment of money by a respondent to the Commission. It serves as an obvious specific deterrent and as an important general deterrent: it sends the message – both to the respondent who must pay and to others – that capital market misconduct comes at a direct economic cost, in addition to any other sanctions that might be ordered. Under section 199 of the Act, a hearing panel is

authorized to order the payment of an administrative penalty only when it: (i) determines that a person or company has contravened Alberta securities laws; and (ii) considers such an order to be in the public interest.

[136] Since amendments to the Act in 2005, section 199 now contemplates administrative penalties of not more than $1 million per contravention; prior to those amendments the cap was $100 000 per contravention.

(b) Administrative Penalty Appropriate

[137] We turn now to the question of whether it is in the public interest to order administrative penalties.

[138] We indicated above that the public interest in this case requires sanctions against each of Workum and Hennig that provide strong specific and general deterrence. We concluded above that market-access bans are called for here. Although we consider such bans against them an essential component of the appropriate sanctions, they are insufficient in the circumstances of this case.

[139] Given the extent and seriousness of the contraventions for which the Individual Respondents bore responsibility – flawed financial disclosure and market manipulations, both of which exposed investors and the Alberta capital market to harm – we believe it is imperative not only that the Individual Respondents be removed for significant periods from access to the capital market but also that they incur a sharp, direct monetary sanction. Any other result would, in our view, fail to provide the necessary specific and general deterrence.

[140] An administrative penalty is a direct, clear instrument of specific and general deterrence. Workum, as noted, correctly submitted that administrative penalties are available only in respect of contraventions of (or failures to comply with) Alberta securities laws; a finding that conduct was contrary to the public interest but did not contravene such laws would not suffice. He went further, arguing that "the magnitude of the administrative penalty should not be influenced by findings that fell short of being breaches of Alberta securities law". As an example, he contended that it would be improper to impose a significant, or any, administrative penalty in respect of only "a *de minimus* breach of the [Act]" when combined with findings of conduct contrary to the public interest.

[141] Workum was correct to note that administrative penalties can only be ordered in response to contraventions (breaches) of Alberta securities laws. As discussed above and at length in the Merits Decision, Workum and Hennig each committed multiple – and very serious – contraventions of Alberta securities laws. It is, therefore, clearly open to us in respect of these contraventions to order administrative penalties, and for them to be significant, if in the public interest.

[142] We do believe it to be in the public interest to order administrative penalties against both Workum and Hennig.

[143] We do not reach the same conclusion in respect of Strategic and Cheshire. They appear to have been conduits for others. We believe that essential – and sufficient – deterrence and protection can be provided by market-access bans against them as discussed.

[144] We turn now to our assessment of the extent or quantum of sanctions necessary.

D. Extent of Sanctions

1. Administrative Penalty: Applicable Maximum – Constitutional Challenges

[145] As noted, Staff sought administrative penalties of $1 million against Workum and $500 000 against Hennig, based on the current wording of section 199 of the Act. The Individual Respondents challenged our authority to issue such orders, as part of their submissions on their respective Constitutional Questions.

(a) Individual Respondents' Positions

[146] The Individual Respondents contended that applying the current wording of section 199 of the Act in this case would amount to improper retrospective application of law. They both referred to the *Canadian Charter of Rights and Freedoms* (the "Charter") and the *Alberta Bill of Rights*, R.S.A. 2000, c. A-14 (the "Alberta Bill of Rights"), with Workum focusing on the latter and Hennig on the former. In essence, both argued that the 2005 increase in the maximum amount of administrative penalty means that our sanctioning authority can no longer be fairly viewed as merely regulatory, but has instead become penal or punitive in nature. As Hennig phrased the Charter argument:

> . . . the [Act], both by the amendment of the sanction provisions [section 199] and as a consequence of the near exclusive use of the notice of hearing process for enforcement of contraventions by the Commission [as distinguished from a prosecution in court of securities law offences under section 194 of the Act], has elevated what would otherwise have been regulatory matters to the status of offences (for the purposes of section 11 of the *Charter*) or amount to an infringement on the security of the person (for the purposes of section 7 of the *Charter*).

[147] Hennig argued indirectly (in connection with his argument for delaying this portion of the proceeding), and Workum argued directly, that applying the 2005 amendment here would infringe the Alberta Bill of Rights by depriving the Individual Respondents of a protected property right, without "due process of law". Workum suggested an absence of due process here on several grounds: retrospective application of the 2005 amendment, which he suggested would be unfair; want of notice of Staff's intention to seek higher post-2005 administrative penalties (terming these two grounds

themselves as "a breach of natural justice and the requirements of procedural fairness"); and what he termed "institutional bias". The institutional bias that he alleged was an issue he had raised in an interim application during the merits portion of the hearing, and which we rejected at the time.

[148] From these various premises, one or other (or both) of the Individual Respondents contended that various consequences follow. First, were amended section 199 to be applied, it would be inappropriate to depart from evidentiary rules governing court proceedings – the specific departures mentioned being those set out in the Act at sections 29(e) ("the Commission . . . shall receive that evidence that is relevant to the matter being heard") and 29(f) ("the laws of evidence applicable to judicial proceedings do not apply"). The first portion of this proceeding not having been conducted under the more restrictive court-like rules of evidence, Hennig in particular suggested that we cannot apply section 199 as currently worded, which (according to both Individual Respondents) now amounts to a penal provision. Second, both Individual Respondents (Workum relying in part on the "due process" protection under the Alberta Bill of Rights) contended that this purported penal nature of amended section 199 precludes its application retrospectively to conduct that predated, or a hearing that commenced before, the amendment.

[149] Hennig and Workum (as mentioned, in connection with his Alberta Bill of Rights arguments) also argued, without explicit statutory reference, that it would be simply unfair to apply the 2005 amendment in this case. As Hennig's submissions phrased it, to apply the amendment to him would subject him "to penalties that were not permissible under the [Act] at the time of the occurrence of the transgressions for which he has been found liable". Workum indicated and Hennig implied that, had they known that they could be exposed to the higher post-2005 administrative penalties, they would or might have conducted their respective defences differently.

[150] In the result, the Individual Respondents took the position that, in assessing appropriate sanction, we cannot apply section 199 of the Act as currently worded, but can only apply the provision as it stood before the 2005 amendment, when it limited administrative penalties to a maximum of $100 000 per contravention.

(b) Staff Position

[151] Staff disagreed with the Individual Respondents. Staff argued that administrative penalties, including the new maximum implemented in 2005, are not punitive, citing jurisprudence as old as 1890 (*R. v. Wason*, [1890] O.J. No 50 (C.A.)) and as recent as 2008 (*Alberta Securities Commission v. Brost*, 2008 ABCA 326). Without conceding that an administrative penalty restricts the enjoyment of property, Staff challenged the "due process" argument on two bases: first, that there would be nothing unfair or otherwise improper in applying the 2005 amendment here; and second, for the reasons this panel gave in 2005, the Individual Respondents "have failed to support their

argument that the structure of the Commission itself gives rise to a reasonable apprehension of institutional bias" and failed also in their suggestions of panel bias (*Re Hennig*, 2005 ABASC 745 at para. 56). In short, Staff's position was that there was no barrier in this case to the application of amended section 199 of the Act.

(c) Intervener's Position

[152] The Attorney General, as intervener in respect of the Constitutional Questions, argued: first, that an administrative penalty "is not punitive in nature but is designed to protect the public" and that there is, therefore, "nothing inherently unfair in applying the revised provision to the [Individual Respondents]"; and second, that the retrospective application of amended section 199 of the Act "does not violate" section 1(a) of the Alberta Bill of Rights or section 7 or 11 of the Charter.

[153] Concerning the Alberta Bill of Rights arguments, the intervener, "[a]ssuming, without conceding, that an administrative penalty involves a restriction on one's ability to enjoy property", submitted that any such restriction "is in accordance with 'due process of law'". He cited, among other jurisprudence, concurring remarks of Ritchie J. in *Curr v. The Queen*, [1972] S.C.R. 889 at 916:

> . . . the phrase "due process of law" as used in s.1(a) [of the *Canadian Bill of Rights*, R.S.C. 1985, App III, which contained wording similar to that used in section 1(a) of the Alberta Bill of Rights] is to be construed as meaning "according to the legal processes recognized by Parliament and the courts in Canada".

[154] The relevant procedural rights, according to the intervener, are: (i) the right to notice of accusations; and (ii) an opportunity to make a defence or contest the governmental deprivation of rights.

[155] Concerning the Charter arguments, the intervener referred to *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 in submitting that:

> . . . an unlimited power to fine might be exercised for regulatory purposes and not to redress harm done to society at large. The *size* of an available administrative penalty does not demonstrate that a proceeding threatens penal consequences. [intervener's emphasis]

[156] He also referred to *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 at paras. 82-83 for his proposition that an administrative penalty, even up to $1 million, "is an economic consequence only and is not an 'intimate and personal choice'" of the sort, according to *Blencoe*, protected by section 7 of the Charter.

[157] Thus, the intervener too submitted that there is no barrier here to the application of amended section 199 of the Act.

(d) Analysis and Conclusions on Constitutional Questions

(i) Administrative Penalty Not Punitive

[158] It appeared to be common ground that laws with no penal consequences can be applied retrospectively. We first consider whether the administrative penalties contemplated by section 199 of the Act – to a maximum of $1 million per contravention – have such consequences.

[159] An administrative penalty is a regulatory tool that this Commission applies not to punish but rather to prevent or deter and, thereby, to protect. To serve those preventative and protective purposes, the quantum of an administrative penalty must in many cases be substantial. Neither this alone – nor the associated, indeed possibly essential, fact that a substantial administrative penalty may be keenly felt – converts a regulatory tool into a penal instrument. As the Court of Appeal of Alberta recently stated in *Alberta Securities Commission v. Brost*, 2008 ABCA 326 at paras. 54, 57:

> . . . Any penalty may well be regarded, from the perspective of the person on whom it is imposed, as punitive. This is understandable. However, simply because sanctions may have a punitive effect on the wrongdoer does not mean that they do not also serve a valid regulatory or administrative purpose. . . .
>
> . . .
>
> The Commission was correct to conclude that the presumption against retrospective application did not apply in this case because administrative penalties under the *Act* are not punitive but are instead designed to protect the public: . . . *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301, 57 D.L.R. (4th) 458 at 471-3, cited in *Re Morrison Williams Investment Management Ltd.* (2000), 7 ASCS 2888.

[160] The court noted that the case before it did not involve a constitutional challenge to amended section 199 of the Act. The quoted comments are thus not determinative of the issue before us; by the same token, the court's use of the term "punitive" in para. 54 was not a finding that an administrative penalty has the penal consequences alleged by the Individual Respondents here. The court clearly recognized that a respondent's perception of an administrative penalty – including its quantum – as punitive does not deprive it of its validity as a regulatory tool.

[161] Indeed, there will be circumstances in which too modest an administrative penalty could constitute little more than a nominal disbursement when compared to the amounts – sometimes in the millions of dollars – involved in improper capital market misconduct. Such an administrative penalty would then become a tolerable cost of doing business improperly rather than a real deterrent. We infer that it is for that very reason that the legislators saw fit to amend section 199 in 2005 to raise the maximum. The Court of Appeal of Alberta reached a similar conclusion in *Brost* (at para. 54):

> . . . The Legislature has conferred on the Commission jurisdiction for administrative penalties up to $1,000,000.00. This increase in the maximum amount of administrative penalty reflects a legislative intent that these penalties ought not to be so low that they amount to nothing more than another cost of doing business. It also signals the Legislature's intent that the Commission should fit the sanction to the circumstances, including the magnitude of the illegality and the need to encourage lawful conduct by those involved with securities.

[162] The 2005 amendment did not, in our view, convert a regulatory tool (the administrative penalty) into something else. Rather, the amendment merely represented a measured effort to maintain the utility and efficacy of the regulatory tool in recognition of economic and capital market reality. We conclude that section 199 of the Act as it reads today does not have "penal consequences" in the sense contended by the Individual Respondents and thus is not contrary to section 11 of the Charter.

[163] Therefore, we find that there is no barrier on this basis to applying the amended provision here.

(ii) Administrative Penalty Not Infringement

[164] We agree with the intervener that an administrative penalty is an economic consequence that does not attract the protection of section 7 of the Charter. We also agree with the intervener that an administrative penalty is not an "intimate and personal choice" within the meaning of *Blencoe* that attracts the protection of section 7. Thus, amended section 199 of the Act is not contrary to section 7 of the Charter and there is no barrier on this basis to applying the amended provision here.

(iii) Due Process Was Provided

[165] We make no finding as to whether an administrative penalty amounts to a deprivation of enjoyment of property within the meaning of section 1(a) of the Alberta Bill of Rights. It is unnecessary for us to do so. We consider that the intervener stated well the essential elements of "due process" for purposes of section 1(a). The point to be determined, in other words, is whether the Individual Respondents have been accorded the procedural rights to which they are entitled in accordance with "legal processes recognized by [the Alberta Legislature, in the present context]", to adopt the wording from *Curr*. Specifically, did the Individual Respondents have notice of the accusations (allegations) against them; and did they have an opportunity to "make a defence or contest a governmental deprivation of rights"? These two procedural rights will be readily recognized as forming the essence of procedural fairness and natural justice on which this Commission has frequently commented. These fundamental rights – essentially the right to a fair hearing – were also the subject of other aspects of the Individual Respondents' respective Constitutional Questions: as noted earlier, Workum (with whose arguments Hennig generally agreed) claimed that they did not have adequate notice that Staff would seek the application of amended section 199 of the Act; and

Workum raised (again) the spectre of a hearing tainted by bias. We consider these arguments in more detail.

(A) No Unfairness

[166] We do not consider it unfair to apply amended section 199 here. The four respondents here under consideration cannot claim to have been taken by surprise – and that, in context, could be the only basis for a claim of unfairness. As noted, it is an undisputed principle that a respondent must be given notice of the case to be met and the opportunity to make full answer and defence. This can include giving the respondent a fair appreciation of the nature of the consequences that might flow from adverse findings; that knowledge might affect how or even whether a respondent chooses to respond to allegations.

[167] The Notices of Hearing both commenced with an introductory paragraph in which it was stated that the "Commission [would] consider whether to make an order . . . pursuant to sections 198, 199 and 202 of the Act". Both before and after the 2005 amendment, section 199 dealt only with administrative penalties. Neither Notice of Hearing specified the terms of any orders that might be sought or ordered. Nor was that necessary. The wording of the Notices of Hearing sufficed to put all respondents on notice, from the outset, that an administrative penalty could result from the hearing if a finding of a contravention of Alberta securities laws was made against them.

[168] We do not believe that any of Workum, Hennig, Strategic and Cheshire could be said to have been misled when Staff ultimately refined their position and quantified the administrative penalties they sought. The Notices of Hearing did not specify any particular amounts; this case was quite distinct from that of *Re Ironside* in which the notice of hearing specified that Staff would be seeking administrative penalties in a particular amount. We believe that any reasonable respondent alerted to the prospect that it might be exposed, on conclusion of a hearing, to consequences under identified provisions would give continuing attention, until the proceedings concluded, to the terms of those provisions, including any changes or repeal. There is, in short, no unfairness in applying here, at the conclusion of this hearing, section 199 as it today reads.

[169] Finally, there is the important practical point that section 199, even as it read before June 2005, contemplated orders of potentially significant magnitude – a maximum of $100 000 per contravention. A respondent reading the two Notices of Hearing would see that Staff alleged many contraventions. Thus, all respondents knew from the outset that, were Staff to prevail in the merits portion of the hearing, they might ask that the respondents be ordered to pay potentially large sums, possibly multiples of $100 000 each. Staff today ask for orders that Hennig pay $500 000 and Workum $1 million. We find it difficult to appreciate how the quanta sought differ substantially from what might have been sought by Staff on a plain reading of the Notices of Hearing even if the pre-amendment cap were applicable. The Individual Respondents faced from the outset – as

they do today – the possibility of large administrative penalties. In our opinion, nothing has changed in that regard that could reasonably have altered their response to the allegations against them. Again, there is no unfairness.

[170] We conclude, therefore, that there has been no want of due process by reason of a denial of procedural fairness.

(B) No Bias

[171] Workum based his claim of a lack of due process by reason of bias on the same arguments he advanced in connection with an earlier application for the dismissal or perpetual stay of this proceeding: he alleged that the investigation, the structure and form of the Commission and an alleged controversy that attracted some publicity deprived the respondents of the prospect of a fair and impartial hearing. We heard that application in July 2005. Workum indicated that he would not repeat his submissions here, contending that the "the very same issues" would be engaged here and surmising that this panel would "presumably [reach] the same conclusion". Workum was correct in his surmise. Our analysis and reasons (set out in *Re Hennig*, referred to earlier) need not be repeated here. Our conclusion then was that the then-applicants failed to substantiate any of the grounds for their application and we therefore denied their application. No new evidence having been adduced to support their allegations, there is no basis for us to reach a different conclusion now that the Individual Respondents have extended the allegations to the issue of administrative penalty.

[172] We conclude, therefore, that there has been no want of due process by reason of institutional bias.

(e) Conclusion on Constitutional Questions

[173] For these reasons, we conclude that for the purposes of our sanction decision in this proceeding, it is appropriate that we apply section 199 in its current form, which specifies a maximum administrative penalty of $1 million per contravention of Alberta securities laws.

2. Appropriate Sanctions

(a) Workum

[174] We have concluded that the public interest demands significant sanctions, providing strong specific and general deterrence, be imposed on Workum. The first component of those necessary sanctions must, we believe, prevent him from again having access to the Alberta capital market through trading or distributing securities or exchange contracts, or exercising authority as a director or officer of an issuer. We consider that permanent cease-trade and denial-of-exemptions orders, and a permanent director-and-officer ban against him are necessary.

[175] Such significant orders alone would not, in our view, provide the requisite deterrence and protection. We believe that this will only be achieved if the sanctions against Workum include a sharp administrative penalty. As discussed, we have authority to order an administrative penalty against Workum of up to $1 million per contravention of Alberta securities laws. Staff sought a $1 million administrative penalty for all his contraventions together.

[176] In all the circumstances, and with a view to the purposes of sanction, we consider that an administrative penalty of that magnitude or more might be appropriate in the absence of market-access bans. However, given the significance of the market-access bans that we have concluded are necessary here, the quantum of administrative penalty need not be as great as it might be in isolation. Considering as a whole the combination of different sanctions to be imposed, we consider that an administrative penalty materially less than that sought by Staff – but still substantial, and much larger than that suggested by Workum – would serve the public interest. We conclude that an administrative penalty of $750 000, coupled with the market-access bans discussed, is in the public interest.

(b) Hennig

[177] Many of our comments concerning the sanctions appropriate for Workum apply equally to Hennig. The public interest requires significant sanctions that provide a strong specific deterrent to Hennig as well as general deterrence. We consider that the first component of the necessary sanctions must restrict Hennig (like Workum) from having access to the Alberta capital market through trading or distributing securities or exchange contracts, or through exercising authority as a director or officer of an issuer. Given his misuse of his position as an officer of PPI, we consider that the latter restriction on Hennig must, like that on Workum, be permanent.

[178] Again, though, even significant market-access bans alone would not provide the requisite deterrence and protection. In our view, to achieve these purposes the sanctions against Hennig must also include a sharp administrative penalty. Staff sought a $500 000 administrative penalty against Hennig.

[179] In all the circumstances, and recognizing that Hennig, however egregious his misconduct, for the most part played a lesser role than Workum, we conclude that the extent of the sanctions against him necessary to provide the requisite deterrence and protection is less than that required against Workum. As noted, there is one exception: given the positions he held with PPI and their connection to his misconduct, Hennig – like Workum – should never again serve as a director or officer.

[180] For these reasons, we conclude that it is in the public interest to order that Hennig be banned permanently from serving as a director or officer (or both) of any issuer; that

he be subject to 20-year cease-trade and denial-of-exemptions orders; and that he pay an administrative penalty of $400 000.

(c) Strategic and Cheshire

[181] Staff sought permanent cease-trade and denial-of-exemptions orders against Strategic and Cheshire, as well as orders that trading in or purchasing of Strategic and Cheshire securities cease.

[182] As we stated in the Merits Decision, Strategic and Cheshire were not unknowing victims of the improper trading in Newmex Shares, and could not disavow responsibility for the improper trading of Newmex Shares in their securities trading accounts. Both acted as conduits in the Individual Respondents' schemes. In so doing, both companies engaged in serious misconduct that exposed investors and the Alberta capital market to harm. We are of the view that neither Strategic nor Cheshire should again have access to Alberta investors and the Alberta capital market or ever be available for such use by others.

[183] We therefore conclude that permanent cease-trade and denial-of-exemptions orders against Strategic and Cheshire – and orders banning all trading in their securities or exchange contracts – are in the public interest.

VI. COSTS

A. Costs Sought

[184] In addition to seeking sanctions, Staff sought orders under section 202 of the Act that Workum, Hennig, Strategic and Cheshire pay costs of the investigation and hearing.

[185] Staff and Workum relied on their written submissions in the matter of costs. Hennig made no submissions directly on costs. As noted, neither Strategic nor Cheshire made any submissions.

1. Position of Staff

[186] Staff provided the panel with considerable detail concerning costs incurred in the investigation, in the first (merits) portion of the hearing and, to a more limited extent, in preparation for this final (sanction) portion of the hearing. This information included copies of invoices and time records.

[187] Staff indicated that investigation costs were $375 350.65 and hearing costs were $477 806.77 – a total of $853 157.42. After deducting $125 000 for costs paid by PPI pursuant to the PPI Settlement and making a further deduction of 20% (by our calculation it appears that Staff's written submissions reflected a deduction of approximately 21%, but for simplicity we will refer to it as a 20% deduction), Staff sought orders for payment of costs totalling $575 000 – $350 000 from Workum; $175 000 from Hennig; $25 000 from Strategic; and $25 000 from Cheshire.

2. Position of the Individual Respondents

[188] Workum conceded that some order for costs would be warranted, based on the findings in the Merits Decision (again reserving his right to appeal those findings). He suggested that an appropriate costs order against him would be $46 000, not the $350 000 sought by Staff (and, incidentally, that costs of $50 000 each against Strategic and Cheshire would be reasonable). Workum did not appear to question Staff's general approach to the issue of costs. However, he did challenge certain specific costs claimed and Staff's proposed allocation of costs among Workum, Hennig, Strategic and Cheshire.

[189] Hennig's submissions did not directly address costs, but perhaps meant to include costs in his written contention that the sanctions sought by Staff were "excessive and inappropriate".

B. Legal Principles

1. General Principles

[190] Our authority to award costs is grounded in section 202 of the Act and sections 191.1 and 191.2 of the Rules. Section 202 is engaged when, as here, a respondent was the subject of an investigation (section 202(1)) or hearing (section 202(2)) and we conclude that the respondent "has not complied with . . . any provision of Alberta securities laws" or "has not acted in the public interest". In such circumstances, we may order "costs of the investigation" and "costs of or related to the hearing that are incurred by or on behalf of the Commission", all subject to the regulations.

[191] The relevant regulations – here, sections 191.1 and 191.2 of the Rules – provide:

> **191.1** Where the Commission or the Executive Director orders under section 202(1) of the Act that the costs of the investigation be paid by a person or company whose affairs were the subject of an investigation, the costs awarded may include one or more of the following:
>
> (a) not more than $50 per hour for each staff member engaged in the investigation;
> (b) the actual amount of the fees and disbursements of a person appointed or engaged under section 28, 41 or 43 of the Act to a daily maximum of $2000;
> (c) the actual amount of the witness examination costs;
> (d) the actual amount of the court reporters' fees;
> (e) the actual cost of the transcripts;
> (f) the costs of legal services to a maximum of $300 per hour for each lawyer involved;
> (g) the disbursements and the incidental costs incurred in respect of the investigation.
>
> **191.2** Where the Commission or the Executive Director orders under section 202(2) of the Act that the costs of or related to a hearing be paid by a person or company whose

affairs were the subject of the hearing, the costs awarded may include one or more of the following:

(a) not more than $50 per hour for time spent by each staff member of the Commission in respect of the hearing or on matters preliminary to the hearing;
(b) the actual amount of the fees and disbursements paid to a person appointed or engaged under section 28, 41 or 43 of the Act to a daily maximum of $2000;
(c) the reasonable costs of witnesses, other than a witness referred to in clause (b), required to attend at the hearing;
(d) the reasonable costs for the services of a lawyer acting as counsel to a daily maximum of $2000;
(e) the costs to the Commission to administer the hearing, including fees paid to Commission members, court reporter fees, transcripts and disbursements required to conduct a hearing to a maximum of $2500 for each day or partial day of hearing;
(f) the reasonable costs incurred for each expert or person engaged as an advisor assisting in the hearing to a maximum of $300 per hour.

[192] Our power to award costs is not a sanctioning power. The purpose of a costs order is not to protect investors and the capital market, or to deter future misconduct in the capital market; nor is it to punish. The purpose of a costs order is, rather, for the Commission to recover costs – funded ultimately by market participants – that it has incurred during the enforcement process. Discretion in respect of costs orders enables a hearing panel to recognize parties' contributions to the efficient administration of the enforcement process (for example, by ordering lesser cost recovery against a cooperative respondent) and thereby, indirectly, encouraging efficiency in other proceedings. As this Commission stated in *Re Capital Alternatives Inc.*, 2007 ABASC 482 at paras. 111-13 (appeal dismissed *Alberta Securities Commission v. Brost*, 2008 ABCA 326):

> As a preliminary point, costs are distinct from sanctions. An order for costs is nothing more than a mechanism for recovery of certain costs that have been expended in an enforcement investigation or hearing. Decisions to order costs turn not on a reapplication of the sanctioning factors discussed above, but rather on whether or to what extent the respondent contributed to the investigation and to the efficient resolution, one way or the other, of the allegations. This is not to say that respondents ought not to mount a defence if they wish; doing so is not, by itself, properly viewed as impeding the efficient resolution of a matter.
>
> The Commission has not, traditionally, ordered full recovery of costs. However, it has the power to do so, within the limits set by the Rules.
>
> We think it appropriate to recognize that the Commission, as a self-funding regulatory body, derives its financial resources from market participants. Costs incurred by Staff in investigations and enforcement hearings may therefore be considered to be borne, at least indirectly, by market participants. In general, we believe that it is appropriate that a respondent, who has been found to have contravened the Act or acted contrary to the public interest, pay at least some of the costs of the investigation and hearing. That is not

> an invariable rule, and even where we make such an order the quantum of the order will vary from case to case. The extent to which a respondent's conduct in an investigation or hearing has tended to facilitate (or impede) the resolution of issues and moderate (or exacerbate) the cost of doing so can be highly pertinent to the determination of appropriate costs orders. Indeed, we believe that a respondent's contribution (or otherwise) to the effectiveness of an investigation and the resolution of allegations will generally be the principal determinant of costs orders.

[193] As set out there, although Alberta securities laws authorize us to order full recovery of costs, we are mindful of the public interest in ensuring that respondents in an enforcement proceeding are accorded fairness and natural justice. Depending on the circumstances, this consideration can affect a hearing panel's determination of what quantum of costs should be paid. As this Commission said in *Re Ironside* (at para. 162):

> The Respondents argued that we must be careful not to award costs of such magnitude that they would deliver "a crushing financial blow" as "exorbitant [costs] may deny an investigated person a fair chance to dispute allegations of professional misconduct" – see *K.C. v. College of Physical Therapists of Alberta* (1999), 244 A.R. 28 at para. 94 (C.A.). We agree that it would be inappropriate to inhibit a respondent's potential defence by creating an environment in which excessive costs awards are feared. We are also cognizant, as was recognized by the Ontario Court of Appeal in *Donnini v. Ontario Securities Commission* (2005), 76 O.R. (3d) 43 at para. 86, that a "costs award, especially a massive one, is about real money for a real person". At the same time, it is not appropriate to reduce a costs award to the point at which respondents become undeterred from abusing the hearing process. . . .

2. Application of the Principles to the Facts

[194] Each of Workum, Hennig, Strategic and Cheshire was found, in the Merits Decision, to have contravened Alberta securities laws and acted contrary to the public interest. Costs were incurred in investigating their conduct and in bringing the matter before a hearing panel.

[195] The Individual Respondents contested vigorously the allegations against them. That is the right of a respondent and, by itself, has no particular bearing on the appropriate costs order. More germane here is the manner in which Workum, Hennig, Strategic and Cheshire behaved, both during the investigation and in the hearing. As the Merits Decision makes clear, the facts underlying this case were complex, spanning many years, involving many individuals and organizations in more than one country, and a great many issues. None of these four respondents – despite having the necessary knowledge and access to information – appeared to have done anything at all to clarify or simplify the facts or the issues. Had they done so, the investigation and hearing might have been considerably expedited, in turn reducing the costs and, conceivably, warranting reduced costs orders.

[196] Far worse than a lack of cooperation, Workum and Hennig did their best to obfuscate matters and, we found, they deliberately deceived Staff. Much of the extent,

duration and cost of the investigation – and to a large extent, the extent, duration and cost of the ensuing hearing – was directly attributable to this appalling behaviour. Strategic and Cheshire did not contribute to inefficiency in the same way, but their lack of participation did nothing to further the efficiency of the hearing process. All of this, we conclude, should be reflected in our costs orders.

[197] As to the manner in which the Individual Respondents conducted themselves once the hearing had begun, there is no doubt that the motions and interlocutory applications brought by one or the other of them added to the complexity and length of the hearing process. In many instances we found no merit in the positions they took. That said, their conduct during the hearing – through their legal counsel or otherwise – was not unprofessional or unbecoming. While we are not convinced that all their motions and applications were necessary, we are disinclined in the circumstances to regard their conduct during the hearing as having impeded the process in the sense relevant to costs orders.

[198] We considered also the role of Staff in the investigation and hearing. The case presented by Staff was involved, and the panel was obliged to review in detail a mass of documentary evidence. A more focused approach might in theory have led to a shorter and simpler hearing. However, given the Individual Respondents' behaviour in the investigation, we find it difficult to fault Staff for the complexity of the investigation or hearing or both. We do not consider Staff's role a ground for reduction in any costs orders. Much was made by Workum of Staff's reliance on one particularly unreliable source-turned-witness, Olnick. In this regard, as we discuss in more detail below, we do discern a basis for some reduction in costs otherwise recoverable.

[199] For these reasons, we believe it appropriate to order recovery of a considerable portion of the costs incurred in the investigation and hearing. We now discuss specific aspects of our analysis. We deal first with the potentially recoverable costs under each of the investigation and hearing categories, then discuss any appropriate reductions and discounts from the potentially recoverable costs to reach the recoverable costs. Finally, we allocate the recoverable costs among Workum, Hennig, Strategic and Cheshire.

C. Potentially Recoverable Costs

1. Investigation and Hearing Costs

[200] As set out above, we may order payment of costs incurred in an investigation, a hearing or both. Because of the nature of enforcement proceedings, some aspects of the investigation often continue after the hearing has commenced. Consequently, the time demarcation between the investigation and hearing can be somewhat arbitrary. Here, Staff chose 21 November 2003 as the appropriate demarcation date – costs incurred on or before 21 November 2003 were allocated to the investigation and costs incurred after 21 November 2003 were allocated to the hearing. Workum appeared not to dispute that date. Accordingly, we accept 21 November 2003 as an appropriate demarcation date

between the investigation and the hearing for costs purposes (the "Demarcation Date"), except for costs incurred after this date that are shown to have been investigation-related.

[201] We accept Staff's representations that the costs claimed were in relation to this matter (despite the vague and often unhelpful descriptions in the material, which we address through a discount).

2. Components of Investigation Costs

[202] Staff set out $375 350.65 in investigation costs, claimed under various parts of section 191.1 of the Rules. Staff's breakdown of investigation costs was as follows:

Commission investigators	$267 342.50
Incidental costs	$10 189.97
Court reporter fees and transcripts	$13 851.68
Witness examination costs	$121.50
Commission legal services	$83 845.00
Total	**$375 350.65**

[203] In support of claimed Commission investigator and legal fees, Staff tendered what appear to be Staff-prepared summaries of time and cost attributed to their work (we will refer to them as "time-charts").

(a) Commission Investigators

[204] As noted, Staff ascribed $267 342.50 to time incurred by Commission investigators.

[205] Workum remarked on the vagueness of the time-charts and the difficulty of determining when work was done. He also pointed out an apparent error in that one entry was dated "8 February 2001", when no investigation was under way; Staff acknowledged that this was a typographical error – the entry should have read "8 December 2001". Workum urged us to reduce permissible costs for Commission investigators by 5% to account for this and other possible errors.

[206] In respect of Workum's concern about "vague" descriptions of work performed, we consider the time-chart descriptions – although certainly brief, even cryptic – to convey adequately the following important information: that work was done; the general nature of the work; by whom it was done; the date on which or period in which it was done; the amount of time spent; and the dollar amount per hour attributed to the work. There being no evidence to the contrary, we accept that the time entries were made in good faith and with reasonable accuracy (albeit possibly with some inadvertent errors to which Workum alluded) and thus fairly reflected time spent and costs incurred in this

investigation. (We apply the same reasoning in respect of hearing-related time-charts and costs.)

[207] We note that some work in this category, although performed by Commission investigators, was done after 21 November 2003 and was quite clearly hearing-related. These amounts should properly be categorized under hearing costs. The amounts are: "Service" on 27 October 2004 ($25.00); "Prepare", "Meeting", "Research", "Comments" and "Review" recorded between 28 November 2003 and 23 July 2004 ($7937.50); and "Comments", "Research", "Prepare", "Review", "Drafting", "Meeting" and "Interview" recorded between 8 December 2003 and 29 January 2007 ($7837.50). Accordingly, we subtract these amounts (totalling $15 800.00) from the total potentially recoverable investigation costs and add them to the total potentially recoverable hearing costs.

[208] Conversely, costs of $812.50 recorded on 5 July 2003 for a Commission investigator's time, accounted for under hearing costs, should properly have been included under investigation costs. We have made that adjustment.

[209] Therefore, $252 355 for Commission investigators is potentially recoverable as investigation costs.

(b) Incidental Costs

[210] As noted, Staff ascribed $10 189.97 to "incidental costs".

[211] Workum claimed that some charges should, by their dates, be categorized as hearing costs rather than investigation costs. He referred specifically to courier charges dated between 13 August 2004 and 22 December 2006 (Staff's written material indicated that these totalled $488.83, and Workum used this sum in his submissions; although our calculations suggested the total was rather less, in this discussion we adopt the amount used by the parties since no unfairness to the respondents results, as will be seen). We also considered a witness summons invoice dated 2 September 2004 ($51.45); court searches requested on 23 June 2005 and 29 September 2006 ($40.00); photocopying invoices dated from 19 December 2003 to 12 April 2006 ($1014.44); and a process service invoice dated 3 May 2006 ($42.00).

[212] We conclude that the evidence does not suffice to demonstrate that these costs were investigation costs. We therefore exclude these costs, totalling $1636.72, from this category. Two of those costs (totalling $93.45) – for a witness summons and process service – we discuss below in respect of hearing costs. It was not clear that the other costs identified (totalling $1543.27) fall within any of the categories of allowable hearing costs set out in section 191.2 of the Rules; we therefore exclude them from further consideration.

[213] We note that Workum disputed $859.44 claimed for travel for Staff counsel to interview Olnick in July 2004. This travel occurred after the Demarcation Date and there was no evidence to demonstrate that it was a cost of the investigation. We are not persuaded that this type of cost falls within any of the categories of allowable hearing costs set out in section 191.2 of the Rules. Accordingly, we exclude this cost from this category and from further consideration.

[214] Therefore, $7693.81 is potentially recoverable as incidental investigation costs.

(c) Court Reporter Fees and Transcripts

[215] Staff sought $13 851.68 in costs for court reporters and transcripts.

[216] Workum disputed a charge for providing a copy of a transcript to Olnick's counsel. Staff agreed to withdraw the claimed $234.

[217] Workum noted that Staff included court reporter and transcript costs from September 2004 until March 2006 as investigation costs. He claimed that these were incurred during the hearing phase but were not hearing administration costs. The reference was apparently to amounts bearing invoice dates from 10 September 2004 to 17 January 2006 totalling $932.50; and a total of $1176.63 invoiced on 29 March 2006 (together, $2109.13). Although the invoice dates fall after the Demarcation Date, Staff represented that these costs "were incurred in relation to the investigation" and noted that certain of the transcripts appeared as evidence in the hearing. We are persuaded that, despite the dates, these costs pertained to the investigation and are potentially recoverable as such.

[218] Therefore, $13 617.68 for court reporter fees and transcripts is potentially recoverable as investigation costs.

(d) Witness Examination Costs

[219] Workum took no issue with the witness examination costs, and we are satisfied that they are potentially recoverable investigation costs in the amount of $121.50.

(e) Commission Legal Services

[220] Workum did not take issue with the $83 845 claimed by Staff under this heading, except for the issue of time that was apparently spent to transfer the file from investigative legal counsel to hearing legal counsel. To account for the inherent duplication, Workum sought a discount of 10% of the claimed costs of some hearing-related legal services. We consider this issue below.

[221] Therefore, $83 845 for Commission legal services is potentially recoverable as investigation costs.

(f) Total Potentially Recoverable Investigation Costs

[222] Based on the above, $357 632.99 is potentially recoverable as investigation costs.

3. Components of Hearing Costs

[223] Staff identified a total of $477 806.77 in hearing costs, claimed under section 191.2 of the Rules. Staff's breakdown of hearing costs was as follows:

Commission investigators	$5762.50
Commission legal services	$379 657.50
Witness examination costs	$776.32
Hearing administration fees (Commission member fees and court reporter)	$91 610.45
Total	**$477 806.77**

(a) Commission Investigators

[224] Workum took no issue with the $5762.50 claimed by Staff for investigators attending the hearing. However, as noted, some of the amounts Staff claimed in this category for the investigation should properly have been considered hearing costs and vice versa. Accordingly, we add $14 987.50 ($15 800.00 - $812.50) here.

[225] Therefore, $20 750 for Commission investigators is potentially recoverable as hearing costs.

(b) Commission Legal Services

[226] Staff identified $379 657.50 as costs of legal services for the hearing.

[227] As mentioned, Workum sought a 10% discount of some hearing-related fees for legal services, citing duplication in effort in transferring the file from investigative legal counsel to hearing legal counsel. Staff noted that possible duplication in transferring the file from former to current legal counsel was included in the 20% discount that Staff proposed. Presumably, Staff intended this to cover duplication arising from the transfer of the file from investigative legal counsel to hearing legal counsel. We agree that a discount is appropriate but address that later in this decision. No specific adjustment is made at this stage.

[228] Workum also objected to the $2000 daily maximum in the Rules being applied lawyer by lawyer, rather than as a cap for costs of all Staff lawyers who recorded time on a particular day. However, Staff argued that the phrase "a lawyer" in section 191.2(d) of the Rules does not limit the number of lawyers for whom Staff may claim costs and that the daily maximum may apply to each lawyer acting as counsel. Workum also contended that several Staff legal counsel did not "[act] as counsel" during the hearing within the meaning contemplated by section 191.2(d) of the Rules. The claim for those lawyers was $41 145. Staff countered that those lawyers "provided research and other legal support

work in the proceeding" and that, had they not, counsel who appeared at the hearing would have had to perform that work at greater cost.

[229] We agree with Staff's interpretation of section 191.2(d) of the Rules on this point. In a complex legal case (which this has been) it is not uncommon to see a party represented by more than one lawyer, with good reason. Members of a legal team may quite properly perform different functions (some presenting the case, others assisting in various ways in the hearing room or behind the scenes), and this may in fact add efficiency. There is no prescribed or implied limit under Alberta securities laws on the size of a Staff legal team engaged on a file and hence no invariable limit on the number of lawyers for whom costs are recoverable. It is conceivable that a respondent could persuade a hearing panel that the participation of one or more of the members of a Staff legal team was somehow unnecessary and corresponding cost recovery therefore inappropriate, but that has not been shown in this case.

[230] Workum also submitted that Staff's materials contained some entries that were likely errors. For example, an entry dated 27 November 2006 for 21.5 hours meant either there was an error on its face or the maximum of $2000 was exceeded for that day. Staff acknowledged an error in that those hours were actually worked over several days and thus the $2000 daily maximum was not exceeded. We accept Staff's representations on this point.

[231] Staff also claimed amounts for the legal services of three lawyers relating to a freeze order (applicable to several persons and companies) and appeals from that order. Staff stated that the "freeze orders [sic] were sought in the public interest, and their appropriateness affirmed on appeal. Appeals and applications to vary or revoke the orders were necessarily responded to by Staff, and as such are allowable costs in this matter". Workum submitted that the "freeze orders [sic] and other matters were not part of the hearing for which Staff . . . can seek costs".

[232] We do not consider that a global statement can be made as to whether or not freeze orders form part of a hearing (or investigation). Each case will be fact-specific. Factors to consider may include timing and the manner in which such matters arose and proceeded. In this case, the freeze order in question predated the hearing. While it almost certainly was initiated in response to information or concerns that came to Staff's attention in connection with their investigation, it is not clear from the facts before us that it was a part of the investigation. As to the subsequent appeals or proceedings relating to the freeze order, it is similarly not clear to us that they were part of the hearing as distinct from being simply adjuncts to the freeze order itself. Accordingly, in the circumstances we agree with Workum that costs of legal services relating to this freeze order are not recoverable hearing costs. Neither Staff nor Workum quantified these costs. The "other matters" to which Workum referred were neither clearly identified nor quantified. In the

circumstances, we consider $20 000 a reasonable amount and therefore deduct that amount.

[233] Therefore, $359 657.50 for Commission legal services is potentially recoverable as hearing costs.

(c) Witness Examination Costs

[234] Workum took no issue with the witness examination costs, and we are satisfied that they are potentially recoverable hearing costs in the amount of $776.32.

[235] As discussed, Staff had included, as investigation costs, $51.45 for a witness summons invoiced on 2 September 2004 and $42.00 for process service invoiced on 3 May 2006. We are persuaded that these two items related to the hearing and are potentially recoverable hearing costs.

[236] Therefore, $869.77 for witness examination costs is potentially recoverable as hearing costs.

(d) Hearing Administration Fees

[237] Workum accepted the amount of fees charged for panel member Bennis.

[238] However, Workum contended that "real time" (live feed) transcripts were not "required" for the administration of the hearing within the meaning contemplated by section 191.2(e) of the Rules, and thus that their $15 364 cost, as calculated by Workum, should not be recoverable. We disagree. Live feeds of the transcripts assist panel members (and counsel who also avail themselves of this service) in clarifying, or providing an opportunity for the panel to identify and seek timely clarification of, spoken remarks. They are thus part of the administration of the hearing and, like other hearing administration costs, are recoverable.

[239] Workum noted that the court reporter invoices show an "internal split" of amounts charged to "Litigation" (a reference, he implied and we agree, to Staff) and "Panel" respectively. He argued that the amounts allocated to the former (a total of $12 280.50 by his calculations) should not be recoverable. Staff submitted that the split was for "internal Commission budgeting and expense recording purposes". Our review of these invoices indicates that, in making this unofficial split, Staff always allocated court reporter hourly charges ("Hearing - Regular Hours") to "Litigation" and almost all other court reporter, transcript and "Realtime" amounts to "Panel". The amounts disputed by Workum thus appear to be primarily base rate charges by the court reporting service. All the amounts under "Litigation" are unquestionably costs of administering the hearing and recoverable as such.

[240] Therefore, $91 610.45 for hearing administration fees is potentially recoverable as hearing costs.

(e) Total Potentially Recoverable Hearing Costs

[241] Based on the above, $472 887.72 is potentially recoverable as hearing costs.

D. Recoverable Costs

[242] Some further adjustments to the potentially recoverable costs of $830 520.71 ($357 632.99 + $472 887.72) are appropriate. We consider three areas of adjustment necessary.

1. Potential Errors and Duplication

[243] First, we agree with Workum's contention (which Staff acknowledged) that the identified costs include amounts resulting from clerical or administrative errors, or possible duplication of work (for example, overlap on the transfer of files among Staff counsel). Given the nature of these concerns and the difficulty of identifying with precision any actual errors or duplication, it is not practical to generate a specific list of items and corresponding costs to be deducted. Staff asserted that these concerns were satisfactorily addressed by their proposed global 20% reduction of the total costs otherwise determined. We consider this sort of global reduction a practical and fair response, with this caveat: what seems to be in doubt or in contention is time expended by Staff, so the appropriate global reduction should apply only to the categories of investigation and hearing costs for which time-charts were relevant.

[244] We are satisfied that a 20% global reduction – applied to the categories "Commission investigators" and "Commission legal services", for both the investigation and the hearing – fairly addresses these concerns raised by Workum. Accordingly, we deduct $143 321.50 from the total potentially recoverable costs calculated above.

2. Other Respondents

[245] The second area that we believe warrants adjustment relates to some of the original respondents – Lexington, Ashland and PPI (as noted, PPI, an original respondent, settled the allegations against it in 2003). Workum suggested that costs of $250 000, $50 000 and $50 000 should be attributed to PPI, Lexington and Ashland, respectively, while Staff suggested that $125 000 be so attributed to PPI and that any allocation to Lexington and Ashland "be measured in the same way" as the allocation to Strategic and Cheshire (for which, as noted, Staff sought costs orders of $25 000 each).

[246] Costs were obviously incurred in investigating all of the original respondents, including PPI, Lexington and Ashland, and in pursuing the merits portion of the hearing against Lexington and Ashland. We do not consider that Workum, Hennig, Strategic and Cheshire should be ordered to pay costs attributable to Staff's pursuit of the other three respondents. Staff did not adjust costs expressly to reflect those attributable to these

other three respondents, but simply reduced Staff's total claim for costs by the amount of costs ($125 000) that PPI agreed to pay under the PPI Settlement. While attractive in its simplicity, we do not consider this approach entirely supportable in principle because it risks conflating the calculation of costs incurred with a computation of costs recoverable or ultimately recovered. As was the case with the issue of errors and duplicative work, we have insufficient information to identify with precision the exact costs attributable to these other three respondents, but we consider that a fair and practical response is to apply a reduction to otherwise potentially recoverable costs in all categories. We consider a global reduction of 20% of the potentially recoverable costs calculated above – $166 104.14 – reasonable.

3. Olnick

[247] The third area of adjustment relates to Workum's contention, in essence, that no hearing costs attributable to Olnick should be recoverable owing to Olnick's unreliability as a witness and our rejection of all his testimony. Staff countered that findings related to Olnick and his trading were important and that the panel ultimately made findings that "mirrored" Olnick's testimony.

[248] We are sympathetic to Workum's contention. Olnick proved to be a very poor witness; his performance in the hearing was most unhelpful, to say the least. We took that into account in the Merits Decision. That does not, however, mean that Olnick-related hearing costs were never incurred, nor demonstrate that all or any of such costs were improperly incurred.

[249] That said, we consider that Olnick's conduct in the hearing created inefficiency. Given the link between hearing efficiency and costs orders, and given that Olnick was a Staff witness, it follows that this is a ground for reducing the quantum of hearing costs otherwise recoverable from the respondents. Staff did not quantify the Olnick-related hearing costs and we are not in a position from the information that was provided to do so ourselves. We accept Workum's suggestion that otherwise potentially recoverable hearing costs be reduced to reflect Olnick-related inefficiency, and we accept Workum's proposal that this be done by a discount of 15%. Accordingly, we reduce the potentially recoverable hearing costs calculated above by a further $70 933.16.

4. Adjusted Recoverable Costs

[250] After making the adjustments discussed, the costs that we consider to be properly recoverable total $450 161.91, which we round to $450 000. But for one further consideration specified below, we believe it appropriate to make orders under section 202 of the Act for the payment of the full amount of such costs. We turn now to the allocation of such costs among Workum, Hennig, Strategic and Cheshire.

E. Allocation of Costs

[251] Staff, as noted, sought orders for costs totalling $575 000 – $350 000 from Workum; $175 000 from Hennig; $25 000 from Strategic; and $25 000 from Cheshire. Workum contended that costs orders of $46 000 against him and $50 000 against each of Strategic and Cheshire would be more appropriate in light of the circumstances and our findings in the Merits Decision. Hennig had no specific proposal.

[252] As a preliminary point, we stress again that costs orders are not sanctions. We made significant distinctions among Workum, Hennig, Strategic and Cheshire in our conclusions on sanction including, as between Workum and Hennig, significantly different durations of certain market-access bans and significantly differing quanta of administrative penalty. However, because costs orders are not sanctions, our reasons for making those distinctions are of no assistance in our present task of allocating costs. In allocating costs our purpose is not deterrence; the most important factor is the respective contribution of the parties to the efficiency or otherwise of the enforcement process in which they were involved.

[253] Although findings were sustained against Strategic and Cheshire, these pertained to only a portion of the several allegations considered in the hearing. Although we found them culpable, they were largely tools or conduits of others. More importantly, their roles in the hearing – and, we infer, also in the investigation – were limited in comparison to the roles of the Individual Respondents. We therefore agree with Staff's position that the portion of the costs payable by Strategic and Cheshire should be much less than that payable by the Individual Respondents. As between Strategic and Cheshire, there is no basis for us to differentiate in the matter of costs. We are satisfied that Staff's proposed allocation of $25 000 in costs to each is reasonable.

[254] We believe that the remainder of the adjusted recoverable costs are properly recoverable from the Individual Respondents.

[255] All the allegations were sustained against both Workum and Hennig and thus there is no preliminary basis for treating them differently in respect of costs. In allocating the remaining adjusted recoverable costs, therefore, we start from the premise that – except to the extent we find differing contributions to efficiency as between them – each of the Individual Respondents bore an equal responsibility for the costs, and this should be reflected in our costs orders.

[256] We discerned no difference between the Individual Respondents' respective conduct in the hearing that would justify differentiation on costs. Concerning the investigation, we noted that their deceptions to Staff contributed to inefficiency and, it follows, increased costs. In that regard, it may be relevant that Workum had been the guiding mind of PPI and bore the greater measure of responsibility for the Individual Respondents' overall misconduct. It might follow that Workum also should bear greater

responsibility for this specific aspect of the misconduct, which had a direct bearing on increased costs. On the other hand, the evidence did not show that Hennig was less active than Workum in deceiving Staff. On balance, we are not persuaded that this is a basis for differentiating in respect of costs as between the Individual Respondents.

[257] Applying only the principles discussed above, our conclusions would have justified a costs order of $200 000 against each of the Individual Respondents. We note, though, that Staff sought differing orders, of $350 000 for Workum but only $175 000 for Hennig; we are reluctant to order against Hennig the payment of more costs than Staff had sought.

[258] We therefore conclude that it is reasonable to order that Workum pay $200 000 and that Hennig pay $175 000 in costs. These amounts, together with the $50 000 allocated above to Strategic and Cheshire, provide for the recovery of all but $25 000 of the adjusted recoverable costs.

VII. ORDERS

A. Sanctions and Costs

[259] For the reasons given we make the following orders:

Workum

[260] In respect of Workum, we order in the public interest:

- under sections 198(1)(b) and (c) of the Act that he cease trading in or purchasing any securities or exchange contracts and all of the exemptions contained in Alberta securities laws do not apply to him, permanently;
- under sections 198(1)(d) and (e) that he resign all positions he holds as a director or officer of any issuer and is prohibited from becoming or acting as a director or officer (or both) of any issuer, permanently; and
- under section 199 that he pay an administrative penalty of $750 000.

[261] We also order under section 202 of the Act that Workum pay $200 000 of the costs of the investigation and hearing.

Hennig

[262] In respect of Hennig, we order in the public interest:

- under sections 198(1)(b) and (c) of the Act that he cease trading in or purchasing any securities or exchange contracts and all of the exemptions contained in Alberta securities laws do not apply to him, for 20 years from the date of this decision;
- under sections 198(1)(d) and (e) that he resign all positions he holds as a director or officer of any issuer and is prohibited from becoming or acting as a director or officer (or both) of any issuer, permanently; and
- under section 199 that he pay an administrative penalty of $400 000.

[263] We also order under section 202 of the Act that Hennig pay $175 000 of the costs of the investigation and hearing.

Strategic

[264] In respect of Strategic, we order in the public interest:

- under section 198(1)(a) of the Act all trading in or purchasing cease, permanently, in respect of any securities or exchange contracts of Strategic; and
- under sections 198(1)(b) and (c) that Strategic cease trading in or purchasing any securities or exchange contracts and all of the exemptions contained in Alberta securities laws do not apply to it, permanently.

[265] We also order under section 202 of the Act that Strategic pay $25 000 of the costs of the investigation and hearing.

Cheshire

[266] In respect of Cheshire, we order in the public interest:

- under section 198(1)(a) of the Act all trading in or purchasing cease, permanently, in respect of any securities or exchange contracts of Cheshire; and
- under sections 198(1)(b) and (c) that Cheshire cease trading in or purchasing any securities or exchange contracts and all of the exemptions contained in Alberta securities laws do not apply to it, permanently.

[267] We also order under section 202 of the Act that Cheshire pay $25 000 of the costs of the investigation and hearing.

B. Interim Orders and Freeze Order Rescinded

[268] There is in existence an interim cease-trade order against Workum, Hennig, Strategic, Cheshire, Lexington and Ashland issued on 21 August 2002, which was extended on 5 September 2002 "until further order" and subsequently varied on several occasions. We direct that this order expire with the issuance of this decision.

[269] Workum and Hennig are also subject to an interim director-and-officer ban issued on 18 September 2002, which was extended on 3 October 2002 "until the hearing of the matter is concluded and a decision rendered" and subsequently varied. This order expires by its terms with the issuance of this decision.

[270] In respect of the extant order freezing property of Strategic, Cheshire, Lexington and Ashland issued on 20 August 2002 and subsequently varied (this freeze order originally applied to Workum, Hennig and another party as well but has since been revoked as it applied to them and their property), we urge Staff to consider whether this order should continue to apply.

[271] This proceeding is now concluded.

18 December 2008

For the Commission:

"original signed by"
Glenda A. Campbell, QC

"original signed by"
Jerry A. Bennis, FCA

"original signed by"
Stephen R. Murison