ALBERTA SECURITIES COMMISSION

DECISION

Citation: Cloutier, Re, 2014 ABASC 2 **Date: 20140102**

Ronald Theodore Cloutier, Venture Contractors Ltd., Viva Communications Ltd., Sunterra Resource Audit Equipment Ltd. and Sunterra Seismic Inc.

Panel:	Ian Beddis Daniel McKinley, FCA
Appearing:	Deanna Steblyk and Taryn Montgomery for Commission Staff Ronald Theodore Cloutier for himself and all other Respondents
Submissions Completed:	17 October 2013
Date of Decision:	2 January 2014

I. INTRODUCTION

[1] In a 24 May 2012 notice of hearing (the **NOH**), staff (**Staff**) of the Alberta Securities Commission (the **Commission**) allege that five respondents (collectively, the **Respondents**) – Ronald Theodore Cloutier (**Cloutier**), Venture Contractors Ltd. (**Venture**), Viva Communications Ltd. (**Viva**), Sunterra Resource Audit Equipment Ltd. (**SRAE**) and Sunterra Seismic Inc. (**SSI**, and, together with the other corporate Respondents, the **Corporate Respondents**) – breached Alberta securities laws and acted contrary to the public interest. Staff thus seek orders against the Respondents under sections 198, 199 and 202 of the *Securities Act* (Alberta) (the **Act**).

[2] Specifically, Staff (having withdrawn certain of their original allegations) allege that:

- the Respondents illegally traded in and distributed securities in Alberta contrary to sections 75(1)(a) and 110(1) of the Act and the public interest;
- the Respondents made misleading or untrue statements to investors contrary to section 92(4.1) and the public interest;
- the Respondents engaged in a course of conduct relating to securities that they knew or ought to have known perpetrated a fraud on investors contrary to section 93(b) and the public interest;
- Cloutier, Venture and Viva made a prohibited representation that investment money would be refunded contrary to section 92(1)(b) and the public interest;
- Cloutier, Venture and Viva engaged in the unfair practice of putting unreasonable pressure on investors contrary to sections 92(3)(d) and 92(5)(a) and the public interest;
- Cloutier failed to comply with a Commission order contrary to section 93.1 and the public interest; and
- Cloutier authorized, permitted or acquiesced in the breaches of the Act by the Corporate Respondents.

II. BACKGROUND AND HISTORY OF THIS PROCEEDING

[3] On 3 August 2010 the Commission issued a temporary order (the **Interim Order**) prohibiting all trading in the Respondents' securities, and prohibiting the Respondents from trading in all securities and using all exemptions under Alberta securities laws. The Interim Order was extended until the hearing of the matter is concluded and a decision is rendered, unless otherwise ordered.

[4] The hearing into the merits of Staff's allegations (the **Merits Hearing**) commenced on 10 June 2013.

[5] Staff called 12 witnesses at the Merits Hearing. Nine of Staff's witnesses were Alberta-resident purchasers (whom we identify by their initials to protect their privacy interests). Staff also called as witnesses: Staff investigator Vi Pickering (**Pickering**); Staff investigative accountant Nicole Chute (**Chute**); and a former employee (the **Shell Employee**) with Shell Canada Energy (**Shell**; its dealings with some of the Respondents are discussed below).

[6] Among the exhibits entered in evidence by Staff are excerpts of transcripts of investigative interviews of Cloutier, Daniel Pacholik (**Pacholik**), Brenda Scott (**Scott**), Bruce Youb (**Youb**), Jory Gibeault (**Gibeault**), Michael Zaruba (**Zaruba**) and Rand Stevenson (**Stevenson**), all of whom were interviewed under oath by Staff (and in one case Ontario Securities Commission staff) and some of whom had counsel in attendance while being interviewed.

[7] Cloutier attended the Merits Hearing, representing and testifying on behalf of himself and the Corporate Respondents. Cloutier called two witnesses on behalf of all Respondents: Staff investigator Gus Gallucci (**Gallucci**); and Pacholik, who was the vice-president of operations for Cell Bridge Communications Corp. (**Cell Bridge**).

[8] We also received written submissions from Staff, and from Cloutier on behalf of all Respondents.

[9] Former Vice-Chair Glenda Campbell, QC, who was a member of the panel designated to conduct the hearing of this proceeding, was appointed a Justice of the Court of Queen's Bench of Alberta on 8 November 2013. This decision was therefore made by the two remaining panel members, Ian Beddis and Daniel McKinley, FCA.

[10] For the reasons discussed below, we find that each of the Respondents breached sections 75(1)(a), 110(1), 92(4.1) and 93(b) of the Act. We find that Cloutier, Venture and Viva breached sections 92(1)(b) and 92(3)(d), and that Cloutier breached section 93.1. We also find that the associated conduct was contrary to the public interest. We further find that, as a director and officer, or de facto director and officer, of the Corporate Respondents, Cloutier authorized, permitted or acquiesced in their breaches of the Act.

[11] This proceeding will thus move to a second phase to determine what, if any, orders ought to be made against the Respondents.

III. EVIDENTIARY MATTERS

A. Standard of Proof

[12] The onus is on Staff to prove their allegations on a balance of probabilities. The evidence presented must be sufficiently clear, convincing and cogent to satisfy this standard of proof (*F.H. v. McDougall*, 2008 SCC 53 at paras. 40, 46).

B. Hearsay Evidence

[13] Relevant hearsay evidence is admissible in Commission enforcement hearings, provided that the rules of natural justice and procedural fairness are observed. We have determined the

weight, if any, to give to any hearsay evidence before us, by examining its content and considering indicators of its reliability, such as its consistency with other evidence before us.

IV. THE EVIDENCE

A. The Respondents

1. The Corporate Respondents

[14] According to Alberta Corporate Registration System (**CORES**) records:

- SSI was incorporated in Alberta on 28 March 2006;
- Youb was SSI's sole director from incorporation until 1 November 2006, when Cloutier became its sole director;
- Cloutier at some point became SSI's sole shareholder; and
- SSI was struck on 2 September 2008 for failure to file annual returns but revived on 17 November 2008.

[15] In marketing material (the **SRAE/SSI Marketing Brochure**), SSI held itself out as having the "Exclusive Marketing and Distribution Rights to the Patented, Proprietary Technologies and the Trademark '**The EYE'TM** for Canada and the Territories" (emphasis in original), with its "clients . . . looking to [it] to provide oil, gas and environmental seismic reports". The Eye was described as consisting of "totally passive electromagnetic subsurface detection devices and imaging systems" that had "successfully demonstrated the basic ability to detect subsurface structures, particularly those of geological interest".

[16] According to CORES records:

- SRAE was incorporated in Alberta on 28 March 2006;
- Youb was SRAE's sole director from incorporation until 1 November 2006, when Cloutier became its sole director;
- Cloutier at some point became SRAE's sole shareholder; and
- SRAE was struck on 2 September 2008 for failure to file annual returns but revived on 17 November 2008.

[17] SRAE held itself out as being in the business of selling undivided fractional interests in certain equipment and in a licence agreement with SSI.

[18] According to CORES records, Venture was incorporated in Alberta on 14 August 2007, with Cloutier its sole director and shareholder.

[19] Venture held itself out as being in the business of selling "Softphone" equipment it legally or beneficially owned or was entitled to so own (the **Venture Softphones** or **Softphones**)

– described as "a voice over internet protocol . . . software application that allows the end user software devices to transmit session initiation protocol . . . packet data over the internet thus enabling two (2) way voice communications". In a brochure titled "VIVA COMMUNICATIONS" (the **Viva Brochure**), Venture was described as the "Exclusive supplier of Equipment to VIVA".

[20] According to CORES records, Viva was incorporated in Alberta on 14 August 2007, with Cloutier its sole director and shareholder.

[21] In the Viva Brochure, Viva held itself out as having built a "communication software framework" that was "licensed globally" to it, which Viva, using Venture Softphones, would provide to identified "Targeted Accounts" – "Hyper Office", "Sales Force", "Hockey Canada", "Churches", "Unions" and "Network Marketing Companies". Viva also held itself out as providing its software (the **Viva Software**) in conjunction with Venture Softphones to customers requiring emergency response or mass callout systems.

2. Cloutier

[22] Cloutier, an Alberta resident, told us that his primary occupation from about 2006 has been with SRAE and SSI and then Venture, Viva and Cell Bridge. Cloutier also told us that he previously worked in the construction, technology and health food sectors and in so doing raised money for a few start-up ventures.

[23] Cloutier testified that Youb incorporated SRAE and SSI and was initially the sole director and shareholder of each, but it was Cloutier's and Youb's joint decision "to structure it this way". Cloutier testified that he became the chief executive officer (**CEO**), president, sole director and sole shareholder of each company and the sole signatory for each company's bank accounts when in November 2008 he purchased SRAE and SSI from Youb, despite the share sale agreements in evidence being made as of 1 November 2006 and CORES records stating that Cloutier became, and Youb ceased to be, a director of each company on that date. Cloutier explained that he had not noticed the 2006 dates when he signed the share sale agreements, "in . . . haste", in November 2008. (Gallucci testified that he did not see any associated share certificate.) Cloutier confirmed that, from SRAE's and SSI's incorporation, he and Youb were joint decision-makers "[o]n most things" and he (Cloutier) played an active role in the companies and was, with a few exceptions, solely responsible for the companies' fundraising.

[24] Cloutier testified that he incorporated Venture and Viva and, from their incorporation, was their CEO, president, sole director and sole shareholder. He testified that he developed the business model for these companies and was solely responsible for their fundraising. He also told us that, from Venture's and Viva's incorporation, he was the sole signatory for their bank accounts.

[25] Cloutier testified that he purchased the assets of Cell Bridge from Scott. Cloutier testified – testimony consistent with CORES records – that he incorporated Cell Bridge in December 2007 and, from its incorporation, was its CEO, president, sole director and sole shareholder. He also told us that, from Cell Bridge's incorporation, he was the sole signatory for its bank accounts.

[26] The evidence is clear, and we find, that Cloutier was a director and officer, or de facto director and officer, of each of the Corporate Respondents. The evidence is also clear, and we find, that Cloutier was a – or the – guiding mind of each of the Corporate Respondents, and that he bore primary, if not sole, responsibility for all fundraising activities undertaken by each of the Corporate Respondents. The evidence is also clear, and we find, that Cloutier was the guiding mind of Cell Bridge. A corporation can only conduct its activities through its guiding mind. As such, what its guiding mind did, knew or reasonably ought to have known can likewise be ascribed to the corporation.

3. No Registration or Filings

[27] According to a certificate issued under section 218 of the Act on 5 June 2013 – and confirmed by Cloutier – none of the Respondents or Cell Bridge was registered under the Act (or its predecessor) from 1989, and since 1997 no prospectus, offering memorandum or report of exempt distribution has been filed in accordance with the Act in relation to a distribution of securities of any of the Respondents or Cell Bridge.

B. The SRAE/SSI Model

1. Staff Investigators' Evidence

(a) Overview

[28] Pickering spoke with or interviewed some of those that paid money to SRAE (the **SRAE/SSI Purchasers**) for the purchase of units (the **SRAE Units** or **Units**). She, together with Gallucci, also interviewed Cloutier on 3 and 30 June and 29 and 30 September 2010 (the **Cloutier Interview**) and Youb on 4 November 2010 (the **Youb Interview**) and obtained documentation.

[29] Pickering provided an overview of the "business income" model offered by SRAE and SSI to prospective SRAE/SSI Purchasers (the **SRAE/SSI Model**). According to the totality of the evidence, pursuant to the SRAE/SSI Model:

- SRAE sold SRAE Units – undivided fractional interests in certain equipment SRAE owned or was entitled to own (the **SRAE Equipment**) and in a licence agreement to be entered into between SRAE and SSI – to the SRAE/SSI Purchasers for $10 000 per Unit plus GST, with SRAE retaining title to the SRAE Equipment as trustee for the SRAE/SSI Purchasers.

- Under the licence agreement, SRAE would license SSI to use the SRAE Equipment to operate SSI's computer software or intellectual property (the **SSI Software** or **The Eye**, and, together with the SRAE Equipment, the **SRAE/SSI Equipment**).

- SSI would offer its customers, such as oil and gas companies, use of the SRAE/SSI Equipment, with a portion of the revenue earned from such use flowing back to SRAE, from which would be paid the promised return to SRAE/SSI Purchasers (the **SRAE/SSI Return**).

[30] Pickering told us her investigation revealed – consistent with statements made by Youb in the Youb Interview – that Youb was responsible for marketing, and finding customers to use, the SRAE/SSI Equipment, for office management and for "deal[ing] with intellectual property".

(b) The SRAE/SSI Agreements

[31] Staff obtained most, if not all, of the documents titled "Ownership Agreement" (the **SRAE/SSI Agreements**), all substantially the same, used in raising money for SRAE and SSI. Using the SRAE/SSI Agreements obtained by them, Staff prepared a summary of the SRAE/SSI Purchasers that bought SRAE Units from 25 October 2006 through 10 May 2007. Staff also obtained a document identifying SRAE/SSI Purchasers that bought SRAE Units from 4 April through 31 December 2006. We are satisfied, having regard to these documents, that from 4 April 2006 through 10 May 2007 SRAE and SSI raised in excess of $2.6 million, including GST, from the sale of SRAE Units to almost 80 SRAE/SSI Purchasers.

[32] Gallucci testified that all but one or two of the SRAE/SSI Agreements obtained by Staff had been signed by Cloutier on behalf of SRAE. Cloutier entered in evidence eight SRAE/SSI Agreements and four associated Bills of Sale not signed on behalf of SRAE by Cloutier or (in some cases) by anyone. Six of these SRAE/SSI Agreements had apparently been witnessed by a Glen Meaver (**Meaver**), one of these six had apparently been signed by Youb on behalf of SRAE, and the Bills of Sale associated with four others had apparently been signed by Youb on behalf of SRAE. Cloutier also entered in evidence a 26 January 2009 "Memorandum Recording a Settlement" between SRAE (per Cloutier) and Meaver, with recitals referencing Meaver's sale of a "specified number" of SRAE Units. Having regard to the evidence in totality, we are satisfied, and we find, that Meaver, and perhaps Youb, were involved to a limited extent in SRAE's and SSI's fundraising.

[33] Under each SRAE/SSI Agreement, SRAE sold an undivided interest in "Equipment" (the SRAE Equipment) and a "Licence Contract" for a purchase price of $10 000 per "Unit" (SRAE Unit) plus GST in consideration for which the SRAE/SSI Purchaser (also called the "Beneficial Owner") was to receive a "Return On Investment" (the SRAE/SSI Return) of $70 000 per Unit, or 700%. According to the SRAE/SSI Agreement, each SRAE Unit represented "an undivided [1/250] ownership interest" in the SRAE Equipment. The SRAE Equipment was identified by four serial numbers in a schedule to the SRAE/SSI Agreement, apparently in reference to four separate units of seismic equipment.

[34] The SRAE/SSI Agreement stated that, on receiving payment from the SRAE/SSI Purchaser, SRAE would provide to the purchaser a bill of sale. The SRAE/SSI Agreement provided that SRAE would hold "legal title" to the SRAE Equipment "as bare trustee and agent for" the SRAE/SSI Purchaser, with SRAE appointed as the "exclusive agent to do all things . . . for and on behalf of" the SRAE/SSI Purchaser and "the other Beneficial Owners" regarding the SRAE Equipment. The SRAE/SSI Agreement also provided that SRAE's appointment as agent could be terminated by written resolution executed by "[t]he Beneficial Owners holding, in aggregate, [250] Units in the [SRAE] Equipment" – that is, apparently, by all SRAE/SSI Purchasers. Under the SRAE/SSI Agreement, after the SRAE/SSI Purchaser had received the SRAE/SSI Return, SRAE had the option to repurchase the SRAE Equipment from the purchaser.

[35] Pickering testified that none of the SRAE/SSI Purchasers with whom she spoke took possession of the SRAE Equipment they purchased.

[36] The SRAE/SSI Agreement described the "Licence Contract" as a "license agreement . . . in which [SRAE] grants to SSI a license to use the [SRAE] Equipment with the [SSI] Software for the purposes of generating revenue" from SSI's customers "for the use, licencing, or rental of the [SRAE/SSI Equipment]". In consideration for use of the SRAE Equipment, SSI would pay to SRAE 30% of the "Gross Software and Equipment Revenue derived from the use of the [SRAE] Equipment by SSI with the [SSI] Software". It was from this "Gross Software and Equipment Revenue" that SRAE/SSI Purchasers were to be paid the SRAE/SSI Return.

[37] Gallucci testified that, in response to the "only tax questions . . . asked or even investigated regarding this case", Cloutier admitted in the Cloutier Interview that he "collected GST and didn't pay it to the government".

(c) Marketing Material

[38] Pickering told us that SRAE/SSI Purchasers with whom she spoke had received the SRAE/SSI Marketing Brochure from Cloutier.

[39] The SRAE/SSI Marketing Brochure, which was undated, included the following statements:

> **THE BUSINESS INCOME PLAN:**
>
> [SSI] has entered into a License Agreement with [SRAE] to provide [SSI] with all the equipment to operate [SSI's] software. SRAE will be able to earn business income from the use of this equipment under the Sunterra License Agreement with SRAE.
>
> **THE EQUIPMENT OWNERSHIP AGREEMENT:**
>
> The SRAE Ownership Agreement provides all of the Beneficial Owners of the equipment with the ability to earn business income by way of a License Fee. The License Fee is based on Thirty Percent (30%) of the Gross Revenue of [SSI's] software and SRAE's fees that are charged to a third party on a project by project basis. All of the terms and conditions are set out in the SRAE Equipment Ownership Agreement . . . .
>
> **EQUIPMENT OWNERSHIP UNITS**
>
> The Investor purchases Equipment Ownership Units in **"The EYE"™** Project.
>
> Each Ownership Unit earns Business Income for the Owner of the Equipment Ownership Unit.
>
> Maximum of 250 Equipment Ownership Units will be sold in **"The EYE"™** Project under this Equipment Ownership Agreement.
>
> **EQUIPMENT OWNERSHIP UNITS HOLDERS BUSINESS INCOME:**
>
> The initial cash flow to the Ownership Unit Holders is projected to start in July and continue on a monthly basis until all of the Ownership Unit Holders have earned the maximum amount of Business Income set out in each individual's Ownership Agreement.

> At $9,000 per hour for eight (8) hours per day is $72,000 revenue per day. The Ownership Unit Holders would receive 30% of this revenue. This would be $21,600 per day or $86 per Ownership Unit per day.
>
> . . .
>
> Four (4) systems working, at $86 per Ownership Unit per day, per system, would earn $344 per day per Ownership Unit. So in 204 days the Ownership Unit Holder would earn $70,000 per Ownership Unit. Then [SSI – this, according to the SRAE/SSI Agreement, should be SRAE] would purchase the Equipment back from the Ownership Unit Holder for $10,000 per Ownership Unit.
>
> [SSI] is currently responding to [a] Request for Proposal . . . on over 1,000,000 acres in Canada. Our clients are looking to [SSI] to provide oil, gas and environmental seismic reports. This would represent over four (4) years of work for one system working 365 days per year.
>
> **SALES CYCLE OF EQUIPMENT OWNERSHIP UNITS:**
>
> **Unit Sales Cycle:**
>
> > 250 Equipment Ownership Units may be sold in this Unit Sales Cycle.
> >
> > A purchase of the Equipment Ownership Unit for $10,000 will earn $80,000 in Business Income per Equipment Ownership Unit.
> >
> > The Company currently has commitments from several interested parties to purchase all available Equipment Ownership Units, including a qualified major Investor to purchase a minimum of 60 Ownership Units ($600,000).

[40] During her investigation Pickering uncovered no evidence of any request for proposal (an **RFP**), or that SSI had any customers, anyone was committed to purchase "all available Equipment Ownership Units" or a "qualified major Investor" wanted to purchase at least 60 Units. Pickering testified, however, that SRAE/SSI Purchasers with whom she spoke mentioned Cloutier telling them that SSI had "an agreement in place" with a Musselman Oil or an individual from Texas named Johnny Musselman (**Musselman**).

[41] Pickering made notes (the **Pickering Notes**) immediately after she completed activities during her investigation of the Respondents. The Pickering Notes, entered as an exhibit, included notes of telephone conversations and emails. Referring to the Pickering Notes, Pickering testified that Youb sent her an email indicating Musselman had given "access to his lands" for testing of The Eye, and providing contact information for its two American developers Fred Eichelberger (**Eichelberger**) and Jim Cullen (**Cullen**). Pickering also testified about a 1 December 2010 telephone conversation she had with Cullen. According to the Pickering Notes, Cullen told Pickering that: he and Eichelberger had developed The Eye "to a point that they thought it would be viable technology"; he, Eichelberger and Cloutier had twice tested The Eye on Musselman's property and "the test results were good", but "there was no pending contract between Cloutier and Musselman"; Cloutier had paid Cullen and Eichelberger about $300 000 or $400 000 to complete The Eye's development; Cloutier was to have paid them a final $100 000 in December 2008 "to help finish the development" but did not; and "[t]hey ran out of money and nothing had progressed on the technology or use of it for 2 years".

(d) Source and Use of Money

[42] Pickering obtained records pertaining to bank accounts held by the Respondents and Cell Bridge (the **Identified Accounts)**:

- one Canadian dollar account (the **SRAE Account**) and one United States (**US**) dollar account (the **SRAE US$ Account**, and, together with the SRAE Account, the **SRAE Accounts**) SRAE had with Royal Bank of Canada (**RBC**), with activity therein from 3 April or 7 July 2006, respectively, through 20 July 2009;

- one Canadian dollar account (the **SSI Account**) and one US dollar account (the **SSI US$ Account**, and, together with the SSI Account, the **SSI Accounts**) SSI had with RBC, with activity therein from 3 April or 7 July 2006, respectively, through 19 August 2009;

- one Canadian dollar account (the **Venture Account**) Venture had with ATB Financial (**ATB**), with activity therein from 27 August 2007 through 30 April 2010;

- one Canadian dollar account (the **Viva ATB Account**) Viva had with ATB, with activity therein from 27 August 2007 through 30 April 2010, and another (the **Viva TD Account**, and, together with the Viva ATB Account, the **Viva Accounts**) it had with TD Canada Trust (**TD**), with activity therein from 13 April through 30 September 2010;

- one Canadian dollar account (the **Cell Bridge ATB Account**) Cell Bridge had with ATB, with activity therein from 25 March 2008 through 30 April 2010, and another (the **Cell Bridge TD Account**, and, together with the Cell Bridge ATB Account, the **Cell Bridge Accounts**) it had with TD, with activity therein from 27 April through 7 October 2010; and

- four Canadian dollar accounts Cloutier had (the **Cloutier Accounts**) – two with ATB, with activity therein from 14 May 2007 through 30 April 2010 (the **Cloutier ATB Account #1)** and from 30 April through 14 May 2007 (the **Cloutier ATB Account #2**), and another two he had with TD, with activity therein from 14 April through 17 October 2010 (the **Cloutier TD Account #1)** and from 30 April through 30 September 2010 (the **Cloutier TD Account #2**).

[43] Having reviewed the banking records obtained, Chute prepared several analyses, including analyses of the source and use of money for the SRAE Accounts (the **Analysis for the SRAE Account** and the **Analysis for the SRAE US$ Account**, respectively), analyses of the source and use of money for the SSI Accounts (the **Analysis for the SSI Account** and the **Analysis for the SSI US$ Account**, respectively), and an analysis of the source and use of money for the Identified Accounts titled "Consolidated Source and Use Analysis for all Bank Accounts - 95% Coverage" (the **Analysis for All Accounts**).

[44] Concerning the "Cash Inflows" set out in the Analysis for the SSI Account, Pickering testified that she was unable to determine why SRAE, which was to have received money from SSI under the SRAE/SSI Agreement, had paid $2 082 150 to SSI, and why Viva, which she understood had no business relationship with SSI, had paid $1 031 500 to SSI.

[45] Concerning the Analysis for All Accounts, Pickering testified about several recipients of money from SSI. Pickering understood that:

- Essential Concepts Inc. (**Essential**), Mairead LLC (**Mairead**) and P - 4 LLC (**P-4**) were companies connected to Eichelberger and Cullen;

- Isource Communications Corp. (**Isource**) was a company owned by Youb "related to a phone card business";

- Packetara Communications Inc. (**Packetara**), a distributor of "softphones", had a licensing agreement or agreements with Youb under which he sold softphones to Cell Bridge or Viva;

- "D. Faber Prof Corp/Faber and Assoc./Faber and Co" (the **Faber Companies)** provided accounting services;

- Johnston Ming Manning LLP (**Johnston Ming**) was the law firm that, according to Cloutier, had prepared the SRAE/SSI Agreements and the documents titled "Sale and Management Agreement" (the **Venture/Viva Agreements**) used in raising money for Venture and Viva – money paid to Venture by those that purchased Venture Softphones (the **Venture/Viva Purchasers**, and, together with the SRAE/SSI Purchasers, the **Purchasers**); and

- Cambridge Management Group Inc. (**Cambridge**) was a company connected to Cloutier that had since been struck.

[46] Pickering also understood that four of the payments, totalling $169 000, were to "investors" – identified in other evidence as SRAE/SSI Purchasers. According to Pickering, Cloutier told her that these payments were "a loan to the investors", and not principal repayment or the SRAE/SSI Return. Consistent with this, Gallucci testified that "there were loans back to some investors" – SRAE/SSI Purchasers and Venture/Viva Purchasers.

[47] Gallucci testified that, to his knowledge, SSI earned no revenue.

(e) Youb's Evidence

[48] In the Youb Interview, Youb stated that:

- He told Cloutier about the "technology", which, Youb understood, had been used by an individual – DH – to locate "subsurface material" for the military.

- He believed that Eichelberger and Cullen were working on "[DH's] technology" and its commercialization.

- He had heard of DH when either Eichelberger or Cullen had telephoned Youb inquiring whether "there was anybody in this oil country that would be interested in this kind of technology".

- Cloutier said "he knew how to do the business model to make this work", and Youb "knew how to set up a company . . . and a bank account so that . . . ultimately [Youb] would end up with some amount of the marketing for international stuff".

- He incorporated SRAE and SSI, but he sold the companies to Cloutier under agreements dated 1 November 2006, and he ceased working with Cloutier in approximately July 2008.

- He had a background in sales and marketing, but, concerning the marketing he was to do in relation to the SRAE/SSI Model, he "[n]ever got to that".

- The "machines were there, they worked", but there were "[n]o paying customers" or "clients" because "[n]obody believed the results" and no oil companies wanted to buy in.

- He never spoke to any oil companies, but "[t]here was one oil guy down in Texas" named Musselman who allowed testing of the SRAE/SSI Equipment on his land; however, there were no funds transferred to, or received by Youb, from Musselman.

- His view was the SRAE/SSI Equipment was not "commercially working" – "it just didn't seem to be a viable business" in that "[t]here wasn't customers coming to buy the thing".

- He saw or knew of only one contract or agreement between Eichelberger and SSI – a "pay as you go kind of thing" – concerning the SRAE/SSI Equipment.

- He saw the four pieces of SRAE Equipment "owned" by Cloutier, as well as two other pieces.

- SRAE and SSI each had a bank account, all money deposited to the former came from SRAE/SSI Purchasers, and he was the sole signatory for each until, apparently, approximately July 2008.

- Although he understood Cloutier was collecting GST from SRAE/SSI Purchasers, Youb did not remit any GST to the Canada Revenue Agency (the **CRA**) "because [Cloutier] didn't want to pay it".

- He – despite having no experience in the oil business or knowledge about the technology – and Cloutier worked on the SRAE/SSI Marketing Brochure; some of the content about the technology came from DH.

- He understood that the $9000-per-hour revenue from use of the SRAE/SSI Equipment, as set out in the SRAE/SSI Marketing Brochure, was based on what other seismic companies were charging per hour for use of their equipment, and that the associated calculations followed a mathematical model used for renting a motor home.

- He understood that the $344 per day to be earned per SRAE Unit, as set out in the SRAE/SSI Marketing Brochure, was "the maximum potential" to be earned with "four machines working on contracts full time".

- He believed that the calculations of revenue from use of the SRAE/SSI Equipment, as set out in the SRAE/SSI Marketing Brochure, were based on 50% of what it would normally cost "to have seismic done", not on what was charged for use of the SRAE/SSI Equipment, for which there were no contracts in place; and he agreed that the revenue set out in the SRAE/SSI Marketing Brochure was projected revenue premised on contracts for the SRAE/SSI Equipment being in place.

- As far as he knew, SSI earned no revenue.

2. Chute's Evidence

(a) General

[49] Chute testified that the Analysis for All Accounts was "the final high-level summary of the source and use of funds for all of the analyzed accounts", reflecting all money deposited to and paid out of the Identified Accounts, with approximately 95% of the money being categorized and the remainder (approximately 5%) representing a consolidation of miscellaneous small amounts received and paid out.

[50] According to the Analysis for All Accounts, $10 724 242.95 in total was deposited to the Identified Accounts, of which $9 342 047 (87.11%) came from "Investors" – the Purchasers, and those among them that also lent money to Cloutier personally (the **Lenders**) – and $89 047.08 (0.83%) came from Shell. Chute told us that as of 7 October 2010 only $13 056.78 in total remained in the Identified Accounts.

[51] Chute calculated that, based "on the amount raised from investors", approximately $550 000 in GST would have been owing to the CRA by SRAE and Venture. Chute testified that, apart from payments to the CRA and the Receiver General of Canada (the **Receiver General**) totalling $96 460.84, "at least" $20 000 of which was apparently "applied to [Cloutier's] personal account", she saw no evidence of GST remittances.

[52] According to the Analysis for All Accounts, $280 480.30 in total was paid out of the Identified Accounts to Cloutier – "either taken in cash or deposited to an account that was not listed in our analyzed accounts".

(b) Source and Use of Money by SRAE and SSI

[53] The Analysis for the SSI Account showed "Cash Inflows" and "Cash Outflows", each totalling $3 462 826.69, with no money remaining by 24 August 2009. Among the money deposited was: $296 800 from SRAE/SSI Purchasers; $2 082 150 from SRAE; $1 031 500 from Viva; and $3356.10 from the SSI US$ Account. Among the payments out were the following:

- $674 898.80 in total to Mairead ($605 985.60), P-4 ($54 806) and Essential ($14 107.20), three companies connected to Eichelberger and Cullen;
- $346 584.65 to Youb, $85 775 to the Youb-owned company Isource, and $65 000 to the Youb-connected company Packetara;
- $341 271.88 to an RBC Visa (the **RBC Visa**) – according to Chute, both SSI and Youb "were on the Visa account";
- $289 172 to Cloutier, and $40 006.50 to the Cloutier-connected company Cambridge;
- $130 548.50 to Robert Smylski (**Smylski**);
- $54 019.50 to Meaver;
- $47 864.30 to the Faber Companies;
- $41 312.13 in total to the CRA ($9006.50) and the Receiver General ($32 305.63); and
- $7000 to Johnston Ming.

[54] The Analysis for the SSI US$ Account showed "Cash Inflows" and "Cash Outflows" in Canadian dollars, each totalling $63 657.94, with no money remaining by 24 August 2009. Among the money deposited was: $49 620.50 from SRAE; and $14 031.44 from Essential. Among the payments out were: $28 271.60 to Mairead; $10 833.97 to Cloutier; $3388.94 to the SSI Account; $1434.27 to the RBC Visa; and $1118.98 to Youb.

[55] The Analysis for the SRAE Account showed "Cash Inflows" and "Cash Outflows", each totalling $2 115 572.98, with no money remaining by 24 July 2009. At least $2 079 500 of the money deposited was from SRAE/SSI Purchasers. Among the payments out were: $2 082 150 to SSI; $7880 to Cloutier; and $2000 to Meaver.

[56] The Analysis for the SRAE US$ Account showed "Cash Inflows" and "Cash Outflows" in Canadian dollars, each totalling $50 801.54, with no money remaining by 7 August 2009.

Almost all of the money deposited came from two individuals, but Chute was unable to determine who they were. Among the payments out was a payment of $49 620.50 to SSI.

3. Cloutier's Evidence

[57] Cloutier testified that the SRAE/SSI Model and the Venture/Viva Model were similar.

[58] He told of hearing from Youb about Cullen and Eichelberger, and their efforts at developing The Eye.

[59] Cloutier testified that he and Youb – who "had more of a technical mind" – created "this partnership", with Youb responsible for dealing with Cullen and Eichelberger in developing The Eye and Cloutier responsible for raising the money: "I went out and raised the money. . . . I sold it."

[60] Cloutier testified that The Eye was tested in Texas on one of five Musselman-family ranches that had oil wells on them. Cloutier explained that Musselman planned to use The Eye to identify ranchland with oil, which he would then buy from the proceeds of an expected "huge financing" which "to this date . . . never took place". Nonetheless, Cloutier indicated that the Texas test generated a "database of information [used] to develop The Eye's software", and that Cullen and Eichelberger continued development work.

[61] In the Cloutier Interview, Cloutier told Staff that by December 2008 or January 2009 development work on the technology had reached the stage of readiness for "the geophysicist's report phase", but that phase did not go forward, primarily because of funding issues. Still, at the Merits Hearing, Cloutier testified that "with some working capital" they "can bring this forward . . . and further develop [The Eye] so that it becomes a credible and recognized technology".

[62] In describing the business model he had developed (using the Venture/Viva Model as an example), Cloutier explained that equipment (in this context, the SRAE Equipment) would be sold by its owner (SRAE) to purchasers (the SRAE/SSI Purchasers). The SRAE Equipment would then be managed and marketed by SSI on behalf of the SRAE/SSI Purchasers to generate income for them, on which they would be taxed.

[63] Cloutier explained to prospective SRAE/SSI Purchasers – partly by reviewing with them the SRAE/SSI Marketing Brochure – how revenue would be generated to pay them the SRAE/SSI Return. Cloutier in his testimony explained his presentation to prospective SRAE/SSI Purchasers as follows:

> . . . for every . . . [$]10,000 you put in, you can earn a [$]70,000 return on that [$]10,000. I think everybody said, That's too good to be true. And I said, Let me walk through the presentation behind how this happens, is that you're buying equipment; that equipment is earning you $70,000 of income, which is taxable in your hands, and so you've got to pay tax on it. And you're going to get that money from 30 percent of the gross revenue shared among all other equipment owners, and when you make that $70,000, then I buy that equipment back off of you . . . . And at any time you can ask for the equipment, which then terminates the contract.
>
> . . .

> . . . the biggest complaint I got is, Why does the contract terminate[?] And I said, Because I just generated you $70,000 of income, more than you could earn on any $10,000 investment that I know of, that you could put into the stock market. And you're relying on the growth of that share or me taking this equipment and going to work for you. You came down to the same trust, whether you gave the money for the share or gave the money to buy the equipment, it came down to you had to believe that I would go to work and do this.
>
> In buying back the equipment at the end of the deal, after they got their money, . . . I had all the company to myself and all the revenue at that point, and through all of this, and even up to today, the company has no liability. And the reason is -- that we can do this is that we're selling -- re-selling our software technology in service, and we have very little cost of goods.

[64] In the Cloutier Interview, Cloutier had explained that the indicated $70 000 return on each $10 000 Unit purchased under an SRAE/SSI Agreement represented "what I was prepared to pay", which in turn was based on a contract he hoped to enter into with Musselman. Cloutier could not recall specifically how much Musselman was to pay for the use of the SRAE/SSI Equipment, but declared that it was "in the range of $100 million". Cloutier said that there were other people interested "if we could show them proof that it worked".

[65] Cloutier elaborated on how SRAE/SSI Agreements would terminate. Once an SRAE/SSI Purchaser had received $70 000 per SRAE Unit under an SRAE/SSI Agreement, that agreement would end and SRAE had the option to buy back the purchaser's SRAE Equipment, failing which it would remain the purchaser's. Cloutier testified that, in his presentations to prospective SRAE/SSI Purchasers, he represented that SRAE would buy back the SRAE Equipment.

[66] Cloutier testified that the representations in the SRAE/SSI Marketing Brochure that SSI "is currently responding to [a] Request For Proposal . . . on over 1,000,000 acres in Canada", and that there was a commitment from "a qualified major Investor to purchase a minimum of 60 Ownership Units ($600,000)" in SRAE were based on discussions he had with Youb concerning interest expressed by a "hard rock miner". However, Cloutier admitted that he never saw such an RFP or commitment, did not know whether there was such an RFP and took no steps to verify whether there was any commitment.

[67] Cloutier testified that in November 2006, 2007 or 2008, he and Youb decided, for tax and liability reasons, "to move [their] intellectual property from Canada to Barbados". On arriving there in furtherance of the move, he was told by Youb that he (Cloutier) was not one of the trustees named for that purpose.

[68] We summarize here several other elements of Cloutier's testimony, including a number of admissions:

- Over $2 million was raised under the SRAE/SSI Agreements.
- Other than for a few SRAE/SSI Purchasers brought in by Youb and Meaver, Cloutier was solely responsible for SRAE's fundraising.
- He met with prospective SRAE/SSI Purchasers and described to them the SRAE/SSI Model.

- He instructed a Johnston Ming lawyer to draft the SRAE/SSI Agreements based on the business model he (Cloutier) had developed.

- He declined to act on that lawyer's recommendation that he (Cloutier) also obtain an opinion from a securities lawyer.

- He sold to the first SRAE/SSI Purchaser in September 2006.

- He never attempted to qualify any SRAE/SSI Purchaser for any registration or prospectus exemption under Alberta securities laws.

- Apart perhaps from the SRAE/SSI Agreements for a few SRAE/SSI Purchasers recruited by Youb and Meaver, Cloutier filled in the SRAE/SSI Agreements, which specified SRAE/SSI Returns matching what Cloutier had discussed with the purchasers.

- He received the SRAE/SSI Purchasers' money under the SRAE/SSI Agreements.

- Consistent with what was stated in the SRAE/SSI Marketing Brochure, he represented to SRAE/SSI Purchasers that cash flow – business income – from the SRAE/SSI Model was expected to begin in July 2007.

- He, with Youb, drafted the business and revenue portions of the SRAE/SSI Marketing Brochure, which he (Cloutier) then provided to, and reviewed with, SRAE/SSI Purchasers.

- The revenue projections in the SRAE/SSI Marketing Brochure were speculative (there were no contracts in place), and based on research by Cloutier and Youb into prices charged by others for other seismic technologies and a representation as to what they would charge for The Eye technology.

- SRAE did not own the SSI Software (intellectual property and software related to The Eye), with the result that the SRAE/SSI Purchasers were buying fractional interests in physical equipment (the SRAE Equipment) – specifically, four pieces of equipment located in Florida and identified by the serial numbers set out in each of the SRAE/SSI Agreements.

- The SRAE Equipment had no value unless it was operated with the SSI Software.

- SRAE paid $800 000 for the four pieces of SRAE Equipment, which were in the possession of Eichelberger and Cullen.

- The SRAE/SSI Purchasers were never intended to have physical possession of the SRAE Equipment, or to become involved directly in running the business.

- No SRAE/SSI Purchaser ever received possession of their SRAE Equipment – to do so would have been "almost impossible" given that they bought only fractional interests in it.

- He did not tell SRAE/SSI Purchasers that they could lose their money, reasoning that they had recourse to the SRAE Equipment.

- He never told the majority of SRAE/SSI Purchasers there was a real risk that the suggested revenue would not be generated.

- In September 2006 he did not know whether the SRAE/SSI Equipment was commercially viable.

- The SRAE/SSI Equipment was under development and not commercially ready, but he did not disclose this to the majority of the SRAE/SSI Purchasers.

- By July 2013 there was still no commercially viable product.

- Money ran out to continue development of The Eye (although Cloutier indicated that he personally continues to provide such funding to Eichelberger).

- He collected GST from SRAE/SSI Purchasers under the SRAE/SSI Agreements, but neither remitted it to the CRA nor told any SRAE/SSI Purchaser that he would not be remitting it.

- Viva did no business with "Sunterra" but lent it money – an undocumented loan never repaid.

- Very little of the $2 million raised remains, most of it having been transferred to SSI and spent on items including his salary of $120 000 per year plus expenses.

- No SRAE/SSI Purchaser received any SRAE/SSI Return.

- The SRAE Equipment remains in Florida and Texas.

- Asked whether SRAE retains control over the SRAE Equipment, Cloutier indicated that "we have control", apparently by virtue of his relationship with Eichelberger.

4. SRAE/SSI Purchasers' Evidence

[69] We found all of the Purchasers (the SRAE/SSI Purchasers and Venture/Viva Purchasers) who testified to be generally credible. Any inconsistencies in their evidence or inability to recall we attribute to the passage of time.

(a) PR

[70] PR, who is retired, had never taken any courses relating to investments. Until purchasing SRAE Units, he had invested only in mutual funds. PR met Cloutier at the office of Smylski. There, they "[t]alked about investment with . . . Sunterra Seismic". This, Cloutier told PR, involved "an imaging machine that picks up images about oil and gas and things like that", equipment that would be of use to "big oil companies, probably . . . any kind of mining companies".

[71] Cloutier gave PR the SRAE/SSI Marketing Brochure, which they reviewed together. PR understood from this brochure and his discussion with Cloutier that, within 204 days of "invest[ing]" his money, he would be getting his money back plus "seven times the initial investment". PR told us that this information "dramatically" affected his decision to purchase SRAE Units. As noted, the SRAE/SSI Marketing Brochure included the statement: "[SSI] is currently responding to [a] Request For Proposal . . . on over 1,000,000 acres in Canada." PR told us that this too influenced his decision to purchase Units.

[72] PR purchased two SRAE Units, each for $10 000 plus $600 GST. For each Unit purchased, an SRAE/SSI Agreement dated 27 September 2006 was signed by PR and witnessed by Smylski, in Smylski's office. Cloutier told PR that he had to pay GST "[b]ecause we were buying a unit, a machine". Cloutier apparently also signed each of these SRAE/SSI Agreements, but PR did not see him do so, nor did he know who filled out these agreements or when, or why separate agreements were executed. Each of these SRAE/SSI Agreements indicated that the SRAE/SSI Return per Unit would be $70 000. PR paid the $21 200 by two bank drafts payable to "Sunterra Seismic" or a "Sunterra" company, the first of which he gave to Cloutier and the second of which PR deposited to the "Sunterra" company's bank account.

[73] PR understood that under these SRAE/SSI Agreements, "I was purchasing a machine, a unit that would do seismic and pick up all kinds of minerals and that and be hired out to these big gas people and companies". PR also understood that this equipment was operational "[b]ecause, in 204 days, we were supposed to expect our return on our money". PR told us that he had not seen this equipment, but had seen a picture of it in the SRAE/SSI Marketing Brochure.

[74] PR understood that Cloutier or a "Sunterra" company would make money by using this equipment "to look for oil and gas for other companies". PR told us that he was never supposed to take possession of the equipment he purchased and that he was not going to be actively involved in pursuing the promised returns or in the business in any way. PR also told us that he had no control over what the equipment was going to do, that this was left to "Sunterra", and that he had no role to play concerning profits made or management decisions.

[75] PR purchased two additional SRAE Units, after he heard from Smylski that Smylski had "invest[ed]" and "reinvested" and after Cloutier mentioned that the price would probably be increasing and there was a "closing window", which "kind of hurried [PR] up on it". For this purchase for $20 000 plus $1200 GST, an SRAE/SSI Agreement dated 25 January 2007 was signed by PR in Smylski's office. Cloutier apparently also signed this SRAE/SSI Agreement, but PR did not see him do so, nor did he know who filled out this agreement. This SRAE/SSI

Agreement indicated that the SRAE/SSI Return per Unit would be $70 000 plus GST. PR paid the $21 200 by bank draft payable to SRAE, which he gave to Cloutier.

[76] PR testified that, after his September 2006 purchases but before his January 2007 purchase, Cloutier told him a "couple of times" that "he had a few big contracts" regarding this technology. PR told us that this was important to him "[b]ecause I would be getting my return on my money if he got the contracts set up and ready to go".

[77] When PR did not receive returns 204 days after making his purchases, he spoke with Cloutier and with Youb; PR believed that Cloutier was the director, and Youb was the owner, of SRAE. According to PR, Cloutier told him that "they're having problems getting the machine running and that he was going down to Texas all the time to help -- to get it fixed", and Youb told him that "they were having a problem" and that "it would take time and money to bring it across the border", "another $500,000".

[78] PR told us that, apart from the SRAE/SSI Marketing Brochure and the SRAE/SSI Agreements he signed, he never received an offering document for any of his purchases of SRAE Units. PR told us that he is not related to Cloutier and that he did not consider himself a close personal friend or a close business associate of Cloutier or anybody else involved with "Sunterra". It is clear from PR's testimony that, at the times he made his purchases, he was not an accredited investor, and PR told us that he was not asked any qualifying questions.

[79] PR has not received any return on his purchases of SRAE Units, or repayment of his purchase money. PR testified that he could have used this money "for a lot of purposes" and that, as a result of this experience, "[y]ou get a little bit leery before you start investing anything anymore, any kind of money".

(b) JM

[80] JM, currently a truck driver, had attended seminars related to investing. Before purchasing an SRAE Unit, he had bought and sold stocks through a stockbroker. JM characterized his investment knowledge as "[n]ot very good".

[81] Cloutier was introduced to JM by Smylski. Smylski and Cloutier met with JM and his wife at their home in fall 2006, a meeting arranged by Smylski. At this meeting, Cloutier gave JM and his wife the SRAE/SSI Marketing Brochure, which they reviewed together. According to JM, at this meeting Cloutier mentioned two customers – "Musselman Oil in Texas" and a northern Canadian diamond mine. It seems from JM's testimony as a whole that he did not believe SRAE or SSI had contracts with these customers at the time. JM told us that the prospect of these customers "definitely" influenced his and his wife's decision to purchase an SRAE Unit.

[82] JM understood that "from day one" Cloutier was "a part owner" or "a partner" of SRAE, and that Cloutier was "up to speed on everything [his] company [was] doing". JM understood, from the details provided by Cloutier, that SRAE's business was "airborne seismic equipment" – equipment "that would fly over . . . land or water, and . . . would take magnetic readings and transfer them back to a stationary vehicle that is recording it all . . . so that it would be recorded in realtime and then could be put on a disk and given to the client to analyze the readings". JM

told us that Cloutier said this equipment "was an existing, developed piece of equipment that was ready to use". JM also told us that it would have affected his and his wife's decision to purchase an SRAE Unit had they known this equipment was still under development because "a bird in the hand is worth two in the bush". According to JM, both Cloutier and Smylski told JM and his wife that "time was of the essence", which also "swayed" their interest. JM thought at the time that SRAE owned the equipment.

[83] "[P]robably two days later", JM and his wife contacted Smylski to ask whether "the offering was still available". Smylski got back to them the following day.

[84] JM and his wife purchased one SRAE Unit, through her numbered company (a company she incorporated at Cloutier's urging), for $10 000 plus $600 GST. For this purchase, JM's wife signed an SRAE/SSI Agreement dated 12 October 2006, which was apparently filled out and also signed by Cloutier. This SRAE/SSI Agreement indicated that the SRAE/SSI Return per Unit would be $70 000. JM told us that he and his wife expected this return "plus the original investment", and to start receiving money in instalments in "[t]hree to six months", which influenced their decision to purchase because "[i]t's a good return over a very short period of time". JM and his wife paid the $10 600 – sourced from Canada Savings Bonds cashed in by JM's wife – by cheque payable to SRAE, which was given to Smylski for forwarding to Cloutier.

[85] JM understood that he and his wife were "[p]urchasing an interest in the equipment". JM told us that nothing was required of him and his wife but their money, that they did not expect to have to participate actively in the business in any way, that they did not see any of this equipment other than in photographs, and that they would never take possession of this equipment.

[86] JM testified that he and his wife mentioned the SRAE/SSI Model to another couple. JM further testified that this couple then met with, and heard the same presentation from, Cloutier at the home of JM and his wife, after which this couple "invest[ed]". JM told us that, although "time was always of the essence", the offering was kept "open for another investor".

[87] From 31 July 2008, when JM was "getting frustrated" due to "[u]nfulfilled promises", he began to make contemporaneous notes of conversations he had with Cloutier in person or over the telephone. With reference to these notes, JM testified that Cloutier conveyed certain information to him, his wife or both. For example, on 31 July 2008 Cloutier told JM, his wife and others that repayment would be starting in September 2008, with full payout by December 2008. On 5 March 2009 Cloutier told JM that money had started to come in from Shell (and more money might come in from others) to one or more of Cloutier's companies, and that this might "help repay Sunterra investors". On 26 March 2009 Cloutier told JM that Musselman had "committed to use the service", and from then until 20 September 2009 Cloutier periodically repeated to JM that money would soon start flowing to SRAE from Musselman. (JM acknowledged that, of the information Cloutier relayed about Musselman, some came from Eichelberger; however, JM understood that Cloutier was also talking with Musselman.) On 20 September 2009 Cloutier told JM, his wife and others that Cloutier did not own The Eye and that they could have their money back, to be repaid from "quite an extensive inheritance" for which Cloutier was acting on behalf of someone named "Mike". From 6 November 2009 until

and including 11 February 2010 Cloutier periodically told JM that money would soon be paid out from this inheritance. JM also told us that, about five or six months before the Merits Hearing, his wife encountered Cloutier, who told her "[s]omething about, Pack your suitcase, it's very close to finalizing".

[88] After their purchase of one SRAE Unit, JM and his wife "were offered other investments, Cell Bridge, Viva", but made none. JM acknowledged that Cloutier said he "would be repaying the full contract", whether through SRAE and SSI, Cell Bridge and Viva or the inheritance – Cloutier kept saying that he "got another deal, and then another deal, and then another deal" and kept "promising" and giving "time frames". However, JM told us that, at the time he and his wife purchased their SRAE Unit, they expected their returns to be paid by SRAE.

[89] JM told us that, apart from the SRAE/SSI Marketing Brochure and the SRAE/SSI Agreement his wife signed, they never received an offering document for their purchase of one SRAE Unit. JM told us that neither he nor his wife is related to or a friend of Cloutier. JM further told us that he did not consider himself a close business associate of Cloutier, and that neither he nor his wife is related to or a friend or close business associate of anybody else associated with SRAE. It is clear from JM's testimony that, at the time he and his wife made their purchase, they were not accredited investors. JM told us that no one talked to him or his wife about qualifying for an exemption, nor were they asked any qualifying questions.

[90] JM and his wife have not received any return on their purchase of one SRAE Unit, or repayment of their purchase money. JM characterized Cloutier in harsh terms and testified that he could have used the lost money "for retirement, for other investments . . . and also for my existing business". He told us that, as a result of this experience, "I don't feel like I want to invest in any business" and "I've lost all faith".

(c) RE

[91] RE, an optometrist, had never taken any courses relating to investments. Most of his investing for over 20 years had been done through a broker, although he had also made investments with Smylski.

[92] In 2006 RE met Cloutier in Smylski's office. Cloutier described an "opportunity" concerning "electronic seismic equipment". RE understood that Cloutier was involved in "the development of the company" and that the seismic equipment was being "beta tested" and was still in the developmental stage. Cloutier told RE that an individual named Musselman, "in the oil business in Texas", was "a potential client". RE told us that this information was important to him because "it made the opportunity of successful payout higher". RE did not know whether there was a contract in place, but Cloutier told him that "they were actually using the technology on [Musselman's] property or land". RE did not recall being told, at the time he purchased SRAE Units, that there were clients or customers that were going to use this equipment.

[93] RE purchased seven SRAE Units, through his professional corporation, for $70 000 plus $4200 GST. For this purchase, RE and Cloutier completed an SRAE/SSI Agreement dated 20 December 2006, signed by both in RE's office. This SRAE/SSI Agreement indicated that the SRAE/SSI Return per Unit would be $70 000 plus GST. Cloutier had also indicated that the

return on this purchase would be "seven times", which influenced RE to purchase because "[i]t's a good return". RE understood that the return on this purchase would be from a pool of all equipment being used. RE paid the $74 200 by cheque from his professional corporation payable to SRAE, which RE gave to Cloutier.

[94] RE understood that under this SRAE/SSI Agreement he was purchasing "[p]art of the ownership in the electronic equipment". However, apart from receiving serial numbers for the equipment purchased and seeing pictures of it, RE never saw, nor took possession of, any of it, and he did not receive a bill of sale for it. RE told us that he would not be actively involved in SRAE's business venture, and he understood that his money would be used for "[d]evelopment and marketing". RE also told us that his intention was to have Cloutier market and sell the equipment and produce revenue for RE, and that RE had no control over what was done with the equipment once he purchased it.

[95] RE subsequently purchased Venture Softphones and lent money to Cloutier. We discuss these subsequent purchases and loans below. At the time RE made his first purchase of Softphones, Cloutier told RE that SRAE's deal with Musselman "was ongoing still". RE did not know what had happened to SRAE; RE told us that, when he spoke with Cloutier over one year before the Merits Hearing, Cloutier "still hadn't received any money".

[96] RE told us that, apart from the mentioned SRAE/SSI Agreement and the agreements discussed below, he never received an offering document for any of his purchases of SRAE Units or Venture Softphones or his loans to Cloutier, totalling $975 200 (according to documents in evidence) or, in RE's estimation, $1.3 million. RE told us that he is not related to Cloutier and that he did not consider himself a close personal friend or a close business associate of Cloutier – the only business RE had done with Cloutier was "the business that we've done here". It appears from RE's evidence as a whole that he may well have qualified as an accredited investor at the times he made his purchases and loans. According to RE, Cloutier did not ask RE any questions about his annual income or net assets.

[97] RE has not received any return on his purchases of SRAE Units or Venture Softphones or his loans to Cloutier, or repayment of the purchase or lent money. RE testified that, as a result, his retirement plans have changed, but that he still invests.

(d) KB

[98] KB, a businessman, had never taken any courses relating to investments. His investment experience was in "RSPs, mutual funds".

[99] KB met Cloutier through Smylski, with whom KB had made investments. KB met with Cloutier at Smylski's place of business. At this meeting, Cloutier discussed The Eye, gave the SRAE/SSI Marketing Brochure to KB and "did a page-by-page summary" of it.

[100] From this meeting, KB understood that The Eye "was a mechanism or device to survey the land and provide reports of what that land had in it, like oil, gas, minerals, and things like that", and that SRAE owned equipment that could perform that function and "was ready to go to work". KB also understood that Cloutier "would take that piece of equipment, survey the land,

and provide information to that customer which would in turn pay him for that information and then the investors would receive a payment", and that Cloutier "had some customers lined up for the use of the equipment". These customers – KB recalled "Canadian government" and "a U.S. customer, Musselman" – were, according to KB, "active customers, ready to go".

[101] KB told us that he was prompted to purchase SRAE Units by the rate of return – "$70 000 per Ownership Unit" as set out in the SRAE/SSI Marketing Brochure – and the time-frame of "[t]hree to six months".

[102] A few weeks after meeting with Cloutier, KB purchased three SRAE Units for $30 000 plus $1800 GST. For this purchase, KB signed an SRAE/SSI Agreement dated 12 January 2007, which was filled out and signed by Cloutier. This SRAE/SSI Agreement indicated that the SRAE/SSI Return per Unit would be $70 000 plus GST. KB paid the $31 800 by cheque payable to SRAE, which he gave to Cloutier.

[103] KB understood that he "would have an interest in" the equipment identified by serial numbers in the SRAE/SSI Agreement, and that he would receive the promised returns from the "overall revenue generated by the company" – he was buying "a stream of revenue". According to KB, he never took physical possession of any equipment, never saw any equipment other than in photographs, never expected to be personally involved in SRAE's business, and did not expect to have to do anything, other than provide his purchase money, to generate the promised returns. KB told us he probably did not know, at the time, that two companies – SRAE and SSI – were involved, nor the interplay between them, and did not know exactly what the purchased equipment was.

[104] KB purchased three additional SRAE Units for $30 000 plus $1800 GST. For this purchase, KB signed an SRAE/SSI Agreement dated 14 February 2007, which was filled out and also signed by Cloutier. This SRAE/SSI Agreement indicated that the SRAE/SSI Return per Unit would be $70 000 plus GST. KB paid the $31 800 by cheque payable to SRAE, which he gave to Cloutier.

[105] KB subsequently lent money to Cloutier. We discuss this loan below. KB had received no returns on his purchases of SRAE Units by the time he made this loan, about which he testified:

> . . . The only revenue . . . that got talked . . . about or chance of revenue was the U.S. connection with this Musselman, and he was to provide [Cloutier] with an agreement or they were to set up a contract or get something rolling, and [Cloutier] was waiting for his potential customer to start using his equipment and always . . . just never seemed to transpire.

[106] KB did not recall signing any document, other than the mentioned SRAE/SSI Agreements and the loan and repurchase agreements discussed below, for his purchases of SRAE Units or his loan to Cloutier. KB testified that he did not seek any legal or accounting advice concerning these agreements, and that no one suggested he do so.

[107] KB told us that he is not related to Cloutier, did not consider himself a close friend of Cloutier, and had not done any previous business with Cloutier. KB also told us that he is not a

relative, friend or close business associate of anyone else associated with SRAE. It is clear from KB's testimony that, at the times he made his purchases of SRAE Units and his loan to Cloutier, KB was not an accredited investor. KB testified that Cloutier did not talk to him about qualifying for an exemption, nor was he asked any qualifying questions.

[108] As far as KB knows, SRAE has generated no revenue. KB does not know what has happened to the equipment SRAE purportedly owned. KB has not received any return on his purchases of SRAE Units or his loan to Cloutier, or repayment of the purchase or lent money, despite receiving over the years several assurances from Cloutier that payment would shortly be forthcoming. KB testified that, as a result, his ability to conduct his business has been hampered and his retirement plans have "[m]ost definitely" been affected. KB further testified that he "want[s] nothing to do" with investing in the Alberta capital market "right now".

C. The Venture/Viva Model

1. Staff Investigators' Evidence

(a) Overview

[109] Pickering spoke with or interviewed some of the Venture/Viva Purchasers. As mentioned, she, together with Gallucci, also interviewed Cloutier and obtained documentation.

[110] Pickering provided an overview of the "business income" model offered by Venture and Viva to prospective Venture/Viva Purchasers (the **Venture/Viva Model**). According to the totality of the evidence, pursuant to the Venture/Viva Model (structured much like the SRAE/SSI Model):

- Venture sold Venture Softphones to the Venture/Viva Purchasers for $50 per Softphone plus GST, with Venture retaining title to the Softphones as trustee for the Venture/Viva Purchasers.

- Under a licence agreement with Viva, Venture would license Viva to use the Venture Softphones in conjunction with the Viva Software (we refer to this together with the Venture Softphones as the **Venture/Viva Equipment**).

- Viva would offer its customers – those requiring emergency response or mass callout systems – use of the Venture/Viva Equipment, with a portion of the revenue earned from such use flowing back to Venture, from which would be paid the promised return to Venture/Viva Purchasers (the **Venture/Viva Return**).

[111] Pickering testified that Viva had one customer – Cell Bridge – which used the Venture/Viva Equipment in the development of an emergency response system called "GeoAlert". During her investigation Pickering uncovered no evidence that Cell Bridge had worked with any government agencies, regulators, telecom carriers, municipalities or educational institutions. Pickering told us her investigation revealed that Cell Bridge's only interaction with oil and gas companies was preliminary work with Shell (discussed below). Pickering referred us to a 12 May 2010 letter from Shell's counsel confirming that there were "no contracts, letters of engagement or service agreements entered into between Shell" and Venture, Viva, Cell Bridge, Cloutier or Pacholik other than Shell purchase orders (the **Shell POs**) under which Shell made

payments to Cell Bridge (in response to five invoices dated 14 September 2009 through 31 March 2010) totalling $68 047.08.

(b) The Venture/Viva Agreements

[112] Staff obtained most, if not all, of the Venture/Viva Agreements – all, according to Pickering and Gallucci, in the same form – used in raising money for Venture and Viva. Gallucci testified that all of the Venture/Viva Agreements he reviewed were signed by Cloutier on behalf of Venture. Using the Venture/Viva Agreements obtained by them, Staff prepared a summary of the Venture/Viva Purchasers that purchased Venture Softphones from 20 September 2007 through 19 January 2010. We are satisfied, having regard to this summary, that Venture and Viva raised in excess of $5.5 million, including GST, from the sale of Softphones to approximately 130 Venture/Viva Purchasers.

[113] Under each Venture/Viva Agreement, Venture sold an agreed number of Venture Softphones at an agreed purchase price plus GST. The "Return on Investment" (the Venture/Viva Return) was also an agreed amount. The Venture/Viva Return typically stipulated was 440% of the amount paid under the Venture/Viva Agreement.

[114] Each Venture/Viva Agreement included a schedule detailing the quantity of Venture Softphones purchased and their serial numbers. Under the Venture/Viva Agreement, after the Venture/Viva Purchaser had received the Venture/Viva Return, Venture had the option to repurchase the Softphones from the purchaser. The Venture/Viva Agreement also provided that the Venture/Viva Purchaser could terminate the Venture/Viva Agreement "at anytime upon sixty (60) days notice in writing to Venture", in which case Venture would deliver possession of the purchased Softphones to the Venture/Viva Purchaser "on the termination date".

[115] The "Viva Licence Fee" was defined as "the monthly fee to be paid by Viva to Venture as consideration under the Viva Licence Contract for the grant of a licence to use the [Venture Softphones], being an amount equal to thirty (30%) of the monthly Gross Software and Equipment Revenue". It was from this "Gross Software and Equipment Revenue" that Venture/Viva Purchasers were to be paid the Venture/Viva Return.

[116] The Venture/Viva Agreement stated that the Venture/Viva Purchaser "is purchasing the [Venture Softphones] for the express purpose of providing possession of the [Softphones] to Venture to manage in providing the same to Viva pursuant to the Viva Licence Contract" and that "Venture agrees to receive the [Venture Softphones] from the [Venture/Viva Purchaser] as trustee and agent for the purpose of placing the [Softphones] with Viva pursuant to the Viva Licence Contract". The Venture/Viva Agreement also stated that the Venture/Viva Purchaser "grants possession of the [Venture Softphones] to Venture in its capacity and role as trustee for the specific purpose of having Venture licence the [Softphones] to Viva under the Viva Licence Agreement in consideration of which Venture shall pay to the [Venture/Viva Purchaser] a portion of the Viva Licence Fee which Venture receives from Viva".

[117] The Venture/Viva Agreement stated that, on receiving payment from the Venture/Viva Purchaser, Venture would provide to the purchaser a bill of sale. The Venture/Viva Agreement provided that Venture would hold "legal title" in the Venture Softphones "as bare trustee and

agent for" the Venture/Viva Purchaser, with Venture appointed as the "exclusive agent to do all things . . . for and on behalf of" the Venture/Viva Purchaser. The Venture/Viva Agreement also provided that:

- Venture manages "chattels . . . similar to or identical to" the Venture Softphones purchased by the Venture/Viva Purchaser "for the purpose of licensing the same to Viva", and these chattels and the Softphones purchased by the Venture/Viva Purchaser – all Softphones purchased by Venture/Viva Purchasers – would "be co-mingled . . . and delivered to Viva for placement with Viva's customers".

- All of the Venture Softphones purchased, when delivered to Viva, would "form a pool of items which will be placed with Viva's customers and when used with the [Viva Software] will generate the Gross Software and Equipment Revenue for Viva".

- Venture would "receive Viva's Licence Fee which will in turn be paid to" the Venture/Viva Purchasers "pro rata to their respective Participating Interests".

[118] Pickering testified that none of the Venture/Viva Purchasers with whom she spoke took possession of the Venture Softphones they purchased.

(c) Marketing and Promotional Material

[119] Pickering obtained marketing material from Cloutier (via his counsel, who indicated that this material had been provided to potential or existing Venture/Viva Purchasers): a pamphlet titled "geoalert®" concerning the "first time-sensitive, location-based emergency alerting system designed by [Cell Bridge] specifically for the oil & gas and petrochemical industry" (the **GeoAlert Pamphlet**); a brochure titled "CELLBRIDGE communications" (the **Cell Bridge Brochure**); and the Viva Brochure.

[120] The GeoAlert Pamphlet stated that Cell Bridge was the "developer and corporation that delivers GeoAlert® as a fully-supported 24/7 service" and was "distributed through fully licensed and trained dealers".

[121] The Cell Bridge Brochure stated that GeoAlert "makes it possible for companies to align their Emergency Response Plans with regulatory requirements and save lives". The Cell Bridge Brochure also represented:

> Through our emergency GeoAlert® service, Cell Bridge works with the government agencies, regulators and the telecom carriers to improve how citizens are notified of impending danger. . . .
>
> Our beginnings are in the Oil & Gas Industry in Western Canada and have expanded to include municipalities, governments, educational institutions and industry in general. . . .
>
> . . .
>
> . . . we are one of the only companies that have the necessary equipment and infrastructure required to meet government regulations for industry emergency response protocol.

[122] The Viva Brochure, which was undated, included the following statements:

VIVA's Business Model

. . .

- Initial client accounts positioned to begin implementing.

. . .

Venture Contractors Ltd.

- First Equipment sold $50.00 per piece (200 pcs. X $50.00 = $10,000.00).
- Equipment earns $220.00 per piece (200 pcs. X $220.00 = $44,000.00 or 440%).
- Venture pays earning monthly.
- Venture re-purchases Equipment $50.00 per piece (200 pcs. X $50.00 = [$]10,000.00).

Venture Contractors Ltd.

- Venture is the Exclusive supplier of Equipment to VIVA.
- Purchaser buys Equipment and enters into a Management Contract with Venture Contractors.
- Purchaser earns business income.

. . .

Venture Contractors Ltd.

- First sale of Equipment 40,000 pcs. X $50.00 = $2,000,000 (Earns $220.00/pc.).
  – Completed by October 31, 2007 – ROI – 440%
- Second sale of Equipment 30,000 pcs. X $60.00 = $1,800,000 (Earns $220.00/pc.).
  – Completed by November 30, 2007 – ROI – 333%
- Third sale of Equipment 30,000 pcs. X $90.00 = $2,700,000 (Earns $180.00/pc.).
  – Completed by December 21, 2007 – ROI – 200%

VIVA's SOLUTION IS SIMPLE

. . .

- Our Equipment Purchasers have [the] opportunity to generate significant revenue from VIVA's management of the equipment.
- VIVA licensed software will continue to improve and we will continue to add new products and services for our clients, customers, and Equipment Purchasers.
- All on a pre-paid monthly recurring revenue model – (No Accounts Receivable).

[123] Page captures from Viva's website (the **Viva Website**) and from Cell Bridge's website (the **Cell Bridge Website**) are in evidence.

(d) Emails

[124] Pickering obtained an email dated 28 October 2009 (the **October 2009 ATB Email**) among individuals she understood had been ATB employees; in it, they discussed what were characterized as "suspicious transactions" made by Cloutier. The October 2009 ATB Email included:

> Venture Contractors Ltd.
>
> [Cloutier] indicated to me that with this company [Cloutier] sells $10,000 units to investors. The investors get $10K of communication equipment with their purchase, which [Cloutier] keeps physical possession of and then lease[s] out. The investor then receives lease income up to $44,000 at which time [Cloutier] repurchases the equipment from them for the $10,000.
>
> Thus the investors make a $54K return on a $10K investment[.]

[125] A 19 September 2009 email from Pacholik to individuals whom Pickering understood to have been Cell Bridge contract employees and suppliers, explained why they would not be paid:

> Unfortunately, our funding source has not materialized and may not for a long time to come. . . .
>
> . . .
>
> I can only recommend that anyone who cannot maintain this timeline, should immediately seek other employment, and once we have closed the funding we can evaluate options for re-engaging your services . . . .

(e) Scott's Evidence

[126] Scott provided to Staff a document titled "Asset Purchase Agreement" between a numbered company (associated, Pickering told us, with Cloutier) and Cell Bridge. The Asset Purchase Agreement provided that:

- Cloutier, through the numbered company, purchased all of the assets of Cell Bridge, including "Version 1 of the GeoAlert technology" and the name "Cell Bridge Communications" for $78 000 plus $4680 GST; and

- the GeoAlert technology purchased was valued at $12 000.

(f) The ERCB's Directive 71

[127] The requirements of the Alberta Energy Resources Conservation Board (the **ERCB**) are found in Directive 071 "Emergency Preparedness and Response Requirements for the Petroleum Industry" (**Directive 71**).

[128] Pickering testified that, from speaking with an employee with the Emergency Planning and Assessment Section of the ERCB, she learned that:

- the ERCB requires oil and gas companies to have an emergency response plan in place when wells are drilled but has not stipulated any specific plan requirements, such as the use of certain equipment or that a phone system or time limits for contacting individuals be in place; and

- the emergency response provisions of Directive 71 have been in force since approximately 2003, and, although there were some amendments made to Directive 71 in 2008, "there was no requirement . . . that required contact within a [specified] period of time".

(g) Source and Use of Money

[129] Chute prepared analyses of the source and use of money for the Venture Account (the **Analysis for the Venture Account**) and for the Viva Accounts (the **Analysis for the Viva ATB Account** and the **Analysis for the Viva TD Account**, respectively).

[130] Concerning the "Cash Outflows" set out in the Analysis for the Venture Account, Pickering testified that she was unable to determine why Venture paid $5 280 283.46 to Viva. According to Gallucci, Youb indicated in the Youb Interview that he was involved, in a small way, with the Venture/Viva Model and in relation thereto had incorporated a Barbados company. This, Gallucci told us, accounts for some of the overseas payments set out in the analyses prepared by Chute.

[131] Having regard to the Analysis for All Accounts, in light of the totality of the evidence, we are satisfied – and we find – that amounts totalling $2 073 774.62 were paid to providers of services or goods to Cell Bridge. We are also satisfied – and we find – that at least a significant portion of another $622 737.54 was also so paid.

[132] Pickering understood that four of the payments set out in the Analysis for All Accounts, totalling $120 000, and a portion of another $112 934.53, were paid to Venture/Viva Purchasers.

[133] Gallucci testified that, to his knowledge, Viva earned no revenue.

2. Chute's Evidence

(a) Venture

[134] The Analysis for the Venture Account showed "Cash Inflows" and "Cash Outflows", each totalling $5 788 787, with no money remaining by 30 April 2010. Among the money deposited was: $5 538 147 from "Investors" (identified in other evidence as Venture/Viva Purchasers); and $250 000 from Temple Trust in the Turks and Caicos. Chute testified that she did not know the reason for the latter deposit. Among the payments out were: $5 280 283.46 to Viva; and $495 498.84 to CIBC Bank and Trust (Cayman Islands).

(b) Viva

[135] The Analysis for the Viva ATB Account showed "Cash Inflows" and "Cash Outflows", each totalling $5 876 279.39, with no money remaining by 30 April 2010. Among the money deposited was: $5 280 283.46 from Venture; $284 900 from Cloutier; and $73 500 from Cell Bridge. Among the payments out, in addition to a sizeable total of payments to Cell Bridge or

providers of services or goods to it (including $7652 to Pacholik and $2903.75 to Cell Bridge) were:

- $1 031 868 to SSI;
- $766 748.91 to Essential (identified by Cloutier as "one of . . . Eichelberger's companies");
- $380 000 to Smylski;
- $346 800.82 to ATB Financial MasterCard (the **ATB MasterCard**), which, according to Chute, was "Cloutier's";
- $50 548.71 to the CRA;
- $25 000 to Johnston Ming;
- $15 930.75 in total to the Faber Companies;
- $5000 to Peter Mason (**Mason**), whom we discuss below; and
- $4050 to Centre for Spiritual Awareness – according to Pickering, a personal donation from Cloutier.

[136] The Analysis for the Viva TD Account showed "Cash Inflows" and "Cash Outflows", each totalling $3300, with no money remaining by 7 October 2010. The money deposited included $3000 from Cloutier. Among the payments out were: $1500 to Smylski; and $1087.90 to Essential.

(c) Cell Bridge

[137] Chute prepared analyses of the source and use of money for the Cell Bridge Accounts (the **Analysis for the Cell Bridge ATB Account** and the **Analysis for the Cell Bridge TD Account**, respectively).

[138] The Analysis for the Cell Bridge ATB Account showed "Cash Inflows" and "Cash Outflows", each totalling $90 177.69, with no money remaining by 30 April 2010. Among the money deposited was: $70 073.58 from Shell; and $16 000 from Cloutier. The payments out included $73 500 to Viva.

[139] The Analysis for the Cell Bridge TD Account showed "Cash Inflows" and "Cash Outflows", each totalling $218 033.25, with no money remaining by 7 October 2010. Among the money deposited was: $192 100 from Cloutier; $18 973.50 from Shell; and $1700 from OCI Q Corp. (according to Pickering, a company owned by Stevenson). Among the payments out were: a total of $40 407.50 to or on behalf of Cloutier (including $9507.50 to the ATB MasterCard); $5400 to Smylski; $5000 to Johnston Ming; and $1000 to Essential.

3. Shell Employee's Evidence

[140] The Shell Employee – the former health, safety, security, environment and emergency response coordinator with Shell – testified that, after a pipeline incident in the Waterton area in 2007, Shell was looking for a means to improve the timeliness of its public notification to affected residents in the event of an emergency. Shell became interested in GeoAlert – a web-based emergency response software program allowing for telephone notification to residents within a predetermined zone in the event of an emergency – which was being offered by Cell Bridge.

[141] The Shell Employee told us that Shell had hired Cell Bridge to develop a pilot project using GeoAlert. He also told us that there was no formal contract governing the arrangement, but that purchase orders were used to pay for this pilot project's development. The Shell Employee testified about a Shell purchase order dated 13 January 2009 (the **Shell PO1**), whereby Shell agreed to pay Cell Bridge $58 000 for the installation of an "Emergency Response EPZ Callout System". He noted that the Shell PO1 stated it was a "SIX (6) MONTH INITIAL TRIAL TERM", and he confirmed that the Shell PO1 was paid.

[142] The Shell Employee testified that in October 2009 he attended a demonstration of the GeoAlert system at the Cell Bridge office in Calgary, also attended by Pacholik. The Shell Employee told us that Pacholik was his primary contact when dealing with GeoAlert.

[143] The Shell Employee testified that in late 2009 Shell hired Cell Bridge to assist it in a mock emergency response exercise being conducted at Shell's Waterton site. The Shell Employee identified a Shell purchase order dated 9 November 2009 (the **Shell PO2**) stating that Shell would pay Cell Bridge for the services it provided in connection with the mock exercise. He confirmed that Shell paid Cell Bridge $4091.58 under the Shell PO2.

[144] The Shell Employee identified a Shell internal accounting document detailing the history of all payments it made to Cell Bridge. This showed that the total amount paid to Cell Bridge by Shell was $68 047.08.

[145] The Shell Employee testified that Pacholik had provided him with a document titled "Service Level Agreement Schedule A" (the **Cell Bridge Service Agreement**). The Shell Employee explained that, according to the Cell Bridge Service Agreement, had Shell contracted with Cell Bridge to use GeoAlert at its Waterton site, Shell would have been required to pay Cell Bridge $5350 per month or $59 500 per year for GeoAlert services. The Shell Employee further explained that Shell would also have had to pay Cell Bridge additional money for added services, though the costs would be "relatively nominal".

[146] The Shell Employee testified that the GeoAlert system was "up and running" and "functional" in 2010, but that Shell never entered into a contract with Cell Bridge. He said that when, by late 2010 or early 2011 he and Pacholik had a verbal agreement ready to be put in writing, Pacholik advised him that Cloutier was unwilling to sign such an agreement. Prior to May 2011, a meeting was held with Shell's Waterton operations manager, Shell's corporate emergency response manager, the Shell Employee and Cloutier to attempt to resolve Cloutier's issues with the agreement. According to the Shell Employee, at this meeting, Shell declined

Cloutier's proposal that it use GeoAlert company-wide. Shell was only prepared to use its Waterton site as a "test case" for GeoAlert and to enter into a contract for that purpose. If GeoAlert proved successful there, Shell would consider wider use of GeoAlert. The Shell Employee testified that by the end of May 2011 he had procured another emergency response system produced by a Cell Bridge competitor that provided virtually the same service as GeoAlert – a user-friendly system that did what Shell required and complied with Directive 71 requirements.

[147] The Shell Employee testified that Directive 71 set out the ERCB's emergency preparedness and response requirements for the petroleum industry. He explained that in 2007 Directive 71 replaced Guideline 71 and required producers to have in place an ERCB-approved emergency response plan. The Shell Employee said that Directive 71 provided guidance to producers on the design of an emergency response plan, such as what needs to be identified, who needs to be contacted and what information ought to be collected. He also said that Directive 71 did not prescribe the precise terms of a producer's emergency response plan, such as specifying the mode of notification or the time period in which notification of an emergency must be made.

[148] The Shell Employee told us that Shell's Waterton site was in compliance with Directive 71 before its involvement with GeoAlert. He further told us that Shell did not at any time require GeoAlert to be in compliance with Directive 71.

[149] The Shell Employee confirmed that Shell never made any long-term commitment to Cell Bridge, and at the time of the Merits Hearing had no relationship with Cell Bridge.

4. Pacholik's Evidence

[150] Pacholik testified that:

- He was the vice-president of operations for Cell Bridge (as a contractor not an employee) but was never a director of Cell Bridge or a director or officer of Venture, Viva, SRAE or SSI.

- He had explained what he "was doing in the emergency response business" to Youb, whom he had known for a few years, and Youb had provided Cloutier's name and information.

- He met with Cloutier "several weeks later" and many times after that.

- He and Cloutier marketed the Softphones to companies such as HyperOffice and Re/Max.

- Cloutier decided to purchase the assets, rather than shares, of Cell Bridge, and Cloutier, who wanted to be the one running the company and making the decisions, ended up with sole ownership of the assets.

- Over the years during which he worked with Cloutier at Cell Bridge, Pacholik received income ranging from probably $5000 to $10 000 per month.

- Cloutier was the one responsible for raising capital for Venture, Viva and Cell Bridge, and, when Pacholik (who said he was not aware of the amount raised until he saw the NOH), asked Cloutier where the money raised had gone, Cloutier told him that he (Cloutier) had made a lot of mistakes along the way.

- He had not seen the Venture/Viva Agreement.

- Concerning the Viva Brochure, he helped Cloutier put the PowerPoint together, but Cloutier prepared the content – "prepared all the materials for . . . pricing structures and how he was bundling the soft phones".

- Agreeing with Staff, the Viva Brochure was presented by Cloutier to "potential investors in Venture or Viva" in order to explain the "investment" to them.

- None of HyperOffice, Sales Force or Hockey Canada, referred to in the Viva Brochure, ever had a contract with Venture, Viva or Cell Bridge.

- GeoAlert was begun before he and Cloutier met; and, once they met, they believed that the ERCB and the oil and gas industry would want to use GeoAlert.

- He estimated that he did 10 to 20 presentations of GeoAlert to oil companies, and he "did many, many conferences and trade shows . . . where we presented to . . . literally hundreds". He also presented GeoAlert to "a number of municipalities" and to universities or colleges.

- "[W]hat we deployed into the oil and gas industry as GeoAlert was designed specifically in concert with the ERCB and their Directive 71 and the oil and gas industry".

- "There is no system out there today [that] does 50 percent of what we did with GeoAlert."

- They worked with Shell to build an emergency response system for Waterton, which would be used internally but was primarily "to communicate with the public and coordinate their emergency response people along with other emergency services in the community".

- After "the live mock-up, we had about 45 people in the boardroom out in Waterton and all fire, emergency response, health department, ERCB, a number of oil and gas companies and many of the volunteers and residents that took part in that mock evacuation literally sang the praises of GeoAlert and what an incredible system it was, ERCB included in that grouping. So, generally, I would say it was a huge success from their perspective".

- "[T]he liability attached to this is the single biggest deterrent to widespread deployment"; in other words, the regulator and the oil and gas industry initially indicated they wanted a "hosted service", but then changed their view as to where liability should rest and wanted a "managed service", so Cell Bridge's business model needed revision.

- The original pricing provided to Shell was predicated on Shell operating the system, but, when Shell subsequently decided that it wanted "us to manage the service", "everybody balked" at the price.

- "[T]he only way to go forward . . . is for us to manage this thing as a managed service".

- "[B]asically everything is mothballed" with Cell Bridge, it having no continuing business at this stage, but Pacholik's company is "still doing work anticipating that one day we will . . . be able to deploy".

- The relationship between Cell Bridge and Shell was governed by Shell PO1 and Shell PO2, with no contract between them for any additional work.

- He did not know whether Shell ever executed the Cell Bridge Service Agreement.

- No oil and gas companies ever indicated an intention or willingness to pay Cell Bridge for the hosted or managed service.

- In fall 2009 they built a proposal in response to an RFP for emergency response for the Province of Alberta and were short-listed, but did not get the contract.

- He has been working on deploying a "Cell Alert" system for almost 15 years, but they still do not have it deployed – it has not been commercially adopted, nor can they get "government commitment".

- There is "still a viable market" for Softphones – they "would have sold many thousands" and there were 150 000 Softphones "available for distribution" – but "we made a bad, bad choice on our supplier".

- The Softphones "generated . . . a few bucks, but no significant revenues", and GeoAlert generated probably $150 000 to $200 000 from "Shell and Tristar and a couple of other little ones", but once Cell Bridge came under Cloutier's ownership it only worked with Shell.

5. Cloutier's Evidence

[151] Cloutier in his testimony admitted that:

- Venture raised over $5 million from the Venture/Viva Purchasers under the Venture/Viva Agreements; very little of that amount remains.

- The majority of the $5 million was transferred from Venture to Viva.

- He received a salary of $120 000 per year plus reimbursement of expenses charged to various credit cards.

- He was solely responsible for raising the $5 million from the Venture/Viva Purchasers.

- He was the one who met with prospective Venture/Viva Purchasers and explained to them the Venture/Viva Model.

- He never attempted to qualify any Venture/Viva Purchaser for any registration or prospectus exemption under Alberta securities laws.

- He filled in the Venture/Viva Agreements and signed them on behalf of Venture, and discussed the dollar figures with the Venture/Viva Purchasers.

- He received Venture/Viva Purchasers' money for the purchase of their Venture Softphones.

- He, together with Pacholik, wrote the Viva Brochure, which Cloutier then provided to Venture/Viva Purchasers, and he never revised its presentation of costs or expected returns.

- Venture's cost of a Venture Softphone ranged from $3.50 to $15.

- The expected return presented in the Viva Brochure – 440% of a Venture/Viva Purchaser's equipment cost ($50 per unit or $10 000) – was made up, because there were no actual customer contracts in place from which to assess revenue.

- It was never intended that the Venture/Viva Purchasers take possession of their Venture Softphones before they received their Venture/Viva Return. After that, on termination of their Venture/Viva Agreements, they could either receive their Softphones (worth $3.50 to $15 each) or resell them to Venture for the purchase price.

- No Venture/Viva Purchaser received any promised Venture/Viva Return.

- No Venture/Viva Purchaser ever received possession of a Venture Softphone.

- It was never intended that the Venture/Viva Purchasers would have any direct involvement in running either the Venture or Viva business, and no Venture/Viva Purchaser ever had such involvement.

- Few, if any, of the bills of sale contemplated in the Venture/Viva Agreements were ever provided to Venture/Viva Purchasers.

- No books of account (required by the Venture/Viva Agreements) were prepared and kept by Venture.

- Venture had no contracts with any customers for use of the Venture Softphones.

- Venture never earned any revenue.

- The only money deposited to the Venture Account was sourced from the Venture/Viva Purchasers.

- Viva had no contracts with any customers, other than the arrangement with Cell Bridge.

- Viva never earned any revenue.

- Cell Bridge had no contracts with any customers, and no revenue other than the approximately $100 000 generated from the Shell POs.

- The arrangement with Shell was terminated after two years.

- He collected GST from Venture/Viva Purchasers under the Venture/Viva Agreements, but neither remitted it to the CRA nor told any Venture/Viva Purchaser that he would not be remitting it.

- Viva never did any business with SSI but lent it money, which was used to pay Youb for the "end points technology" set up offshore by Youb; that loan was undocumented and has never been repaid.

- Viva lent Essential (which he had identified as Eichelberger's) almost $800 000 to finance development of The Eye; that loan was undocumented and has never been repaid.

- The Venture Softphones are on a server set up in Calgary by Pacholik.

6. Venture/Viva Purchasers' Evidence

(a) RE

[152] Smylski had RE talk to Cloutier about the Venture/Viva Model. RE understood Venture was a company owned by Cloutier whose business was "[v]oice-over internet hardware".

[153] For his personal corporation's purchase of such hardware – described as 2000 Softphones (identified by serial numbers) – for $100 000 plus $6000 GST, RE signed a Venture/Viva Agreement dated 16 October 2007. Cloutier also signed this Venture/Viva Agreement, which RE and Cloutier filled out together. This Venture/Viva Agreement indicated, in Cloutier's

handwriting, that the Venture/Viva Return would be $100 000, exclusive of GST. RE paid the $106 000 by cheque from his professional corporation payable to Venture, which RE gave to Cloutier.

[154] RE understood that Venture was going to license Viva, a company owned or started by Cloutier, to use the equipment – the voice-over internet hardware produced by Venture. Cloutier gave RE a demonstration of this hardware "at one point" at Cloutier's office. According to RE, he never intended to take possession of the equipment he purchased under the Venture/Viva Agreement, and he would not be actively involved in Venture's or Viva's business.

[155] Cloutier told RE that the Venture/Viva Return would be paid "[t]hrough the licensing agreement [–] the end-users would be paying Viva, and Viva would be paying Venture". RE testified that, when he signed the Venture/Viva Agreement, Cloutier "had been talking to people at Hockey Canada and Re/Max", but that RE was not aware of any contracts in place with these companies at the time. RE told us that hearing about these companies influenced his decision to purchase because "if there's possible end-users, that made it more attractive". RE testified that the promised return influenced his decision to purchase because it was a "[g]ood rate of return". RE understood that the return would be from a pool of all hardware being used.

[156] RE made a second purchase of Venture Softphones in an insurance account. For his purchase of 2000 Softphones (identified by serial numbers) for $105 000 (apparently not including GST), RE instructed that a Venture/Viva Agreement dated 30 May 2008 be signed on behalf of the applicable trust company, Guardian Trust (**Guardian**). Cloutier also signed this Venture/Viva Agreement, which RE and Cloutier filled out together. This Venture/Viva Agreement indicated, in Cloutier's handwriting, that the Venture/Viva Return would be $940 000, exclusive of GST. RE testified that this return influenced his decision to purchase because it was "[l]ots of money, lots of return". RE paid the $105 000 by cheque from his professional corporation payable to Venture, which RE said he probably gave to Cloutier.

[157] RE made a third purchase of Venture Softphones, again in his insurance account. For his purchase of 5000 Softphones (identified by serial numbers) for $250 000 (including no GST), RE instructed that a Venture/Viva Agreement dated 15 April 2009, filled out by Cloutier, be signed on behalf of Guardian. Cloutier also signed this Venture/Viva Agreement. This Venture/Viva Agreement indicated, in Cloutier's handwriting, that the Venture/Viva Return would be $1 250 000, exclusive of GST. RE paid the $250 000, but could not recall whether that was done by wire or cheque.

[158] Cloutier told RE about Cell Bridge. Cloutier told RE that "Cell Bridge was going to have developed software to be used in an emergency response system", and that "there was a regulation that was going to be specific for oil and gas producers that . . . the Cell Bridge software would address". RE also understood that the technology Cell Bridge would be using, and the Venture technology he had purchased, would meet the requirements of this regulation. RE could not recall when Cloutier told him this, but RE told us that the information was important to him as a current or potential purchaser of the Venture technology because "the potential of having it saleable to the oil industry just upped the return".

[159] Cloutier also told RE that he "had been marketing to Shell", and Cloutier showed RE "a purchase order from Shell Waterton gas plant". Cloutier told RE that "their test field was going to be Shell or Waterton, and if they were happy with how it worked there, they would buy it for their company" and that "if it was marketable to Shell and Shell came on board, he was pretty sure that he could get other oil companies to follow suit". This information influenced RE's view of the Venture/Viva Model because "the more end-users, the better the chance of return".

(b) MH

[160] MH, a public service employee, had attended investment seminars and described herself as being "thoroughly knowledgeable" about investments and generally risk-averse.

[161] MH "was dealing with [a named Smylski business] . . . on other investments" when Smylski . . . told her about Cloutier who had "some investment material [she] may be interested in".

[162] In 2007, at Smylski's office, MH met with Cloutier about the Venture/Viva Model. Asked for Cloutier's role in this, MH responded: "He was the CEO, president." Cloutier gave MH, and reviewed with her, the Viva Brochure. MH told us that Cloutier "was going to be selling some equipment, and I would be getting my investment money off this equipment when it was sold". She testified that the high returns set out in the Viva Brochure "had a little bit of influence" on her decision to purchase. According to MH, Cloutier did not explain the basis for the projections included in the Viva Brochure. MH purchased Venture Softphones about two or three weeks after this initial meeting. When she did so, MH understood that Venture and Viva were "just starting" and she did not believe that they had any paying customers.

[163] For her purchase of 600 Softphones (identified by serial numbers) for $30 000 plus $1800 GST, MH signed a Venture/Viva Agreement dated 19 October 2007 in Smylski's office. Cloutier also signed this Venture/Viva Agreement, which was filled out by MH and him. This Venture/Viva Agreement indicated, in Cloutier's handwriting, that the Venture/Viva Return would be $132 000, exclusive of GST. MH paid the $31 800 by cheque payable to Venture, which she gave to Cloutier.

[164] MH told us that she was not going to take possession of the Softphones she purchased, or be actively involved in using these phones to make money to generate the promised returns. Rather, according to MH, Cloutier was going to be using these phones. MH told us that she never took possession of, or saw, the Softphones she purchased. MH understood that she turned over management of the equipment she purchased to Venture to generate the promised $132 000, and that she would have nothing to do with generating the promised returns. Asked whether she understood that Cell Bridge "was doing the emergency response business" and that "working with Shell to get the contracts . . . was a very big part of how [she was] going to receive [her] money", MH agreed.

[165] Approximately one year later, when MH had not yet received any returns, she received a letter on Viva letterhead dated 5 November 2008 (the **MH Viva Letter**), signed by Cloutier as "President/CEO". MH told us that she paid particular attention to the following paragraph in this letter:

> First of all, I must convey my sincere apologies for not meeting the initial target dates promised for business income payments on your equipment purchase. As you can appreciate, I was somewhat optimistic in the time estimated to secure the first contract needed to generate the revenue envisioned; however, my goal is to return the principal of your purchase over the next six months with the balance of payments in the next twelve to eighteen months. I wish to share also that my learning in this experience has been one of being more realistic with my goals and to not overpromise, then everyone is happy. We would like to deposit the payments directly into your account so we will require a VOID cheque from you to set up that transaction. Please mail that to the address below at your earliest convenience.

[166] The MH Viva Letter also included the following paragraph:

> I am pleased to announce that VIVA is the exclusive provider of our complete communication technologies to Cell Bridge Communications Corp. (www.cellbridge.ca), a world leader in emergency response technology. Cell Bridge offers VIVA a unique opportunity to get involved in the billion dollar oil and gas industry. This contract alone has the potential to payout all the Unit Holders not only their principal but also their business income in a reasonable time period. Enclosed is a package on Cell Bridge Communications Corp. that provides more information on the dynamic company and you can also view their website at www.cellbridge.ca.

[167] On 13 November 2008 MH mailed to Cloutier the requested VOID cheque.

[168] Subsequently, MH telephoned Cloutier for an update, at which time "he mentioned that he had a contract with Shell Canada, and they . . . would be able to possibly use this kind of technology for that". Questioned by the panel, MH clarified that this contract with Shell was one Cloutier "had or was working on". MH told us that this information was important to her as an existing purchaser "because that told me that maybe I would be getting some return on my investment in the very near future".

[169] MH testified that she has been in contact with Cloutier weekly, initially by telephone and "in the last few years" by email. The responses from Cloutier were, MH told us, "[u]sually . . . the same" – MH understood from these that Zaruba and Stevenson, about whom MH first heard two or three years after she purchased Venture Softphones, were "receiving money from inheritances, and out of that money, they were paying [Cloutier] . . . , and then from that money, [Cloutier] was going to pay us". MH testified that for two or three years Cloutier has repeatedly promised her he will shortly be receiving money from Zaruba or Stevenson but that, as far as she knows, Cloutier has never received any money from either. MH told us that she did not know any of the details concerning the receipt of this money but she understood by then that the Softphones were not going to be making any money.

[170] MH told us that, apart from the Venture/Viva Agreement, she never received an offering document for her purchase of Venture Softphones. MH testified that she is not related to Cloutier and that she did not consider herself a close personal friend or a close business associate of Cloutier. It is clear from MH's testimony that, at the time she made her purchase, she was not an accredited investor, and MH told us that she was not asked any qualifying questions.

[171] MH has not received any return on her purchase of Venture Softphones, or repayment of her purchase money. MH testified that this experience has "taken a toll a bit on my health" and that she will not be investing in Alberta companies "anymore".

(c) DG

[172] DG, a public service employee, had never taken any courses relating to investments, and his purchase of Venture Softphones was his only "investment experience".

[173] "[P]robably around October 2007" DG met Cloutier at Smylski's place of business. DG had met Smylski in August 2007. In probably October 2007 Smylski told DG about an "investment" opportunity with Cloutier. Smylski told DG "[a]lmost nothing" about this opportunity – Smylski described it as "a really great opportunity" in which he, an accountant and a number of others had "invested". Smylski suggested to DG that "perhaps it would be wise . . . to take . . . equity out of [DG's] home to invest".

[174] DG first talked with Cloutier about the Venture/Viva Model "probably the beginning of December 2007". According to DG:

> [Cloutier] had something he called soft phones, and these phones were supposed to be able to offer a communication option for people rather than using standard cell phones because it would offer a greater opportunity to, say, reach people in areas that might not be covered by normal cell service, but still had internet service or satellite service.

[175] Cloutier later told DG that "basically rather than give people shares in ownership in the company, he . . . would allow us to buy the equipment for the company to use, and as the company used it, there would be income, the income would be pooled and . . . that pooled income would be divided three ways" – "a third of it going . . . back into the company, a third of it going to the investors and a third of it to [Cloutier] and . . . [Pacholik]". Cloutier also told DG that the purchase money would be used "to complete the development of the software". Cloutier told DG that "[h]e was closing off this investment right away", at "[t]he end of January". This time limit, DG testified, "[a]bsolutely" affected his decision to purchase "because I was afraid . . . I'm going to be the guy left to turn out the lights". Cloutier further told DG that, if DG purchased in January, "about April I could start expecting to receive revenue cheques". It was DG's testimony that this and the amount of the expected returns – "somewhere around quadruple my money" – also affected his decision to purchase. According to DG, Cloutier also told him, before and after he purchased in January 2008, that "[t]his was all but a done deal, . . . that this would be a quick loan of money to the company and that my returns would come so quickly that I wouldn't even miss any, and any cost I incurred in the meantime would just be a drop in the bucket". This, as well, "[a]bsolutely" affected DG's decision to purchase. DG further testified that people he trusted – people with, he thought, investment knowledge and experience – "were getting involved on a large scale, and I thought wow, this is possibly a great opportunity to ride [their] shirttails".

[176] DG recalled receiving "a flyer that seemed to have a bit of a write-up about Viva, but nothing too technical or specific". DG also recalled seeing a binder about Viva but did not recall receiving one. Although Cloutier told DG that he would "get an investor relation package" and could see and use the Softphones, this never happened:

> . . . this was something that was supposed to happen at the beginning with Viva; I was supposed to get a sign-in user name and password to be able to sign into the investor portion of the website so that I could see from the investor side how things were going and what . . . the general populace wouldn't see. I never got that, and I would hound him about it quite a bit. I would ask him for it. Every time I phoned him, I would say, I still haven't received the package you were supposed to give me. I was supposed to receive access to the soft phones that Viva was going to be marketing and get a chance to try them out and see what it was I was invested in. I was supposed to see it before I actually invested. For one reason or another, it always didn't work or wasn't ready or one thing or another.
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> . . .
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> I was invited actually to come and tour the facility in the Bell tower and his facility where his offices were, whenever I was in Calgary. It just never happened that I was in Calgary at that time that was convenient to do that. So I didn't get to take him up on the offer. . . .
>
> . . .
>
> I saw a picture of a soft phone on a screen. It never did anything, that I was aware of. It never was to the point that he could actually demonstrate it for me. . . .

[177] For his purchase of 1000 Softphones (identified by serial numbers) for $50 000 plus $2500 GST, DG signed a Venture/Viva Agreement dated 29 January 2008. Cloutier also signed this Venture/Viva Agreement, which was filled out by him. This Venture/Viva Agreement indicated, in Cloutier's handwriting, that the Venture/Viva Return would be $220 000, exclusive of GST. DG paid the $52 500 – funded by equity from his home – by bank draft payable to Venture, which DG gave to Cloutier.

[178] DG understood that Venture was "the parent corporation that ran a number of different companies, and [Viva] was one of those", and that Cloutier was the president and CEO of Venture and Viva. It was DG's testimony that, when he made this purchase, "[t]here was an existing prospective client base":

> [Cloutier] didn't tell me he actually had anybody signed on ready to purchase equipment. He had HyperOffice that was ready to sign contracts, to market the product; that's what I understood. But I don't recall him ever saying that he had anybody currently beginning to use the product and that revenue would generate right away from that.

[179] According to DG, he was never going to take possession – indeed, he never tried to take or took possession – of the equipment he purchased and he was not going to be actively involved in this business venture. DG understood that the income he was to receive would be derived from all of the Softphones pooled together. He understood that his role was to provide money for the purchase of the equipment and that the equipment would then earn revenue through the efforts of Cloutier and his companies. DG also understood that he would receive the Venture/Viva Return first, "then the buyback of the equipment was to take place".

[180] DG made a second purchase of Venture Softphones after Cloutier "mentioned that he was reopening the investment for a little extra time to allow for extra revenue to complete the software". For his purchase of 400 Softphones (identified by serial numbers) for $20 000 plus

$1000 GST, DG signed a Venture/Viva Agreement dated 5 March 2008. Cloutier also signed this Venture/Viva Agreement, which DG and Cloutier filled out together. This Venture/Viva Agreement indicated, in Cloutier's handwriting, that the Venture/Viva Return would be $88 000, exclusive of GST. For this purchase, DG gave Cloutier $1000 in cash and a $20 000 bank draft payable to Venture.

[181] In making his two purchases of Venture Softphones, DG dealt only with Cloutier.

[182] Time passed, and DG, who was not receiving any of the promised returns, contacted Cloutier several times. Cloutier gave DG "[w]ide and varied" reasons for the delay, including development of the software taking longer and being more expensive than anticipated. DG testified:

> . . . To begin with, the technology was supposed to be used for some company HyperOffice; [Cloutier] was in talks with them for contracts for them to market the software and introduce it to the marketplace and for people and companies to use it. And he talked about realty companies being able to use this click-to-call type of software.
>
> . . . in April [2008], I asked him how things were going and how were the things with the contract with HyperOffice, and in his discussions he talked less and less about HyperOffice and more and more about software development and negotiations for contracts. . . . At that time, I was calling him roughly every three to four weeks to find out where things were at . . . . He mentioned at the end of May or the beginning of June sometime, something about this company called Cell Bridge and this software program called GeoAlert, where they were using . . . satellite technology to be able to offer emergency response for oil companies . . . .
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> . . .
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> . . . I said, That's really interesting, what does that have to do with Viva Communications and HyperOffice and contracts with realty companies? And he said, Well, this is a much better use of this technology. It's a great opportunity to use this technology for a better purpose that is going to be both more lucrative and more useful to the marketplace. And my response to that was simply, Again, that's great, what does it have to do with Viva Communications? I'm not invested in Cell Bridge or this GeoAlert, so I don't know how this has anything to do with my investment. . . .
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> . . .
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> . . . He said, This is such a better opportunity, that he has to put a lot of money and resources and time into it, and that's why he's -- "that's why I'm not working Viva Communications anymore".
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> . . .
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> . . . he mentioned how there was a connection between Viva Communications and Cell Bridge and GeoAlert and that this was important because of something called Directive 71.
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> . . .
>
> Directive 71 was supposed to be -- according to his explanation, which I don't doubt, is Directive 71 provided a layout and a process by which all oil and gas companies, et cetera, were supposed to govern themselves according -- based on the emergency response protocol. They had certain things they were supposed to be able to do. They were supposed to be able to alert so many people and so much time, in the instance of some sort of an accident that could be hazardous to the public.

> . . .
>
> . . . he told me that the Directive 71 wasn't fully enacted right now, and the reason was because the technology wasn't there, the technology didn't exist to allow oil and gas companies, et cetera, to be fully compliant with Directive 71.

[183] Asked whether Cloutier mentioned any oil companies with which Cell Bridge had a relationship, DG told us:

> [Cloutier] often tossed around a number of oil company names: Nexen was one, Husky, and Shell was the one he discussed the most. He talked a little bit about beginning negotiations and discussions with the Shell oil and gas plant or the Shell gas plant, specifically Waterton gas plant.
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> . . .
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> . . . [Cloutier] mentioned the name Linda at Shell. . . . I'm dealing with Linda at Shell, and we're in talks with her and her team and her group about them piloting GeoAlert as an emergency response package for them to sign on contracts with.

[184] DG asked Cloutier for "proof" of his dealings with Shell, but received nothing. Eventually, in summer 2009, DG "track[ed] down" Linda at Shell. Over the telephone she confirmed that she and Cloutier had had discussions and that Cloutier had shown her "the program and software". She said that "it was good, but it wasn't complete" and that "the software needed tuning" to be more user-friendly and less cumbersome. According to DG, when he told Cloutier about this telephone conversation, Cloutier told DG that:

> Linda was resisting on signing with GeoAlert, this GeoAlert program with Cell Bridge. She was resisting and dragging her feet for one reason or another, and that executives above her level were telling her to do it, and she was not doing it, and she would probably lose her job for not doing it if she didn't get onboard soon[.]

[185] DG also testified that:

> . . . within a year and a half of the original investment in January, [Cloutier] mentioned that he was signing a piloting contract with, and I want to say Shell, but I can't be positive, but it seems to me it was the Shell gas plant . . . .
>
> So it seemed to me that they were signing some smaller contracts, and I don't recall the amount, and I remember questioning him, shouldn't 30 percent of that come our way, and I don't recall what the response was.

[186] DG further testified that, eventually, Cloutier "stopped working them [the Softphones] all together", not having the capital to continue operations.

[187] DG told us that, apart from the Venture/Viva Agreements, he never received an offering document for either of his two purchases of Venture Softphones. DG told us that he is not related to Cloutier or any of the directors or officers of Venture and that, at the times he made his two purchases, he was not a close personal friend or a close business associate of Cloutier. It is clear from DG's testimony that, at the times he made his two purchases, he was not an accredited investor, and DG told us that he was not asked any qualifying questions.

[188] When DG became concerned that he "was getting pretty close to losing [his] house", he asked Cloutier to "buy back the $20 000 contract . . . made . . . in March 2008". DG testified that Cloutier instead suggested "an advance on your income from Viva", paying DG $3500 in July or August 2009. DG told us that Cloutier made two additional payments to him – the last of these in February 2010 – totalling $5500. According to DG, Cloutier characterized these additional payments, and recharacterized the first advance, as personal loans. DG told us that he has not received any other payments relating to his purchases of Venture Softphones. DG testified that this loss of money has affected his life "pretty significant[ly]" and that "I will never invest again", "[a]nywhere, ever, at any time".

(d) DAG

[189] DAG, who is unemployed, had not taken any courses relating to investments and had no investment experience.

[190] DAG met Cloutier through Smylski, through whom DAG had made his first investment. DAG met Cloutier "once only" – on 4 July 2008, in Smylski's office.

[191] According to DAG, when he and Cloutier met, they talked about "[i]nvestment opportunities, that there was a good investment opportunity to be had, some money to be made" and Cloutier "introduced [DAG] to the binder with the Venture material in it". Asked to describe this investment, DAG told us that, "to [him], it was a telecommunications software". DAG testified that he and Cloutier talked about "the oil industry . . . using this at some end of the production". Asked whether Cloutier ever told him that Venture had customers for the product, DAG responded that Cloutier "did not specifically come out and say that -- about what customers he had, no". DAG also told us that there were no specifics as to contracts or purchase orders. According to DAG, Cloutier "was raising capital to fund the project". From the documentation shown to DAG by Cloutier, DAG understood that "[t]he software would be sold to investors, and that's how I would be recouping my money, is through the software that would be sold".

[192] For his purchase of 600 Softphones (identified by serial numbers) for $30 000 plus $1500 GST, DAG signed a Venture/Viva Agreement dated 4 July 2008 in Smylski's office. Cloutier also signed this Venture/Viva Agreement, which was filled out by him. This Venture/Viva Agreement indicated, in Cloutier's handwriting, that the Venture/Viva Return would be $132 000, exclusive of GST. DAG paid the $31 500 by certified cheque payable to Venture, which DAG gave to Cloutier.

[193] DAG understood that, under this Venture/Viva Agreement, he was purchasing "software phones" – "I was getting 600 units of this product." DAG told us that he never saw these phones, nor was it ever his intention to take physical possession of them – "to the best of my knowledge there was no need for me to have a hands-on with the actual software". DAG understood that, as at 4 July 2008, "the software was ready to go and ready to be handed out and in sales form". DAG also understood that he was never going to be actively involved in this business venture; the equipment he purchased would stay with and be managed by Cloutier or one of Cloutier's companies who or which would take whatever steps were necessary to generate the $132 000

return (DAG's pro rata share of the gross revenue that was to be shared by all who owned equipment).

[194] DAG told us that, at the time of his purchase, Cloutier discussed the Venture/Viva Return with him and that this would be received "anywhere from six months to a year". DAG told us that the fact of the return was important information for him "[b]ecause it would give me financial stability", and that the timing affected his decision to purchase "because I heard about different investments, and it took a longer period of time to receive money back, and this time frame was short and concise, and that's what I was looking for". DAG testified that he did not inquire as to how the $132 000 return had been calculated – "I was kind of overwhelmed at the time at the largeness of the amount of money I was to receive back". DAG further testified that he did not know how – whether by monthly payments, lump-sum payment or otherwise – he was to receive the $132 000 return. DAG testified that he "would not have invested" had he known there was a risk of losing all of his purchase money.

[195] DAG told us that, apart from the Venture/Viva Agreement, he never received an offering document for his purchase of Venture Softphones. DAG told us that he is not related to Cloutier and that he did not consider himself a close personal friend or a close business associate of Cloutier. It is clear from DAG's testimony that, at the time he made his purchase, he was not an accredited investor, and DAG told us that he was not asked any qualifying questions.

[196] DAG has not received any return on his purchase of Venture Softphones, or repayment of his purchase money. He has not spoken to Cloutier since making his purchase. DAG testified that this loss of money has "made me a very jaded person" concerning "this particular type of investment".

(e) SH

[197] Prior to purchasing Venture Softphones, SH, a home-care worker and business owner, had no experience, knowledge or education in investing.

[198] In spring 2008 SH and her husband IN were looking to invest approximately $20 000 they had received from the sale of their home. They saw a newspaper advertisement about an information session concerning an investment in Saskatchewan farmland. They attended that session, at which SH saw Smylski, but decided that the investment was not for them.

[199] Soon after attending that session – after SH and IN had "pretty much decided" to use their money as a down-payment for a house – SH received a telephone call from Smylski. He encouraged them to invest their money instead, mentioned that her brother-in-law was "really happy" with the returns from an investment he had made with Smylski, and stated that Smylski had "many, many different investments he could show us and explain to us". SH and IN met with Smylski in spring or summer 2008, and told him that they wanted to invest in what SH's brother-in-law had. Smylski said that the brother-in-law's investment was "no longer available", but told SH and IN of another option:

> He said he had an amazing investment that he wasn't sure that we can even still get in on and that he would have to call [Cloutier] in Edmonton and check if there was even a possibility we could still squeeze in on getting in on it, and if we did and if we were lucky enough to get into it, we

> would be the absolute last people to get in on the investment. Basically he didn't really tell us what it was. He mentioned the returns; . . . I believe his numbers were, if you put in [$]10,000, you're going to receive [$]40,000 on top of that, if I'm not mistaken, so you would end up with [$]50,000. . . .
>
> He said there are people who have remortgaged their homes, there are people who have put in their entire retirement into this, and he said he himself had a really substantial amount of money invested in it and that he believed in it 100 percent and that it was, like, the closest thing to a guarantee that you could get.
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> . . .
>
> . . . He didn't say anything about what the companies were called; he didn't say what we would be investing in; . . . I remember him saying, [Cloutier] has a heart of gold. He would take the shirt off his back for anybody, and it was just, like, this guy is amazing, and if you could possibly get in to the last-minute investment, you're going to be so fortunate to do so. So he basically said he would call [Cloutier] and see if there was a possibility he would make an exception for us and come . . . and then meet with us.

[200] A few days after meeting with Smylski, SH and IN received a telephone call from Smylski or Cloutier. This led to SH and IN meeting with Cloutier in summer 2008. At this meeting, Cloutier very quickly took them through the Viva Brochure and gave them one. Cloutier also gave them his business card, which SH believed identified Cloutier as the CEO of Cell Bridge. SH told us that Cloutier "sort of very vaguely mentioned something about soft-phone technology and how it was . . . on the brink of exploding into being a really, really big deal". She testified that "[Viva] was with respect to soft phones and something called a click-to-call application that [Cloutier] sort of explained to us. And there was briefly something mentioned about Cell Bridge designing emergency response systems for places like oil rigs and things of that nature". According to SH, Cloutier "sort of explained to us that [Venture] was sort of the mother company or umbrella company . . . and that everything else, whether it was Viva or Cell Bridge or whatever kind of stemmed out from that umbrella company, and that's who we would be signing the contracts with, is [Venture]".

[201] As for customers for this Softphone technology, SH told us Cloutier mentioned "that the Re/Max Realty office in Vancouver was either on the brink of or had already signed contracts to have this technology in all of their realtors' offices in Re/Max in Vancouver" and "that there was a contract with Shell that was going on apparently in the Waterton area, and it was something that Cell Bridge was designing an emergency response system for". SH later clarified she and IN understood that there were signed contracts with both Re/Max Realty and Shell, and that money was being earned. SH also believed that Cloutier said "there were other potential contracts that were looking like -- there were other potential contracts that would be getting signed"; she "vaguely" remembered Cloutier talking about Husky Oil and ConocoPhillips. SH told us that Cloutier told her work was going on at Waterton, but she did not verify that for herself. SH "vaguely" recalled Cloutier telling her that, in relation to an RFP for the province of Alberta for emergency response, the province decided to go with a company competing with Cell Bridge.

[202] Cloutier told SH and IN that they "were absolutely very, very lucky to get in because we were the last people to get in". SH elaborated:

> . . . I believe I remember hearing . . . that there are people who have been waiting to see their money, their returns start coming in for several years. So what I understood at the time was there had been people who had already put in their money in two or three years prior to us, and, you know, there was sort of this idea of, I like you . . . so I will let you into this investment, but you're the last-minute people who are able to get in on this . . . . So we felt fortunate to be able to squeeze into that.

[203] Asked whether Cloutier gave any reason for this investment being closed, SH remembered Cloutier saying that "these contracts had been signed by Shell and Re/Max Realty in Vancouver, and because those very large contracts had been signed, the money was going to start coming in". SH told us that this "definitely" influenced her and IN's decision to purchase Venture Softphones because "Re/Max is a really well-known, reputable company and so is Shell, so we thought these are really big-time businesses, and so if he's doing business with these people, and they're signing contracts with them or they already have, then that must be something really incredible".

[204] According to SH, Cloutier told SH and IN that "on the 21st of every month, all the investors were to receive cheques, and . . . August 21st or September 21st, at the very latest, we would be receiving a cheque for our returns". SH understood that she and IN would receive all of their purchase money first and then the promised returns, and Cloutier said "certainly within a year" SH and IN "would see all of [their] returns, completely everything". SH told us that this "was definitely the make-it-or-break-it factor because . . . we were really, really wanting to buy a house, and if we thought that there was any possibility of us not getting our returns back within that time period, then we would have opted to spend our money on a down payment and buy a house instead".

[205] SH testified that Cloutier "reiterated" the information Smylski had given about five-fold returns. SH told us that the promised returns "[d]efinitely" influenced their decision to purchase because "we thought we could buy so much of a nicer, bigger house with $100,000 down payment".

[206] According to SH, Cloutier told her and IN that "it's a start-up" and because of that it is considered "a very high risk", but there are also "very high rewards", and that "all it takes is one phone call" to get their money back. SH told us that being told they could get their money back "was what influenced us into signing those contracts" – it, too, was "the deciding factor". SH testified that she and IN "definitely would not have put [their] money into" the Venture/Viva Model had they thought there was a risk of losing their money.

[207] SH and IN did not purchase Venture Softphones until a second meeting held at their request a few days or perhaps one week later – on 7 August 2008. At this second meeting, Cloutier reiterated that it would take "one phone call" to get their money back, and that the money would "start flowing in" on 21 August 2008 or "for sure" 21 September.

[208] For the purchase by SH and IN of 200 Softphones (identified by serial numbers) for $10 000 plus $500 GST, IN signed a Venture/Viva Agreement dated 7 August 2008. Cloutier also signed this Venture/Viva Agreement, which was filled out by him and IN in SH's presence. This Venture/Viva Agreement indicated, in Cloutier's handwriting, that the Venture/Viva Return

would be $44 000, exclusive of GST; this was, according to SH, to be in addition to the return of the purchase money. SH and IN paid the $10 500 by bank draft payable to Venture, which they gave to Cloutier.

[209] SH understood that she and IN were purchasing equipment – "[s]oft phones" – under this Venture/Viva Agreement, but she testified that it was "[d]efinitely" the returns that prompted her and IN to enter into this agreement. SH told us that she was not sure who was supposed to use the equipment to earn the revenue to pay the returns, but later said that she and IN "assumed that . . . somehow it would possibly get put to use with the contracts that [Cloutier] had mentioned, like with Re/Max and Shell, . . . and that would hopefully be the way that we end up getting our returns on our investment". SH also told us that she and IN did not expect to have to do anything other than provide their purchase money to earn that revenue, did not expect to take possession of the equipment they purchased, would not have known what do to with that equipment and never saw any of it. SH testified that she and IN did not really understand how the promised returns were to be paid – "I don't believe that we understood that it was paid to us on the use of our equipment. I think that we went into the agreement thinking that we would just get paid." SH testified that Cloutier "explained to us that any money coming through to him, whether it was from Cell Bridge or Venture or Viva or, in fact, I think he may have even mentioned [SRAE], . . . would trickle through to the investors". SH also testified that she and IN did not understand that they were turning over the equipment they purchased to be managed, that Venture could repurchase that equipment, or that SH and IN could opt to take possession of it. SH explained that the latter was contradictory to what Cloutier told her and IN – "that if we ever wanted our money back, it would just be one phone call, and we could get our money back".

[210] SH testified that Cloutier told her and IN that "we would get a CD, he would mail it to us, and he made it sound like it was . . . a software application that we would have to install in our computer, and we would get to try out these 'soft phones' that we purchased", but that she and IN never received the CD.

[211] SH's grandmother gave her and IN $10 500, with a view to assisting them in buying a home. SH then telephoned Cloutier and on 16 September 2008 met with him. SH told us:

> . . . It was after the August 21st date went by that the investors were supposed to get their first cheque, but when I talked to [Cloutier] about that, he said it was a little snag, little holdup, nothing to worry about, and we would be seeing our returns on September 21st, starting on that day, and I really wanted to meet with him to put in, like, some more money. I wanted to see if it was even a possibility for us to be able to squeak some last bit of money in before September 21st.

[212] SH and IN made a second purchase of Venture Softphones. For their purchase of 408 Softphones (identified by serial numbers) for $20 400 plus $1020 GST, SH signed a Venture/Viva Agreement dated 16 September 2008. Cloutier also signed this Venture/Viva Agreement, which was filled out by him and SH. This Venture/Viva Agreement indicated, in Cloutier's handwriting, that the Venture/Viva Return would be $89 760, exclusive of GST. SH and IN paid the $21 420 by two bank drafts and a cheque from SH's grandmother, all payable to Venture, which SH gave to Cloutier. According to SH, this money derived from the money remaining from the sale of their home, IN's personal savings, and the money given to her by her grandmother; "we cleaned our account out essentially to put pretty much everything we had into

this". On 15 October 2009 this Venture/Viva Agreement was replaced with one in IN's name and signed by him, at the request of SH and IN.

[213] SH told us that, when making this second purchase, she asked Cloutier for an update:

> . . . he said that everything was on track, and everything was fine and that we would be seeing our money right away, and he was very reassuring. He said we were very lucky to put in money at the last second like this, and we were just so fortunate because we would be seeing our returns right away; the other people would have been waiting for a very long time.

[214] SH acknowledged that she and IN did not seek a legal or accounting opinion before signing either of their Venture/Viva Agreements, but told us that neither Smylski nor Cloutier advised that they do so.

[215] SH and IN have never seen any of the promised returns or repayment of their purchase money, and, despite requesting equipment, have never received from Venture any of the equipment they purchased. SH became aware in the latter part of 2010 or 2011 that some people were receiving money, which she assumed was "their return on investment".

[216] SH testified that, after attempting to contact Cloutier several times without success, they contacted Smylski, who referred to "a little snag" and "a little holdup".

[217] SH told us that subsequently, in summer or early fall 2009, she met with Cloutier and asked that the purchase money be returned, which she and IN wanted to use as a down payment on a house. Cloutier responded "I've got nothing for you" and "I have no money". It was at this meeting, SH testified, that Cloutier first spoke of "Zaruba in Toronto and a family inheritance" – "[Cloutier] kept reiterating that once [Zaruba] gets his big money, . . . then [Cloutier] would get his big money, and then all the investors would get their money, and we were all about to get paid out". Cloutier also told SH that the inheritance money "was going to be there within the next month", and the promised returns were "right around the corner". According to SH, Cloutier did not ask her to do anything to assist in obtaining the inheritance money and did not offer any proof of the existence of the estate. SH testified that at this meeting Cloutier told her "nothing concrete" about Venture, Viva and Cell Bridge – "something to the effect of there being delays with the technology and again snags, but everything was on track, and everything was going to work out. But money was tight, and . . . I remember him talking about there being some types of holdup with the Cell Bridge contract with Shell, that there [were] some types of snags building out in the Waterton area". SH also testified that Cloutier said, "Yeah, . . . go ahead and start looking for houses, you will get your money back to put into your down payment". SH further testified that Cloutier "also . . . said that [he] had other interested investors that would buy our equipment or whatever, and [he] could also give us our money back that way and . . . [he] definitely made it sound like [he was] not solely relying on [Zaruba]". SH and IN tried to contact Cloutier often and did speak with him several times – SH testified to one telephone call from Cloutier in which "he was very angry and aggressive". SH told us that in winter 2010 Cloutier reassured IN that his and SH's money "is still coming".

[218] SH and IN hired a lawyer, and contacted Cloutier's lawyer, to attempt to get their purchase money back, but these efforts were unsuccessful.

[219] SH told us that she and IN did not receive a bill of sale or anything called a prospectus or offering memorandum, and that they were not provided with a subscription agreement or other document referencing accredited investors. According to SH, she and IN did not consider themselves close personal friends of Cloutier, and she and apparently IN are not related to Cloutier and did not consider themselves close business associates of Cloutier, and are not family, close personal friends or close business associates of anyone else associated with Venture, Viva or Cell Bridge. It is clear from SH's testimony that, at the times she and IN made their purchases, they were not accredited investors. SH told us that no one talked, or posed questions, to her and IN about qualifying for a registration or prospectus exemption in order to make their purchases; no one mentioned the term "accredited investor".

[220] SH testified that she and IN had separated, in part "because of the fact that we were fighting over this a lot, over the loss of our money"; as a result of this experience, she has "a really huge financial burden". SH also testified that, in the result, "we're not going to be quick to go and invest any kind of money that we ever have in the future in anything because . . . it's really destroyed our trust".

(f) HK

[221] HK, who is retired, had invested for many years with a stockbroker.

[222] HK told us that he first met Cloutier in fall 2008, when HK and others, all directors of an oil company in financial difficulty, were introduced to Cloutier as a party potentially interested in taking over the company. Cloutier ultimately purchased "the shares of that corporation", with the negotiations leading up to that (in which HK participated) probably occurring in January or February 2009. Over the course of many meetings, Cloutier's company SRAE was mentioned as having the "seismic technology . . . to evaluate the leases" of the oil company, and Venture and Viva were also mentioned.

[223] Cloutier told HK and his wife about "the opportunity to invest in Venture and Viva". HK understood that Cloutier was the sole owner, managing director and operations manager of both companies.

[224] HK testified that he and his wife "invested in Viva" in April 2009 – "[o]ur purchase in Viva was for soft-phone technology", "800 units of soft-phone technology".

[225] According to HK, before he and his wife made this purchase, Cloutier "explained in depth the arrangements between Viva and Venture and also its connection to Cell Bridge". Specifically, Cloutier explained that Cell Bridge was "a company that owned software that all operating oil and gas companies in Alberta could use to comply with the ERCB ruling of . . . each operation and site needing an emergency response team". HK elaborated:

> . . . Those soft phones were to be leased by Venture to interested parties, which included sport teams and other people, other groups that needed the use of a soft phone. And that development continued on into the oil patch with the -- what I just described as the ERCB ruling, and [Cloutier] was presenting this technology to oil companies, and he spoke of Shell and the ongoing meetings that he was having with Shell in their Waterton operations, that was kind of his prototype. He

> referred to newspaper articles of those meetings, and that was the nature -- the potential of going into the oil patch, meeting the qualifications of the emergency response team that was required, indicated to me that that's where the potential growth was, aside from Viva's arrangements with the sports groups and the other groups. The potential breakthrough into the Alberta oil industry would be significant going forward.

[226] HK also told us Cloutier indicated that Shell had a contract with Cell Bridge for the soft-phone technology:

> . . . [Cloutier] explained to us that [Shell was] using the software; that was kind of his first entry of strength into the marketplace and that he had an ongoing relationship with executives in Shell from the Waterton plant, that he met with them regularly. I mean, he and I met frequently . . . . And on those trips . . . he told me he was also meeting with Shell and developing this technology, and it was functioning well in Waterton and that Shell was going to take it much broader than their Waterton plant.

[227] HK testified that these explanations from Cloutier affected his and his wife's decision to purchase – the way the "project" was described "indicated that there was significant potential for growth and returns that would meet the returns that [Cloutier] represented to us".

[228] Prior to making their purchase, HK and his wife made a trip to the Cell Bridge office in Calgary to see a demonstration of the Softphone technology. HK described this as "a good presentation" – "[t]here appeared to be substance to what [Cloutier was] presenting".

[229] In evidence are handwritten notes made – some by Cloutier, others by HK – prior to the purchase of Venture Softphones by HK and his wife. Certain of these notes made by Cloutier concerned "how Viva and its relationship to Venture would generate cash flow" and "how . . . the operations of Cell Bridge would generate cash flow to the unit holders of Viva". According to HK:

> . . . the [$]9.95 to [$]29.95; that was the range above the leasing rates for the soft phones, and the 15 percent to the right on that same line would represent an average of that range that he used, for $15 a month times 400,000 units would generate $6 million of revenue, 30/70 percent split, the 30 percent would be [$]1.8 million, which would flow through Viva from Cell Bridge . . . .

[230] Other of these notes made by Cloutier related to "the emergency response plan that was required by the ERCB".

[231] Information from HK indicated that Cloutier demonstrated or stated that Viva had one million customers, that there were "82 unit holders" (holders of soft-phone technology) who had "invested approximately $3 million" in Viva, and that Cloutier had raised another $2.5 million "in Sunterra".

[232] Prior to "invest[ing] in Viva", HK received the Viva Brochure from Cloutier, which, HK told us, they "went through . . . , more or less, page by page". HK testified that his decision to purchase was affected by the following information in the Viva Brochure: "Launch soft phone into large installed customer base at no incremental cost. ie: Hyper Office (300,000 plus), Sales Force (600,000 plus), Hockey Canada (100,000)." HK explained: "It's a significant number of lease agreements, of soft phones that [Cloutier] would have had already with customers." The

information in the Viva Brochure and from Cloutier concerning returns – equipment sold at $50 per piece, earning (from "these 1 million customers that [Cloutier] had, and going forward with the development of customers through the Cell Bridge software that he described") $220 per piece – also influenced HK's decision to purchase. HK explained: "It's a significant plausibility . . . with that many customers, a million customers in place and the oil patch in front of you, potentials to earn that type of revenue per piece of equipment. Even if it did half as well as he represented, still reasonable returns to go forward with."

[233] HK understood that Venture was the exclusive supplier of equipment to Viva, that he and his wife were buying equipment and entering into a management contract with Venture, and that as purchasers he and his wife would earn business income.

[234] For their purchase of 800 Softphones (identified by serial numbers) for $40 000 plus $2000 GST, HK and his wife signed a Venture/Viva Agreement dated 9 April 2009. Cloutier also signed this Venture/Viva Agreement, which HK and Cloutier filled out together. This Venture/Viva Agreement indicated, in Cloutier's handwriting, that the Venture/Viva Return would be $176 000, exclusive of GST. HK and his wife paid the $42 000 by cheque payable to Venture, which HK gave to Cloutier.

[235] HK acknowledged that he had ample time to seek legal and accounting advice before he and his wife executed the Venture/Viva Agreement, but did not do so.

[236] Asked when Cloutier told them they would start seeing returns, HK testified that "[t]here was no specific date" and that "it was always in the future" and "it was always -- there was some reason that it had to be next month". HK understood that he and his wife were the owners of the equipment specified in Schedule "A" of the Venture/Viva Agreement, but told us that he never got a Softphone. HK acknowledged that he and his wife put the equipment they purchased in trust with Venture to generate income for them – up to the specified $176 000. HK understood that every purchaser of equipment was to have a pro rata share in the revenue generated by Viva on a monthly basis. It was HK's testimony that his "motivation for investing was the cash flow", that it was not his intention to purchase the equipment and himself market and earn income from it (nor was this discussed as a possibility), and that he was relying on Venture (without any involvement from him) to make the promised returns.

[237] HK subsequently lent money to Cloutier. We discuss this loan below.

[238] HK told us that, apart from the mentioned Venture/Viva Agreement and the loan and repurchase agreements discussed below, he never received an offering document for his and his wife's purchase of Venture Softphones or his loan to Cloutier. HK told us that he is not related to Cloutier and that he did not consider himself a close personal friend or a close business associate of Cloutier or any of the directors or officers of Venture. Concerning their business relationship, HK indicated that he did know Cloutier "fairly well" and "had some level of confidence" in him given their mentioned involvement with the oil company in financial difficulty. It appears from HK's testimony that he and his wife may well have qualified as accredited investors at the times the purchase and loan were made. However, it was HK's testimony that they were not asked any qualifying questions by anyone.

[239] HK and his wife have received no income from Venture or Viva or money from Cloutier. HK testified that, in the result, they as retirees have had "to make adjustments". HK also testified that this experience has "certainly affected my willingness to invest in private placements, anything like that, going forward" and "has affected my faith in some Albertans who represent business ventures".

D. The Loan Arrangement

1. Staff Investigators' Evidence

(a) Overview

[240] Pickering provided an overview of the loan arrangement offered by Cloutier (the **Loan Arrangement**). According to the totality of the evidence, pursuant to the Loan Arrangement:

- Cloutier solicited certain of the Purchasers – the Lenders – to lend money to him personally for three months, after which Cloutier would repay the principal amount of each loan together with agreed interest.

- At the same time (but for perhaps a few exceptions), Cloutier either:

  - entered into a repurchase agreement with each Lender, under which Cloutier would personally repurchase the Lender's respective SRAE Units or Venture Softphones, for an amount in excess of what the Lender had paid for them; or

  - undertook to pay a "Gift Amount", ranging from $100 000 to as much as $15 million.

- The loans were to be used by Cloutier to provide financial assistance to two individuals – Zaruba from Ontario and Stevenson from Alberta – purportedly entitled to receive multi-million dollar proceeds from different estates (the **Zaruba Inheritance** and the **Philippine Inheritance**, respectively, and the **Inheritances** collectively), money in which Cloutier was to share once the estates were settled. The money that Cloutier was purportedly to receive from these two estates would supposedly enable him to repay Lenders their loans plus interest, and repurchase their respective SRAE Units or Venture Softphones or pay the promised "Gift Amount". Cloutier conveyed some or all of this information to at least some of the Lenders.

[241] Pickering told us that Mason, a lawyer acting for Zaruba, was purportedly assisting him in obtaining the Zaruba Inheritance.

[242] Pickering testified about what she had learned concerning the Philippine Inheritance: a fisherman (apparently named "Romy", "Romey" or "Romeo") from a small village in the Philippines was purportedly the sole beneficiary of a vast estate – in the hundreds of millions of dollars, held in various bank accounts all over the world – left to him by his aunt (apparently with the surname "Santiago"); the aunt had purportedly amassed a large amount of money during

her tenure with the Ferdinand Marcos government; and the fisherman purportedly sought out Stevenson to assist him in obtaining the inheritance money, in return for which Stevenson would receive a share of the inheritance money.

[243] Pickering told us that during her investigation she was never able to substantiate the existence of either of the Inheritances.

(b) Loan Agreements, Repurchase Agreements and Gift Letters

[244] Staff obtained most, if not all, of the documents used by Cloutier in pursuing the Loan Arrangement. These documents were titled: "Loan Agreement" (the **Loan Agreements**); "Sunterra Seismic Inc. Unit Pre-Payment Agreement" (the **SSI Repurchase Agreements**, entered into by Lenders that were also SRAE/SSI Purchasers); "Venture Contractors Ltd. Unit Purchase Agreement" (the **Venture Repurchase Agreements**, entered into by Lenders that were also Venture/Viva Purchasers, and, together with the SSI Repurchase Agreements, the **Repurchase Agreements**); and "Gift Letter" (the **Gift Letters**). From these documents, Staff prepared summaries of the Loan Agreements, the Repurchase Agreements and the Gift Letters. We are satisfied, having regard to these documents, that:

- from 9 July 2009 through 6 January 2011 Cloutier received in excess of $2.5 million in loans from approximately 25 Lenders for which he promised to repay a total in excess of $3 million;

- from 9 July 2009 through 18 February 2010 Cloutier promised to pay a total of approximately $10 million to approximately 24 Lenders under Repurchase Agreements; and

- from 7 August 2009 through 6 January 2011 Cloutier promised to pay a total in excess of $60 million to approximately 10 Lenders under Gift Letters.

[245] The Loan Agreement stated that, within three months from the date of the agreement, Cloutier promised to repay to the Lender the principal amount of the loan plus interest at a specified rate, typically 20%. Certain defaults would incur interest at 25% per year.

[246] The SSI Repurchase Agreement stated that, within three months from the date of the agreement, Cloutier would pay a stated amount "as a pre-payment of" units of SSI – presumably meaning SRAE Units – owned by the "Beneficiary". In the event that Cloutier did not pay the Beneficiary "before [SSI] begins to pay out to the Unit Holders, then [SSI] will make all payments to the Beneficiary" and "[SSI] will repay the Loan to the Beneficiary that the Beneficiary lent [Cloutier] under the Loan Agreement . . . by [SSI] increasing the Return On Investment in the [SRAE/SSI Agreement] by the Loan Amount and the initial Interest set out in the Loan Agreement".

[247] Similarly, the Venture Repurchase Agreement stated that, within three months from the date of the agreement, Cloutier would pay a stated amount "for the purchase of" units of Venture – presumably meaning Venture Softphones – owned by the "Seller". In the event that Cloutier did not pay the Seller "before [Viva] begins to pay out to the Unit Holders, then Viva will make

all payments to the Seller" and Viva "will repay the Loan to the Seller that the Seller lent [Cloutier] under the Loan Agreement . . . by Viva increasing the Return On Investment in the [Venture/Viva Agreement] by the Loan Amount and the initial Interest set out in the Loan Agreement".

[248] The Gift Letter provided that, for value received, Cloutier would pay to the "Beneficiary" the "Gift Amount, within Five Banking Days of receiving the funds from Michael Zaruba and Rand Stevenson".

[249] Pickering told us that none of the Lenders "received returns" under the Loan Agreements, the Repurchase Agreements or the Gift Letters. According to Pickering, Cloutier told Lenders that "he was waiting for the inheritance in order to pay their returns".

(c) Emails

[250] The October 2009 ATB Email discussed the Zaruba Inheritance:

> The other business venture is through an estate that [Cloutier] is partnering with that belongs to a Mr. Michael Zaruba . . . .
>
> [Zaruba] apparently has hundreds of millions tied up in an estate battle for the past 11 years in American Courts.
>
> Because he was cash short [Zaruba] has had [Cloutier] raise funds for him to bridge until the estate is released.
>
> [Cloutier] indicated he raised $900K through selling units again to investors. This time the return is 20% interest + [$]54K so that an initial investment of $10K will return $66K.
>
> When asked [Cloutier] indicated he has approximately 20 unit holders in this venture and that all of the investors were almost exclusively from . . . where he was working with a broker. I tried to get [Cloutier] to expand on who this broker was and his response was "well he's not technically a broker" and didn't go further.
>
> [Cloutier] has also indicated that for his part in raising funds for [Zaruba] he is to receive a 1 time wire of [$]60 million of which some is allocated to his unit holders and some to [Cloutier].
>
> [Cloutier] indicated that when funds arrived in his personal account he would place[:]
> [$]5 million in [Viva]
> [$]5 million in Cell Bridge
> [$]5 million in [SSI]
> [$]2.5 million in Sunterra Oil
> approximately [$]10 million to unit holders
>
> The rest would stay in his account.

[251] In an 18 September 2009 email to Pacholik, Cloutier stated:

> The message from the lawyer [Mason] dealing with the closing of the estate for [Zaruba] has let me know that it will take another 7 to 10 days, (September 25) to register the real estate and transfer the names on the bank accounts to the right full [sic] new owners.

> Then a meeting will be set up for [Zaruba] and [Mason] to close on the investment portfolio and upon that being completed then [Zaruba] will advance the loan. Funds may be available by September 30, however October 9 is more of a realistic date.
>
> As I am assured that it will be completed . . . .
>
> . . . We are truly at the end of this waiting period as its [sic] just a matter of days now.

[252] In a 3 November 2009 email to Cloutier, Pacholik stated:

> . . . this whole process with [Mason] and [Zaruba] is sounding a lot like my go around with [another individual]. Every week another reason as to why releasing funds will not [occur] this week. . . .
> So how do we take control back?? I think we have to find other ways to activate funding. . . .

[253] Also in evidence are copies of several emails from Mason (or Zaruba through Mason) to Gibeault (the **Mason/Gibeault Emails**). These document promises made from September 2009 through March 2011 by Mason (or Zaruba through Mason) to Gibeault and perhaps others that payment of her money was imminent, further promises of when money from the estate was expected to be received and paid out, and reasons for delays in receiving the money from the estate. Several of these Mason/Gibeault Emails were also sent to Cloutier.

[254] The Mason/Gibeault Emails offered various explanations for delayed payment, such as: "[w]e are just about at the turnover stage with some minor details being worked out" (28 October 2009); "[d]ue to unforeseen circumstances we are unable to finalize the payout for the Zaruba party until early next week thus leaving me no alternative but to schedule your loan repayment towards the end of next week" (13 November 2009); "[d]ue to bank timing and the payout registration . . . you can expect repayment of your loan prior to weeks [sic] end" (25 November 2009); "[w]e have a reporting from TD Canada Trust stating the turnover of estate accounts will be complete on the 28th and at that point, we can proceed with the 'partnership' turnover" (24 June 2010); "we anticipate [Zaruba] to gain access to his estate settlement in the next day or two. I would like to set in motion the time line for the turnover of the 'partnership in friendship' transaction. . . . [T]his closing will take place on or before August 10th, 2010" (6 July 2010); "[o]nce again, we have been postponed. This delay is due to banking issues" (19 August 2010); "before the end of today is the day some funds will be clearing" (1 November 2010); "[Zaruba] has separated a large sum from his expected payout. This sum remains on deposit in his desired financial institution. . . . It is understood that this amount will clear all banking procedures and holds over the next two days and will be available to [Zaruba] in the week to come" (17 December 2010); "everything has been processed and we are in that unfortunate 'bank' waiting period" (4 February 2011); "I anticipate complete availability of funds which I thought was going to be the case over the past week. . . I have this morning been informed that I must attend two more meetings in Toronto to complete the turnover/closing. . . . [T]he 'third party holds' will indeed be taken off the accounts" (9 February 2011); and "I have finally been notified that all affairs are in order and this transaction will now conclude! . . . You have been given many time lines which have come and gone. . . . I assure you the broken time lines are not a product of anything being wrong or this not being cleared. It has just been a series of complications and some misinformation due to the circumstances. This has now been worked

out and a time line has firmly been set to have funds flowing. . . . This time line places this to be complete before April 1st, 2011" (2 March 2011).

[255] Also in evidence are copies of several emails from Mason to Cloutier (the **Mason/Cloutier Emails**). These, similar to the Mason/Gibeault Emails, document promises made from 19 June 2009 through 5 May 2010 by Mason to Cloutier that payment of his money was imminent, further promises of when money from the estate was expected to be received and paid out, and reasons for delays in receiving the money from the estate. The Mason/Cloutier Emails offered various explanations for delayed payment similar to those made in the Mason/Gibeault Emails (some appeared to be identical messages), such as: "I would like to apologize for the lengthy delay in setting the closing date. The representing financial institutions were at a slight standstill until the beginning of this week. We have now been informed . . . that the closing will conclude . . . in 37 (thirty seven) banking days thus bringing the availability of funds for all registered individuals on August 13th 2009 at 08:00A.M. This transaction will take place . . . in New York City" (19 June 2009); "with some minor setbacks that we have faced over the past week, we have no choice but to delay your closing appointment by seven . . . non[-] business days. The appointment will remain . . . Tuesday August 25 2009"; "your transaction interest will conclude commencing Wednesday September 16, 2009"; "[b]ased on the timing of routing through the Canadian banking system we are looking at a further 5 to 10 days" (17 September 2009); "verbal confirmation . . . of final turnover on October 27th" (16 October 2009); "all details have been worked out and a final appointment for [Zaruba] has been set for next week. Following his appointment, I will make arrangements for your funds" (30 October 2009); and "we need the senior Zaruba party on site in Toronto . . . . Unfortunately this will delay the . . . turnover appointment until Friday May 7th. . . . I assure this will not be a prolonged delay . . . . [Y]our accounting is accurate to May 10th 2010 at which time full access will be available" (5 May 2010).

[256] Also in evidence are copies of several emails between Cloutier and Stevenson (the **Stevenson/Cloutier Emails**). These, similar to the Mason/Cloutier Emails, document promises made from 5 January 2010 through February 2011 by Stevenson that payment of the estate money was imminent, further promises of when money was expected to be received and paid out, and reasons for delays in receiving the money. The Mason/Cloutier Emails also document Stevenson repeatedly requesting Cloutier to send him money so Stevenson could obtain the estate money, and Cloutier advising that he was waiting for money from Zaruba that, once received, he would send to Stevenson. For example, in early January 2010, Stevenson told Cloutier that things were "[s]till on track, moving forward", that "a few arrangements are still being made on the terms of the release, amounts, term deposits", and that the "Chinese were having some problem in how to give us access to our money without losing [the] account", but that Stevenson had a "solution" he believed would be accepted, leaving him in "no doubt . . . that the funds will be released" and that Cloutier's "assistance would be appreciated". In the same email exchange, Cloutier advised Stevenson that he (Cloutier) was "expecting to have access to funds from [Zaruba] . . . (Jan 18)" and then he would have "the minimum of $500,000 available for you". In another email exchange starting on 31 March 2010, Cloutier advised that he was having "a problem collecting funds", but that he expected to receive money from Zaruba shortly and would then send Stevenson "the $500 we always talked about". Stevenson reported the same day that "it looks like the release is coming down fast" and that the "Chinese have asked that

Romy come to China". On 1 April 2010 Stevenson emailed Cloutier that "Romy" had been given money for his trip to China and that "cash-on-hand, it's getting quite low" but thought he would be "OK until next week when your funds come in".

(d) Investigative Interview Evidence

(i) Gibeault

[257] In excerpts of the transcript of her investigative interview conducted on 5 April 2011 (the **Gibeault Interview**), Gibeault stated that:

- Mason told her he was representing a client with an inheritance (the Zaruba Inheritance), asked if she was interested in helping the client with his living expenses while he waited for money from the inheritance, and introduced her to Zaruba.

- In 2008, she lent money to Zaruba, for which he would pay her interest at 40%.

- Zaruba told her he was to receive the Zaruba Inheritance from the Czech Republic and that "the inheritance was in an investment", with several parties involved.

- She was told by Mason or Zaruba several dates – the most recent being the beginning of 2011 – on which she was to receive her money, but payment was always delayed for a variety of reasons.

- She never saw any documentation evidencing the Zaruba Inheritance.

- She introduced Cloutier to Mason and Zaruba and was initially the "go-between".

- Her understanding of the status of the Zaruba Inheritance was that all documentation had been completed and they were waiting for the bank to release the money to Zaruba.

- She did not know the specifics of what the Zaruba Inheritance entailed, and no details were ever discussed.

(ii) Zaruba

[258] Excerpts of the transcript of the investigative interview of Zaruba conducted on 16 February 2011 (the **Zaruba Interview**) were entered in evidence. Pickering testified that, although the summons directed Zaruba to bring with him to the interview documentation "[w]ith respect to your pending inheritance", including "legal filings" and "estate documents", he did not bring any substantiating the existence of the Zaruba Inheritance.

[259] Zaruba produced to Pickering a 23 March 2010 "Loan Agreement" between Zaruba as the "Borrower" and Cloutier as the "Lender" (the **Zaruba Loan Agreement**), documenting an $800 000 loan from Cloutier to Zaruba in return for which Zaruba was to pay Cloutier $1 million – repayment of the loan amount plus $200 000 interest – within six months of the date of the Zaruba Loan Agreement.

[260] In the Zaruba Interview, Pickering questioned Zaruba about a statutory declaration purportedly signed by Zaruba before a notary public on 29 July 2010 (the **Zaruba Statutory Declaration**). Presented with the Zaruba Statutory Declaration, Zaruba said that he did not recognize the document or recall signing it, but that he did recognize his signature on it. The Zaruba Statutory Declaration stated that Zaruba:

- would receive a large sum of money "sometime in the near future" from a "large family inheritance";
- had solicited $800 000 from Cloutier to assist Zaruba in paying for "personal and inheritance related expenditures";
- would pay Cloutier a total of $960 000 within six months "of the last advance" and "should be in a position to retire my obligation to [Cloutier] and to pay a portion of the sum" by 30 August 2010; and
- promised to pay Cloutier "from the proceeds of [the Zaruba Inheritance]" a further $200 million as a "gift" for Cloutier's financial support in Zaruba's "time of need".

[261] In the Zaruba Interview, Zaruba stated that:

- He borrowed money to subsist until he received money from his grandmother in the Czech Republic who, still living, was in the process of transferring to him land she owned there, which he then intended to sell.
- There was a legal document (a letter which he had not yet obtained) in the Czech Republic evidencing that his grandmother was transferring the land – a "large" piece of farmland of unknown size.
- He was expecting the land to be transferred to him "at any time".
- He believed that the land was worth approximately $4.5 million based on what his grandmother had told him, although he had never seen an appraisal.
- There was no money in any bank account relating to the Zaruba Inheritance.
- He was introduced to Cloutier through Mason and had only met Cloutier once in person.
- He and Cloutier had entered into the Zaruba Loan Agreement.
- The loan was to be used for personal reasons and not to further the transfer and sale of the Czech land.

- He has not paid Cloutier any money because he has not been in a position to do so – the $1 million was to be paid from the $4.5 million to be realized from the sale of the Czech land.

- Cloutier never asked him what he would do with the lent money.

- He does not have lawyers in Europe; his grandmother is handling the transfer.

- He never promised Cloutier a further gift payment.

- The Zaruba Inheritance only relates to money that would be realized from the sale of the Czech land.

- An email he sent to Cloutier dated 7 April 2010 – in which Zaruba referred to his "accounts" being released and expecting "sign off" by the "estate executor and his legal representative" – contained inaccuracies, as there were "no funds in accounts, period", there was no "estate executor" or executor's "legal representative". He had no explanation as to why he did not describe the circumstances more accurately to Cloutier.

[262] In the Zaruba Interview, Zaruba provided Pickering with a release document executed by Cloutier in favour of Zaruba dated 10 November 2010 (the **Zaruba Release**). This stated that Cloutier, in consideration of $1 123 838 paid to him by Zaruba, released Zaruba from "all matters related to any issue with respect to funds advanced to or services provided to" Zaruba. Pickering testified that as at 10 November 2010 Zaruba had not paid any money to Cloutier. Pickering further testified that in the Zaruba Interview Zaruba stated that, although he had not paid any money to Cloutier, Mason had advised Zaruba the Zaruba Release was to be signed showing Zaruba had paid money to Cloutier.

[263] In the Zaruba Interview, Zaruba undertook to provide Staff with information and documentation regarding the Czech land he was to inherit, the letter evidencing that his grandmother was transferring the land to him, and the identity of his grandmother's legal representative in the Czech Republic. However, Pickering told us she was advised by Zaruba's counsel that Zaruba was not yet able to meet those undertakings as he had not yet received the documents from the Czech Republic. According to Pickering, she never received any of the requested information and documentation.

[264] Zaruba also undertook to advise of all deadline dates he had given Cloutier for Zaruba's payment of money to Cloutier, together with the reasons why they passed with no money being paid as promised. Zaruba's response, provided by his counsel, was that he "does not recall what the deadline dates were or reasons provided for why funds had not been received and has not been able to locate any documents to assist him to refresh his recollection".

(iii) Stevenson

[265] In excerpts of the transcript of his investigative interview conducted on 7 April 2011 (the **Stevenson Interview**), Stevenson stated that:

- he had no agreement with Cloutier that he would share any money with Cloutier; and

- he had no discussion with Cloutier about a $25 million inheritance he was to obtain – the Philippine Inheritance.

(e) Source and Use of Money

[266] Concerning the Analysis for All Accounts, Pickering testified that the following amounts were paid to Zaruba, Stevenson and Mason:

- $420 700 in total to Zaruba ($385 700 to him personally and $35 000 to his company One Goal Elite Soccer);

- $262 160 to the Stevenson-owned company OCI Q Corp.; and

- $243 000 to Mason.

2. Chute's Evidence

[267] Chute prepared analyses of the source and use of money for the Cloutier Accounts (the **Analysis for the Cloutier ATB Account #1**, the **Analysis for the Cloutier ATB Account #2**, the **Analysis for the Cloutier TD Account #1** and the **Analysis for the TD Account #2**, respectively).

[268] The Analysis for the Cloutier ATB Account #1 showed "Cash Inflows" and "Cash Outflows", each totalling $1 537 857.87, with no money remaining by 30 April 2010. Among the money deposited was: $1 427 600 from Lenders; and $49 500 received from SSI. Among the payments out were:

- $357 500 in total to Zaruba ($322 500 to him personally and $35 000 to his company One Goal Elite Soccer);

- $294 900 to Viva;

- $190 000 to Mason;

- $188 000 to the Stevenson-owned company OCI Q Corp.;

- $41 394.33 in total to or on behalf of Cloutier ($16 194.33 to him personally and $25 200 to the ATB MasterCard);

- $33 000 to two individuals who, according to Pickering, rented to Cloutier the Edmonton home in which he resided (the **Edmonton Landlords**);

- $24 685 to Centre for Spiritual Awareness - according to Pickering, a personal donation from Cloutier;

- $22 000 to Cloutier's wife;
- $17 000 in total to Purchasers, one of these also a Lender;
- $16 000 to Cell Bridge;
- $10 000 to the Youb-connected company Packetara; and
- $4600 to the Receiver General.

[269] The Analysis for the Cloutier ATB Account #2 showed "Cash Inflows" and "Cash Outflows", each totalling $10 000, with no money remaining by 14 May 2007. The money deposited included $9000 from SSI. Among the payments out were: $2000 to Cloutier; and $7840 classified as "Withdrawals".

[270] The Analysis for the Cloutier TD Account #1 showed "Cash Inflows" totalling $571 823.65, with a balance of $3007.41 remaining by 7 October 2010. Among the money deposited was: a total of $494 990 from four individuals; and a total of $55 539.32 from three business entities. Among the payments out were:

- $186 100 to Cell Bridge;
- $74 160 to OCI Q Corp.;
- $63 200 to Zaruba;
- $48 300 in total to two Purchasers, one of these also a Lender;
- $48 000 to Mason;
- $10 782.40 to Essential (Eichelberger's and perhaps also Cullen's company);
- $6000 to Cloutier;
- $5000 to Johnston Ming;
- $3000 to one of the Edmonton Landlords;
- $3000 to Viva;
- $1000 to Cloutier's wife; and
- $500 to Smylski.

[271] The Analysis for the Cloutier TD Account #2 showed "Cash Inflows" totalling $10 035.01, with no "Cash Outflows" and thus that amount remaining by 7 October 2010. The money deposited included $10 000 from a "Source Unknown".

3. Pacholik's Evidence

[272] Pacholik testified that:

- Cloutier told him almost weekly, beginning in 2009 or 2010, about two inheritances – one through Zaruba and one through Stevenson – in which Cloutier was expecting to share, with the money to arrive the following week.
- Pacholik relayed this information to Cell Bridge contractors who had yet to be paid.
- He had doubts about the inheritance money ever arriving, and it did not.

4. Cloutier's Evidence

[273] In his testimony Cloutier explained his rationale for the Loan Agreements and pursuing the Inheritances:

> . . . the sad note is I never produced dollar one in revenue. I couldn't take any of the technologies and get them to commerce so that I could generate revenue. So that's why borrowing the money personally to finance the inheritances provided a way out for all of us. And every lender, every equipment owner that phones me over the last four years is sick and tired of hearing me say, It's next Tuesday, Wednesday or Thursday, that I will get paid out of my inheritance, my gift from the inheritance. But that's the best information I have today to tell them is the last information I get.

[274] Cloutier in his testimony admitted that:

- He entered into the Loan Agreements personally.
- All Lenders under the Loan Agreements were either SRAE/SSI Purchasers or Venture/Viva Purchasers.
- He received over $2 million from Lenders under the Loan Agreements.
- He never attempted to qualify any Lender for any registration or prospectus exemption under Alberta securities laws.
- The motivation or incentive he offered SRAE/SSI Purchasers and Venture/Viva Purchasers to lend him money under the Loan Agreements was repurchase of their SRAE Units or Venture Softphones, as evidenced by the SSI Repurchase Agreement and the Venture Repurchase Agreement and also, for some, the Gift Letters.
- He was introduced to Mason and Zaruba by Gibeault.

- The money he lent to Zaruba – approximately $1 million – was sourced from the money he received under the Loan Agreements; Cloutier is now owed approximately $1.5 million in principal and interest.

- Zaruba promised to pay Cloutier $290 million from the Zaruba Inheritance, when received by Zaruba, in return for Cloutier's financial assistance.

- He conducted no due diligence on the purported Zaruba Inheritance.

- He has nothing to evidence Zaruba's promise to pay him $290 million or otherwise verify the existence of the Zaruba Inheritance, apart from the Zaruba Statutory Declaration.

- He had sent Zaruba money before meeting him, and they only met in person twice.

- The Zaruba Statutory Declaration stated that Cloutier was to receive money from the Zaruba Inheritance by 30 August 2010, and Cloutier was told repeatedly that he would receive such money imminently, but he has received none.

- He still believes that he will get money from Zaruba.

- Cloutier was introduced to Stevenson by Smylski.

- Stevenson promised Cloutier $26 million for financial assistance he had provided to Stevenson.

- Cloutier understood that Stevenson was seeking access to a large inheritance from the estate of a Ms. Santiago (who had accumulated money while working for the Ferdinand Marcos government) to her nephew Romeo (or Romey) Santiago.

- He gave Stevenson or Stevenson's company OCI Q Corp. approximately $500 000, sourced from the money Cloutier received under the Loan Agreements.

- Cloutier had documentation showing that OCI Q Corp. was to pay him $10 000, but no documentation evidencing Stevenson's promise to pay him $26 million.

- He had seen, but had no copies of, some documentation from Stevenson purportedly verifying the existence of the Philippine Inheritance.

- He was told repeatedly over the past three years by Stevenson that he would receive Philippine Inheritance money imminently, but he has received none.

- He intended to pay the Lenders the money owing under the Loan Agreements, the Repurchase Agreements and the Gift Letters from the funds he was to receive from the Inheritances, and had no ability to do so without such funds.

5. Lenders' Evidence

(a) RE

[275] Beginning in July 2009 RE entered into several Loan Agreements with Cloutier, as well as several Venture Repurchase Agreements. RE told us that, although he had seen no return since 2006 on any of his purchases of SRAE Units or Venture Softphones, he was motivated to enter into these Loan Agreements because he thought at the time, and probably still did at the time of the Merits Hearing, that "Cell Bridge . . . was a marketable item".

[276] Concerning the first Loan Agreement and two Venture Repurchase Agreements, all dated 9 July 2009 and prepared by Cloutier, RE testified:

> I was lending money to [Cloutier] under the understanding that he was going to buy back the shares or my contracts in full and pay them out in full, so I wouldn't have to wait for the incremental payments as money was generated by the end-user.
>
> . . .
>
> . . . The loan was being used to further . . . Cell Bridge -- bring it to market, and the purchase agreements, the idea was that if I would loan him more money for that, . . . he would be purchasing back my units of Venture.
>
> . . .
>
> My understanding was that the personal loan was to be used to further Cell Bridge, and the money from Cell Bridge was going to fund the purchase back of all of the -- turned out to be, didn't start out that way, but turned out to be all of the units that I bought in Venture -- or Guardian had bought of Venture, so I wouldn't have to wait for the incremental payouts over time because I would get my money all at once.

[277] RE told us that these Venture Repurchase Agreements motivated him to enter into this Loan Agreement.

[278] Under this Loan Agreement, signed by Cloutier, RE was to lend $200 000 to Cloutier and Cloutier was to repay RE $240 000 within three months. These Venture Repurchase Agreements were signed or purportedly signed by RE and on behalf of Guardian, respectively (RE's professional corporation and Guardian being the respective "Seller"), by Zaruba (the "Purchaser"), and by Cloutier on behalf of Venture and Viva. Under these Venture Repurchase Agreements, Zaruba was to pay RE's professional corporation and Guardian $205 000 and $1 040 000, respectively, within three months "for the purchase of Ten (10) Units of [Venture] that are owned by the Seller". (RE told us that at the time he did not wonder why the "Purchaser" would be paying a different amount in each of these Venture Repurchase Agreements for 10 "Units of [Venture] . . . owned by the Seller".) RE had never met and did not know Zaruba. However, RE understood that Zaruba was "going to buy some of my units", and Cloutier had told RE that Cloutier "had a business arrangement with [Zaruba], and [Zaruba] was to receive some family inheritance and participate with [Cloutier]". In cross-examination, RE recalled that these Venture Repurchase Agreements were replaced with ones identifying Cloutier rather than Zaruba as the "Purchaser" and RE as the "Seller". RE understood that the $200 000 loan "was going to further development of Cell Bridge, the income stream that [Cloutier] would

have from Cell Bridge would buy back the units from the original". RE also understood that, for lending the $200 000 to Cloutier, RE would receive 20% interest on the lent money, and Cloutier or Zaruba would "buy back units". The motivation for lending the $200 000 was "immediate payout", through unit buy-back. According to RE, RE probably gave Cloutier a cheque for the $200 000.

[279] There are in evidence a second Loan Agreement and Venture Repurchase Agreement, both dated 30 July 2009, characterized by RE as "the same sort of agreement for the same reasons as the other one". Under this Loan Agreement, signed by RE and Cloutier, RE was to lend $50 000 to Cloutier and Cloutier was to repay RE $60 000 within three months. Under this Venture Repurchase Agreement, signed on behalf of Guardian (at RE's instruction) and by Cloutier personally and on behalf of Venture and Viva, Cloutier was to pay Guardian $350 000 within three months "for the purchase of Five (5) Units of [Venture] that are owned by the Seller". RE lent the $50 000 to Cloutier by personal cheque.

[280] A third Loan Agreement and Venture Repurchase Agreement, both dated 11 August 2009, were described by RE as "no different than the other ones". Under this Loan Agreement, signed by Cloutier, RE was to lend $20 000 to Cloutier and Cloutier was to repay RE $24 000 within three months. Under this Venture Repurchase Agreement, signed by Cloutier personally and on behalf of Venture and Viva, Cloutier was to pay Guardian $220 000 within three months "for the purchase of Two (2) Units of [Venture] that are owned by the Seller". RE told us that he probably lent the $20 000 to Cloutier, but could not recall the method of payment.

[281] RE told us that a fourth Loan Agreement and Venture Repurchase Agreement, both dated 1 September 2009, were related in the same manner as the earlier agreements and that the money was being lent for the same purpose, the "development of Cell Bridge". Under this Loan Agreement, signed by RE and Cloutier, RE was to lend $30 000 to Cloutier and Cloutier was to repay RE $36 000 within three months. Under this Venture Repurchase Agreement, signed by Cloutier personally and on behalf of Venture and Viva, Cloutier was to pay Guardian $330 000 within three months "for the purchase of Three (3) Units of [Venture] that are owned by the Seller". RE testified that he "must have paid" the $30 000.

[282] According to RE, a fifth Loan Agreement and Venture Repurchase Agreement, both dated 21 October 2009, were related in the same manner as the earlier agreements and the money was being lent for the same purpose, "to further develop Cell Bridge and get it marketed". Under this Loan Agreement, signed by RE and Cloutier, RE was to lend $50 000 to Cloutier and Cloutier was to repay RE $60 000 within three months. Under this Venture Repurchase Agreement, signed by Cloutier personally and on behalf of Venture and Viva, Cloutier was to pay Guardian $650 000 within three months "for the purchase of Five (5) Units of [Venture] that are owned by the Seller". RE testified that he "must have paid" the $50 000.

[283] RE told us that a sixth Loan Agreement and Venture Repurchase Agreement, both dated 4 November 2009, were related in the same manner as the earlier agreements and that the money was being lent for the same purpose. Under this Loan Agreement, signed by Cloutier, RE was to lend $20 000 to Cloutier and Cloutier was to repay RE $24 000 within three months. Under this Venture Repurchase Agreement, signed by Cloutier personally and on behalf of Venture and

Viva, Cloutier was to pay Guardian $260 000 within three months "for the purchase of Two (2) Units of [Venture] that are owned by the Seller". RE could not recall advancing the $20 000, but he testified that he probably did.

[284] RE told us that a seventh Loan Agreement and Venture Repurchase Agreement, both dated 5 November 2009, were related in the same manner as the earlier agreements and that the money was being lent for the same purpose. Under this Loan Agreement, signed by Cloutier, RE was to lend $40 000 to Cloutier and Cloutier was to repay RE $48 000 within three months. Under this Venture Repurchase Agreement, signed by Cloutier personally and on behalf of Venture and Viva, Cloutier was to pay Guardian $800 000 within three months "for the purchase of Eight (8) Units of [Venture] that are owned by the Seller". RE understood that this purchase amount, and the purchase amounts in all of his Venture Repurchase Agreements, represented "a refund of capital plus the return". RE lent the $40 000 to Cloutier by two cheques, one personal and the other from RE's professional corporation.

[285] In evidence are a Loan Agreement and Gift Letter, both dated 11 December 2009 and prepared by Cloutier. RE testified: "At this point . . . [Cloutier] still needed capital, so he was offering gift letters as return." RE told us that the Gift Letters were motivation, as were the Venture Repurchase Agreements, to enter the Loan Agreements. RE also told us that the money was being lent for the same purpose, "the marketing of . . . Cell Bridge". RE elaborated: "[T]he carrot of lending him the $20,000 was the gift letter, and the $20,000 going towards the development of Cell Bridge, like the other loan agreements, he was buying back -- buying back units. There [were] no more units to buy back; he already purchased them all. So to give me some sort of incentive, . . . over and above the 20 percent interest, was the gift." Under this Loan Agreement, signed by Cloutier, RE was to lend $20 000 to Cloutier and Cloutier was to repay RE $24 000 within three months. Under this Gift Letter, also signed by Cloutier, Cloutier was to pay RE $200 000 "within Five Banking Days of receiving the funds from [Zaruba] and [Stevenson] as early as the 14 day of January, 2010". RE told us that this arrangement was "[c]ompletely separate" from the money he had paid to Venture "in that Venture was already looked after by the other loan agreement[s]". RE testified that this $200 000 was "a really big return" and that he thought "at that point [Cloutier] was scrambling for money". RE lent the $20 000 to Cloutier by cheque from his professional corporation.

[286] RE told us that another Loan Agreement and Gift Letter, both dated 16 April 2010 and prepared by Cloutier, were related in the same way as the earlier Loan Agreement and Gift Letter and that the money was being lent for the same purpose. Under this Loan Agreement, signed by Cloutier, RE was to lend $10 000 to Cloutier and Cloutier was to repay RE $12 000 within three months. Under this Gift Letter, also signed by Cloutier, Cloutier was to pay RE $100 000 "within Five Banking Days of receiving the funds from [Zaruba] and [Stevenson] as early as the 20 day of April, 2010". RE told us that, as far as he knew, he lent the $10 000 to Cloutier.

[287] Cloutier did not dispute that RE had provided to him all of the mentioned money pursuant to these transactions.

[288] Asked how Cloutier was planning to repay the loans made by RE, RE testified: "I assumed it was going to be from the money that arrived from use of Cell Bridge out in the

industry, back through Viva". RE also told us that Cloutier told him that "he was going to get money from an inheritance that he would be able to use to satisfy the gift letter[s]". In cross-examination, RE elaborated: "I certainly recall that [Cloutier was] getting large sums of money from [Zaruba and Stevenson]; I recall that. What I don't recall is [Cloutier] saying that the money I loaned [Cloutier] was going to fund those guys to get their inheritance". RE further stated: "That wasn't my understanding." RE acknowledged that Cloutier told him that Cloutier had an affidavit signed by Zaruba. RE acknowledged that he gave the loan money to Cloutier personally, but did not recall that Cloutier needed to borrow the money personally. Nor did RE recall that the loan money had nothing to do with Cloutier's corporations.

[289] RE told us that all of these loans are outstanding.

(b) HK

[290] In September 2009 HK lent $40 000 to Cloutier, after Cloutier indicated that he needed some bridge financing. HK elaborated:

> . . . [Cloutier] had described to me how he had -- a friend of his was involved in -- was a beneficiary of a large estate that was coming -- that was in process, that was due to be distributed shortly, within three months, is what he told me. But with the ongoing costs and operations of running the corporations that he had, he was short of money and asked me if I would be interested in loaning him some money . . . .
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> . . .
>
> My understanding, as I recall, was that the person was deceased obviously, and it was a sizable estate, millions -- I'm thinking 3, 4, 5 million, in that range -- that would be available to [Cloutier]. He talked vaguely about the arrangement that he had with whoever the beneficiary was of that estate. How he would release that money to [Cloutier], I can't answer. I don't know how that arrangement worked. But to the net result that it would be available to [Cloutier], and he would be able to pay this loan agreement back.

[291] HK told us that he was motivated to make this loan because he thought his and his wife's earlier purchase of Venture Softphones had left them "fairly vulnerable" and he believed the loan arrangement gave them "more security". HK explained that the loan was tied to the earlier purchase:

> It was tied to the previous purchase of the soft phones in that it provided -- with the attached unit purchase agreement, that was a party to -- I mean it was -- the two agreements were connected. And the loan agreement -- I mean the existence of the unit purchase agreement really got us out of our reliance on the previous management sale agreement that we had entered into back in April.

[292] In evidence are a Loan Agreement and a Venture Repurchase Agreement, each dated 25 September 2009 and signed by HK and Cloutier. The Venture Repurchase Agreement was also signed by Cloutier on behalf of Venture and Viva; HK understood that this was done because Cloutier "was acting as agent for Viva and Venture . . . because it involved the units and the management agreement". Under the Loan Agreement, prepared by Cloutier, HK was to lend $40 000 to Cloutier, and Cloutier was to repay HK $48 000 within three months. HK lent the $40 000 to Cloutier by corporate cheque payable to Cloutier, which HK gave to Cloutier. Under the Venture Repurchase Agreement, Cloutier was to pay HK $400 000 within three months "for

the purchase of Four (4) Units of [Venture] that are owned by the Seller". HK understood this reference to four "Venture Units" to be a reference to his and his wife's 800 Softphone "units". According to HK, Cloutier would make this payment to HK "prior to Viva paying out any of the other unit holders". HK testified that the Loan Agreement and the Venture Repurchase Agreement were "not contractually related", and that "the loan agreement in itself would not have been sufficient for me to sign it, but with the unit purchase agreement together with it made it okay for me to sign it".

[293] After three months had passed with no performance under the Loan Agreement and no contact with Cloutier, HK met with a lawyer, who made inquiries and advised that Cloutier's two companies "had been struck by Alberta Registries approximately ten days prior". That same day, when HK asked Cloutier why his corporations had been struck, Cloutier explained that "it was just a clerical error or shortcoming of some of his staff". HK has not spoken with Cloutier since.

(c) KB

[294] In October 2009 KB lent $60 000 to Cloutier. This occurred after Cloutier contacted KB offering "an opportunity to get [his] money back out of Sunterra in a very short order", "three months". KB elaborated:

> . . . [Cloutier] discussed about a fellow named Michael about an inheritance that would give him the opportunity to buy my units back, and then he needed some money to do this, to make the loan agreement or procedure, whatever he had to do, and it would be a very short order that I would see my money back and clear me out of Sunterra and any investments I had with [Cloutier].
>
> . . .
>
> . . . It was a gentleman involved in a -- Michael, that's the only name I remember. He was entitled or to receive an inheritance, the amount I don't know, never did know. There was a name Peter, was apparently a lawyer looking after, I guess, that side of the investment or his paperwork or on Michael's behalf.

[295] KB understood that Cloutier's involvement in this inheritance – clearly, we find, the Zaruba Inheritance – would be of benefit to KB such that he "was to receive [his] investments from Sunterra and the loan agreement", and that money obtained by Cloutier from this inheritance would be used by Cloutier to pay KB. However, according to KB, he simply expected to be paid what he was promised, regardless of the source.

[296] In evidence are a Loan Agreement and an SSI Repurchase Agreement, each dated 6 October 2009 and signed by KB and Cloutier. Under the Loan Agreement, KB was to lend $60 000 to Cloutier (according to KB, "I had six units, so [Cloutier] was charging [$]10,000 a unit"), and Cloutier was to repay KB $72 000 within three months. KB advanced the $60 000 to Cloutier by two cheques payable to Cloutier, which KB gave to Cloutier. Under the SSI Repurchase Agreement, Cloutier was to pay KB $480 000 within three months "for the Six (6) Units of [SSI] that [are] owned by the Beneficiary". KB told us that, by signing the SSI Repurchase Agreement, "I would get my initial investment back plus the return, rate of return that I was promised", all "in three months", in addition to repayment of the $60 000 loan plus interest under the Loan Agreement.

V. ANALYSIS

[297] We analyze in turn the various allegations against the Respondents.

A. Trading in, Dealing in and Distributing Securities

[298] Staff allege that the Respondents breached sections 75(1)(a) and 110(1) of the Act by illegally trading in and distributing securities in Alberta and by illegally acting as dealers in securities in Alberta.

1. Regulatory Regime

(a) Trading

[299] Before 28 September 2009, section 75(1)(a) of the Act prohibited a person or company from trading in a security if not registered to do so with the Executive Director of the Commission (the **Executive Director**), unless an exemption applied. This prohibition (the **Trade Registration Requirement**) is relevant to the Respondents' alleged trading misconduct between April 2006 and 27 September 2009.

[300] From 28 September 2009, section 75(1)(a) of the Act has used a "business trigger" approach (the **Dealer Registration Requirement**), which prohibits a person or company from acting as a dealer without being registered to do so in accordance with Alberta securities laws, unless an exemption applies. "Dealer" is defined in section 1(m) to include "a person or company engaging in or holding itself out as engaging in the business of . . . trading in securities . . . as principal or agent". Requirements for the registration of firms (persons or companies registering in various dealer categories) and individuals (registering in corresponding categories) are outlined in National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**), Parts 7 and 2, respectively.

[301] The Trade Registration Requirement and the Dealer Registration Requirement (together, the **Registration Requirements**) both require a "trade" or trading in securities – the Trade Registration Requirement by virtue of its wording and the Dealer Registration Requirement by virtue of the use of "trading in securities" in the definition of "dealer". Section 1(jjj) of the Act broadly defines "trade" to include not only a "sale or disposition of a security for valuable consideration" but also "any act, advertisement, solicitation, conduct or negotiation made directly or indirectly in furtherance" of a trade. The Commission has in other decisions found a range of activities to constitute acts in furtherance of a trade in a security, including: preparing and completing subscription forms for investors; giving prospective investors promotional material about an investment; meeting with prospective investors to explain an investment opportunity; and accepting investors' subscription money.

[302] A person or company is subject to the Dealer Registration Requirement if the person or company is a "dealer" – engaging in or holding itself out as engaging in the business of trading in securities. Section 1.3 of Companion Policy 31-103CP *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**CP 31-103**) offers guidance on the concept of "engaging in the business", citing such indicia as:

- engaging in activities similar to those of a registrant;

- directly or indirectly carrying on such activities with repetition, regularity or continuity;

- being, or expecting to be, remunerated or compensated for such activities; and

- directly or indirectly soliciting securities transactions.

[303] Also according to that provision, "[s]olicitation includes contacting someone by any means, including advertising that proposes buying or selling securities or participating in a securities transaction, or that offers services or advice for these purposes". CP 31-103 further indicates that an issuer trading in its own securities may be considered a dealer if it frequently trades in securities or actively solicits investors – or engages in other activity that would be trading in securities for a business purpose.

[304] Thus, to find a contravention of section 75(1)(a) of the Act, we must conclude from the evidence that:

- there was a security as defined in the Act;

- there was a trade as defined in the Act in relation to that security;

- in respect of activity on or after 28 September 2009, the person or company engaged in or held itself out as engaging in the business of trading in securities; and

- the person or company was not registered (and no exemptions from the Registration Requirements were available).

(b) Distributing

[305] Section 110(1) of the Act prohibits the distribution of a security if no prospectus has been filed with the Commission and receipted by the Executive Director (the **Prospectus Requirement**), unless an exemption applies. "Distribution" is defined in section 1(p) to include a "trade in securities of an issuer that have not been previously issued". "Issuer" is defined in section 1(cc) to mean a person or company that has outstanding securities, is issuing securities, or proposes to issue securities. Thus, to find a contravention of section 110(1), we must conclude from the evidence that:

- there was a security as defined in the Act;

- there was a trade as defined in the Act in relation to that security;

- there was a distribution as defined in the Act of that security; and

- a prospectus was not filed and receipted for that distribution of securities (and no exemptions from the Prospectus Requirement were available).

(c) Exemptions

[306] Alberta securities laws provide a number of exemptions from the Prospectus Requirement. Before 28 September 2009, comparable exemptions were available from the Trade Registration Requirement. Among the key exemptions from the Trade Registration Requirement (before 28 September 2009) and the Prospectus Requirement are:

- the "accredited investor" exemption (the **AI Exemption**), available where an individual investor satisfies specified monetary thresholds for financial assets, net income or net assets (National Instrument 45-106 *Prospectus and Registration Exemptions* (**NI 45-106)**, section 2.3);

- the "family, friends and business associates" exemption (the **Relational Exemption**), available for certain close relationships (a specified family member, "close personal friend" or "close business associate") between the investor and certain senior officials of the issuer (NI 45-106, section 2.5);

- the "offering memorandum" exemption (the **OM Exemption**), for which the requirements include an offering disclosure document from the issuer that complies with prescribed requirements, and a signed risk acknowledgement from the investor (NI 45-106, section 2.9); and

- the "minimum amount" exemption (the **Minimum Amount Exemption**), which requires a minimum cash investment of $150 000 (NI 45-106, section 2.10).

[307] A further exemption (the **Registered Dealer Exemption**) is available from the Registration Requirements – the exemption for trades of securities made through or by a registered dealer (NI 31-103, section 8.5 and, previously, NI 45-106, section 3.1).

[308] Those who seek to rely on an exemption from the Registration Requirements or the Prospectus Requirement must make a "reasonable, serious effort – or take whatever steps were reasonably necessary – to satisfy themselves that the exemption was available" at the time of the trade or distribution of the security (*Re Robinson*, 2013 ABASC 203 at para. 151). It is insufficient to assume or hope that an exemption was available at the time of the trade or distribution of the security. Nor is it sufficient that some, but not others, of the trades within a distribution qualify for a claimed exemption.

[309] Once Staff have proved that a respondent has traded securities without registration or engaged in a distribution without filing a prospectus, the onus shifts to the respondent to demonstrate the availability of, applicability of, and strict compliance with the conditions of, a claimed exemption (*Re Arbour Energy Inc.*, 2012 ABASC 131 at para. 737).

2. Impugned Activities Involved Securities

[310] Staff contended that the SRAE/SSI Agreements, the Venture/Viva Agreements, the Loan Agreements, the Repurchase Agreements and the Gift Letters were all "securities" within the meaning of the Act. The Respondents disagreed.

[311] "Security" is broadly defined in section 1(ggg) of the Act to include, among other things:

> (ii) any document constituting evidence of title to or interest in the capital, assets, property, profits, earnings or royalties of any person or company; . . .
>
> (v) any bond, debenture, note or other evidence of indebtedness, share, stock, unit, unit certificate, participation certificate, certificate of share or interest, preorganization certificate or subscription . . .; . . .
>
> (ix) any profit-sharing agreement or certificate; . . .
>
> (xiv) any investment contract; . . .

(a) SRAE/SSI Agreements and Venture/Viva Agreements

[312] The Respondents contended that the SRAE/SSI Agreements and the Venture/Viva Agreements were outside the Commission's jurisdiction because they involved not securities but rather equipment – specifically, the SRAE Equipment and the Venture Softphones. The Respondents also contended that because the terms of the SRAE/SSI Agreements and the Venture/Viva Agreements spoke of a sharing of "gross revenues" and not "profits", the arrangements were not sales of securities.

[313] The SRAE/SSI Purchasers and the Venture/Viva Purchasers, respectively, purchased the SRAE Units and the Venture Softphones under the SRAE/SSI Agreements and the Venture/Viva Agreements. This entitled those Purchasers to share according to their participating interests in certain revenues derived from the use of the relevant equipment. In our view, the SRAE/SSI Agreements and the Venture/Viva Agreements were clearly documents that constituted title to or interest in the profits or earnings of SRAE and SSI or Venture and Viva (whether before or after taxes or expenses) – a percentage of the gross revenue derived by SSI or Viva and paid to SRAE and Venture – and thus were "securities" under sections 1(ggg)(ii) and (ix) of the Act.

[314] We also consider whether these arrangements were "investment contracts" under the Act. This Commission explained the concept of investment contract in *Re Kustom Design Financial Services Inc.* (2010 ABASC 179 at para. 153) as follows:

> The term "investment contract", which is not defined in the Act, has been defined through jurisprudence. The leading Canadian case is *Pacific Coast Coin Exchange of Canada Limited v. Ontario (Securities Commission)*, [1978] 2 S.C.R. 112, affirming (1975), 8 O.R. (2d) 257 (C.A.), affirming (1975), 7 O.R. (2d) 395 (Div. Ct.), in which the majority of the Supreme Court of Canada referred to two American decisions (*SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946); and *State of Hawaii v. Hawaii Market Center, Inc.*, 485 P.2d 105 (1971)). This jurisprudence defines an investment contract as an investment of money in a common enterprise with expected profits arising significantly from the efforts of others. The Court in *Pacific Coast* stressed that this definition reflects the economic realities of the transaction in that it recognizes the investor's dependence on the efforts of third parties to realize the profits expected from the transaction. This reasoning, we note, is consistent with the views expressed by the Supreme Court of Hawaii in *Hawaii Market* (at 109) that the "subjection of the investor's money to the risks of an enterprise over which he exercises no managerial control is the basic economic reality of a security transaction".
>
> In our determination of whether the loan arrangements between investors and each of the Kustom Companies were securities, we are mindful that remedial legislation such as the Act is to be

> construed broadly; as stated by the Supreme Court of Canada in *Pacific Coast* at 127 (citing *Tcherepnin v. Knight*, 389 U.S. 332 at 336 (1967)), "in searching for the meaning and scope of the word 'security' in the Act, form should be disregarded for substance and the emphasis should be on economic reality".

[315] Thus, in assessing whether there was an investment contract, we examine not the form but rather the substance of the arrangement, to determine whether:

- there was a payment of money by a purchaser;
- made with an intention or expectation of profit;
- in a common enterprise in which the purchaser's prospects are entwined with and dependent on the efforts and success of others; and
- where the efforts undertaken by those other than the purchaser are the undeniably significant ones that influence the success or failure of the common enterprise.

[316] In the circumstances here, we note the following:

- Cloutier and his companies SRAE, SSI, Venture and Viva solicited capital from the public for use in the respective business enterprises.
- The arrangements among the SRAE/SSI Purchasers or the Venture/Viva Purchasers and the respective companies involved the purchasers paying money to either SRAE or Venture.
- The payments of money by the SRAE/SSI Purchasers and the Venture/Viva Purchasers were clearly made with an intention or expectation by them to profit financially through their entitlement to a share in the pooled revenues from the respective common enterprises (the SRAE/SSI seismic imaging business and the Venture Softphone business).
- SSI or Viva was to enter into contracts with customers for the use of the SRAE/SSI Equipment or the Venture/Viva Equipment, thereby generating revenue. A portion of the money paid by SSI's or Viva's customers for the use of the SRAE/SSI Equipment or the Venture/Viva Equipment would be paid to SRAE or Venture, from which the SRAE/SSI Returns or the Venture/Viva Returns would be paid to the respective Purchasers.
- The SRAE/SSI Agreements and the Venture/Viva Agreements contemplated that the respective companies, SRAE and SSI or Venture and Viva, would have possession of or control over the SRAE Equipment and the Venture Softphones. This was intended to be for the mutual benefit of the respective companies and Purchasers. At all times the SRAE Equipment and the Venture Softphones remained in the possession and control of SRAE and SSI or Venture and Viva. Neither the SRAE/SSI Purchasers nor the Venture/Viva Purchasers received or

were intended to receive any physical goods. Indeed, it would have been impossible for the SRAE/SSI Purchasers to receive physical possession of anything – they had purchased only a "fractional interest" in the SRAE Equipment. Moreover, both the SRAE Equipment and the Venture Softphones had little, if any, use or value without the associated software which was owned by SSI or Viva, respectively, and had little, if any, value relative to the purchase money paid for the SRAE Units or the Softphones.

- Once the Purchasers had paid their money, they were not required to do anything further to earn the promised SRAE/SSI Returns or Venture/Viva Returns. Indeed, they were not intended to have – and did not have – direct involvement in or control or authority over any aspect of the business or operations of either SRAE and SSI or Venture and Viva. The expected profits were to come solely from the efforts of other parties – SSI's entering into contracts with customers for use of the SRAE/SSI Equipment, and Viva's entering into contracts with customers for the use of the Venture/Viva Equipment.

[317] Although in form the arrangements were cast as asset transactions – the purchase and sale of SRAE Equipment or Venture Softphones – their substance was very different. It is clear from the entirety of the evidence that these sales of SRAE Units and Venture Softphones were not mere sales of physical goods but were actually securities investment arrangements. These were not sales of goods transactions under which purchasers bought and took possession of a piece of equipment, then used it as they saw fit – the SRAE/SSI Purchasers and the Venture/Viva Purchasers did not take possession of the SRAE Equipment or the Venture Softphones purchased, nor did they intend to do so. Instead, the SRAE/SSI Purchasers and the Venture/Viva Purchasers understood that they were entering into arrangements documented by the SRAE/SSI Agreements or the Venture/Viva Agreements, respectively, under which they would be entitled to receive payment of the promised SRAE/SSI Returns or Venture/Viva Returns from the revenue streams generated solely by the Respondents' efforts in managing the use of the SRAE/SSI Equipment and the Venture/Viva Equipment (the commercial value came from combining the SRAE Equipment with the SSI Software and the Venture Softphones with the Viva Software).

[318] These were undoubtedly strictly passive arrangements from the perspective of the Purchasers, which were completely dependent on the efforts of the Respondents, efforts undeniably essential to the success or failure of the SRAE/SSI Model or the Venture/Viva Model. Therefore, we find that the SRAE/SSI Agreements and the Venture/Viva Agreements were "investment contracts" and therefore "securities" under section 1(ggg)(xiv) of the Act.

(b) Loan Agreements, Repurchase Agreements and Gift Letters

[319] Staff contended that the Loan Agreements, the Repurchase Agreements and the Gift Letters were "evidence of indebtedness" and thus securities under section 1(ggg)(v) of the Act. The Respondents countered that the Loan Agreements, the Repurchase Agreements and the Gift Letters were "stand-alone agreements" allowing Cloutier to use "the loan proceeds . . . at his sole discretion".

[320] The Loan Agreements, the Repurchase Agreements and the Gift Letters represented debts owed by Cloutier to the Lenders holding them. Each document was an obligation by Cloutier to pay a sum of money to the holder: the Loan Agreements promised repayment of the principal amount loaned plus interest within three months; the SSI Repurchase Agreements and Venture Repurchase Agreements each promised the payment of a stated amount, also within three months; and the Gift Letters promised payment of a stated "Gift Amount" upon Cloutier's receipt of money from the Inheritances. The Repurchase Agreements and the Gift Letters were, we find, used as incentives by Cloutier to persuade certain of the Purchasers to lend him money personally under the Loan Agreements.

[321] We find that the Loan Agreements, the Repurchase Agreements and the Gift Letters were "evidence of indebtedness" and therefore "securities" under section 1(ggg)(v) of the Act.

3. Trading in, Dealing in and Distributing Securities

(a) Trading and Dealing in Securities

[322] As a result of our findings that the SRAE/SSI Agreements, the Venture/Viva Agreements, the Loan Agreements, the Repurchase Agreements and the Gift Letters were securities, any sales of these securities for valuable consideration or acts in furtherance of such sales would be trades under section 1(jjj) of the Act and until 28 September 2009 subject to the Trade Registration Requirement. If the person or company engaged in or held itself out as engaging in the business of trading these securities after 27 September 2009, then the person or company would be a "dealer" under section 1(m) and subject to the Dealer Registration Requirement.

[323] We find, for the reasons discussed below, that the Respondents all engaged in trading or acts in furtherance of trading in securities and, in the case of Venture, Viva and Cloutier, also engaged in the business of trading in securities.

[324] SRAE and SSI, on the one hand, and Venture and Viva, on the other, were the issuers of their respective securities – the SRAE/SSI Agreements and the Venture/Viva Agreements. SRAE and SSI, and Venture and Viva, marketed the sale of their respective securities through means such as the SRAE/SSI Marketing Brochure and the Viva Brochure, and they solicited the sale of (and sold) their securities to members of the public for money. Cloutier was primarily responsible for the fundraising activities of SRAE and SSI, and solely responsible for such activities of Venture and Viva – for example, he was involved in preparing the SRAE/SSI Marketing Brochure and the Viva Brochure; and he solicited the sale of (and sold) the SRAE/SSI Agreements and the Venture/Viva Agreements to members of the public for money by, among other things, meeting with prospective purchasers, filling out or assisting in filling out such agreements, and receiving purchase money. Cloutier also solicited the sale of (and sold) the Loan Agreements, the Repurchase Agreements and the Gift Letters to members of the public for money. Therefore, the Respondents engaged in both actual sales and acts in furtherance of sales of their securities. These activities thus were "trades" within the meaning of section 1(jjj) of the Act.

[325] As we have found "trades", it is important to determine which of the Registration Requirements were applicable to the trades.

[326] The evidence is that SRAE and SSI had completed their fundraising activities prior to 28 September 2009 and thus were subject only to the Trade Registration Requirement.

[327] The evidence is that, while Venture and Viva had completed the majority of their fundraising activities prior to 28 September 2009 and thus were subject to the Trade Registration Requirement, there were some sales of their securities from that date, when the Dealer Registration Requirement governed.

[328] Similarly, some of the Loan Agreements, the Repurchase Agreements and the Gift Letters were entered into prior to 28 September 2009 and thus were subject to the Trade Registration Requirement, while others were entered into from that date when the Dealer Registration Requirement governed.

[329] Turning to the nature of the activities from 28 September 2009, we note that Venture, Viva and Cloutier, with repetition, regularity and continuity, solicited the sale of (and sold) their securities to members of the public with the expectation of being remunerated or compensated therefor. Further, that expectation was realized – the banking evidence shows that almost all of the money received by Venture and Viva was sourced from the sale of their securities to the Venture/Viva Purchasers, and Cloutier admitted that he received over $2 million from Lenders under the Loan Agreements (some $1.4 million from Lenders was deposited to the Cloutier ATB Account #1). We are satisfied – and we find – that Venture, Viva and Cloutier each engaged in the business of trading in their securities and therefore acted as dealers from 28 September 2009.

[330] From the foregoing, it follows, and we find, that all of the Respondents were required to be registered pursuant to the Trade Registration Requirement before 28 September 2009, with Venture, Viva and Cloutier also required to be registered pursuant to the Dealer Registration Requirement from that date, unless an exemption from the Registration Requirements was available and relied on for all of the trades.

(b) Distributing Securities

[331] We found above that the Respondents engaged in trading and acts in furtherance of trading in securities. Here, none of the securities – the SRAE/SSI Agreements, the Venture/Viva Agreements, the Loan Agreements, the Repurchase Agreements and the Gift Letters – had been previously issued. Thus, we find that the Respondents' trading in these securities in Alberta involved "distributions" within the meaning of section 1(p) of the Act. These distributions had to comply with the Prospectus Requirement unless an exemption from the Prospectus Requirement was available and relied on for all of the distributions.

4. No Registration or Prospectus

[332] The evidence is that none of the Respondents was registered under the Act (or its predecessor) from 1989, and since 1997 no prospectus has been filed in accordance with the Act in relation to a distribution of securities of any of the Respondents.

5. Not All Trades and Distributions Exempt

[333] We are satisfied from the evidence that an exemption – the AI Exemption, the Relational Exemption or the Minimum Amount Exemption – was available from the Trade Registration Requirement or the Distribution Requirement (or both) for some of the Respondents' sales of securities. We are also satisfied, however, that an exemption was not available for many of the securities sales. For example, as no offering memorandum has since 1997 been filed in accordance with the Act in relation to a distribution of securities of any of the Respondents, the Respondents could not rely on the OM Exemption. As well, most of the Purchaser witnesses did not qualify under the AI Exemption, the Relational Exemption or the Minimum Amount Exemption. As noted, the onus is on a respondent to show the applicability of, and strict compliance with, exemptions, and none of the Respondents here discharged that onus.

[334] Regarding their trades from 28 September 2009, the Dealer Registration Requirement was not satisfied by Venture or Viva, or by Cloutier, because none was a registered dealer. These Respondents pointed to no evidence indicating that any of such trades were made through or by any registered dealer; therefore, the Registered Dealer Exemption was not available to them.

[335] In short, we find, in respect of each Respondent, that many of their trades and distributions of securities were made without an available exemption from the Registration Requirements or the Prospectus Requirement.

[336] Moreover, the evidence is clear, as Cloutier acknowledged in his testimony, that he never attempted to qualify any Purchaser or Lender for any registration or prospectus exemption under Alberta securities laws; he did not believe that any of the Respondents were selling "securities". (In this regard, we note that Cloutier admitted he declined to act on a lawyer's recommendation that he (Cloutier) obtain an opinion from a securities lawyer concerning certain of the Respondents' fundraising activities.) This applied to all Respondents, given that Cloutier was the individual primarily or wholly responsible for the Respondents' fundraising activities.

6. Registration and Prospectus Requirements Breached

[337] For the reasons given, we find that all of the Respondents traded in securities prior to 28 September 2009, in breach of section 75(1)(a) of the Act. We find that Venture, Viva and Cloutier, after 27 September 2009, acted as dealer by engaging in or holding themselves out as engaging in the business of trading in securities without registration, in breach of section 75(1)(a). We also find that all of the Respondents engaged in distributions of securities without receipted prospectuses, in breach of section 110(1).

[338] We further find that Cloutier, as a director and officer or a de facto director and officer of the Corporate Respondents, authorized, permitted or acquiesced in these breaches of the Act by the Corporate Respondents.

B. Non-compliance with Interim Order

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

[340] Section 1(n) of the Act defines "decision" to include an "order" made by the Commission under a power conferred by the Act.

[341] On 3 August 2010 the Commission issued the Interim Order against the Respondents pursuant to the Commission's authority under sections 33(1) and 198(1) of the Act. Among other things, the Interim Order prohibited Cloutier from trading in securities. The Interim Order was still in effect at the time of the Merits Hearing.

[342] Between November 2010 and January 2011 Cloutier solicited three Lenders to lend him money – a total of $80 000. These transactions were documented by six Loan Agreements and five Gift Letters. As found above, sales of the Loan Agreements and the Gift Letters were "trades" in "securities". It follows that, when Cloutier made these sales between November 2010 and January 2011, he failed to comply with the Interim Order.

[343] We therefore find that Cloutier, in so failing to comply with the Interim Order between November 2010 and January 2011, breached section 93.1 of the Act.

C. Prohibited Representations – Refund

[344] Staff allege that Cloutier, Venture and Viva represented to SH, a Venture/Viva Purchaser, that she could receive a refund if she changed her mind about her purchase of Venture Softphones.

[345] Section 92(1)(b) of the Act prohibits the making of a representation, without the Executive Director's permission, that the purchase price of a security will be refunded (inapplicable here is the exception in section 92(2) for securities which have such a right or obligation attached).

[346] SH testified that Cloutier told her and her husband, on more than one occasion when they were discussing the Venture/Viva Model, that she and her husband could get their purchase money back with "one phone call". SH told us that the possibility of a refund was a "deciding factor" in her and her husband's decision to sign Venture/Viva Agreements. We note that, when SH did ask that the purchase money be returned, Cloutier responded "I've got nothing for you" and "I have no money".

[347] We are satisfied, and we find, that Cloutier did, on more than one occasion, assure SH and her husband that they could have their purchase money – paid under the Venture/Viva Agreements – refunded. Cloutier did not refer us to any evidence that the Executive Director's permission had been sought or granted. Therefore, we find that Cloutier, by these statements, breached section 92(1)(b) of the Act.

[348] As noted earlier, Venture and Viva could act only through their guiding mind – Cloutier. We conclude that Cloutier's prohibited representations to SH and her husband about a refund were also Venture's and Viva's representations. Accordingly, we find that Venture and Viva also breached section 92(1)(b) of the Act. We further find that Cloutier, as a director and officer of

Venture and Viva, authorized, permitted or acquiesced in these breaches of the Act by the Venture and Viva.

D. Unfair Practice – Unreasonable Pressure

[349] Staff allege that Cloutier, Venture and Viva engaged in an unfair practice by putting unreasonable pressure to purchase on certain Venture/Viva Purchasers. In support of this allegation Staff pointed to Cloutier's dealings with Purchaser witnesses DG and SH.

[350] Section 92(3)(d) of the Act prohibits a person or company from engaging in an unfair practice with the intention of effecting a trade in a security. As set out in section 92(5)(a), an "unfair practice" includes "putting unreasonable pressure on a person to purchase . . . a security".

[351] DG and SH each testified that Cloutier represented that the Venture/Viva Model was time-limited.

[352] According to DG, Cloutier told DG that "[h]e was closing off this investment right away", at "[t]he end of January". This time limit, DG testified, "[a]bsolutely" affected his decision to purchase in January 2008 "because I was afraid . . . I'm going to be the guy left to turn out the lights". After Cloutier "mentioned that he was reopening the investment for a little extra time to allow for extra revenue to complete the software", DG made a second purchase in March 2008.

[353] SH testified about Cloutier telling her and her husband, before making their first purchase of Venture Softphones, that they "were absolutely very, very lucky to get in because [they] were the last people to get in" and that Cloutier would "let [them] into this investment, but [they're] the last-minute people who are able to get in on this". Asked whether Cloutier gave any reason for this investment being closed, SH remembered Cloutier saying that "these contracts had been signed by Shell and Re/Max Realty in Vancouver, and because those very large contracts had been signed, the money was going to start coming in". SH and her husband purchased Softphones soon after – via a Venture/Viva Agreement dated 7 August 2008.

[354] We are satisfied, and we find, that by presenting the Venture/Viva Model as time-limited, Cloutier placed unreasonable pressure on DG and SH to enter into Venure/Viva Agreements within the meaning of section 92(5)(a) of the Act. We are also satisfied that Cloutier did so with the intention of effecting a trade in – the sale of – Venture/Viva Agreements (and such trades did occur). We therefore find that Cloutier engaged in the unfair practice of putting unreasonable pressure on DG and SH to purchase securities in breach of section 92(3)(d).

[355] As noted, Venture and Viva could act only through their guiding mind – Cloutier. We conclude that, in all the circumstances, Cloutier's unfair practice relating to DG and SH was also Venture's and Viva's unfair practice. Accordingly, we find that Venture and Viva also breached section 92(3)(d) of the Act. We further find that Cloutier, as a director and officer of Venture and Viva, authorized, permitted or acquiesced in their breach of this provision.

E. Misrepresentations

1. Allegations and Law

[356] Staff allege that the Respondents breached section 92(4.1) of the Act by making verbal and written statements to prospective and existing Purchasers that the Respondents knew or reasonably ought to have known: (i) in a material respect and at the time made, were misleading or untrue or which omitted to state all of the facts necessary to make the statements not misleading; and (ii) would reasonably be expected to have a significant effect on the market price or value of the SRAE/SSI Agreements, the Venture/Viva Agreements, the Loan Agreements, the Repurchase Agreements or the Gift Letters. The NOH particularizes 11 (originally 12, but one was withdrawn) such alleged statements – commonly referred to as misrepresentations.

[357] Section 92(4.1) of the Act states:

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

[358] While the section refers to "misleading" and "untrue" as alternatives, it does not preclude a statement having both aspects. In the discussion that follows, when we refer to a statement as misleading, that term should be understood as "misleading or untrue (or both)".

[359] In considering materiality, "[c]ommon sense inferences about materiality may suffice" (*Arbour* at para. 764). The materiality standard is objective, based on reasonable expectation. As stated in *Arbour* (at para. 765), this involves:

> . . . a determination as to whether untrue or omitted facts would reasonably be expected to have a significant effect on the market price or value placed on securities by reasonable investors – a proxy for this is, essentially, determining whether there is a substantial likelihood that such facts would have been important or useful to a reasonable prospective investor in deciding whether to invest in the securities on offer at the price asked.

[360] Reliance by an investor on a particular misrepresentation is not a necessary element of section 92(4.1) of the Act.

2. Alleged Misrepresentations

(a) Statements as to Contracts, Customers and Status of Equipment

(i) Cloutier, SRAE and SSI

Allegations

[361] Staff allege that Cloutier, SRAE and SSI made misleading statements that:

- SRAE, SSI or both "had contracts or customers for their products which would generate income imminently"; and

- the SRAE/SSI Equipment was "operational and in use".

Evidence

[362] Staff focused on statements in the SRAE/SSI Marketing Brochure, and testimony of certain Purchaser witnesses.

[363] The SRAE/SSI Marketing Brochure did not name specific customers. It did, however, say that "[o]ur clients are looking to [SSI] to provide oil, gas and environmental seismic reports", and that SSI "is currently responding to [a] Request for Proposal . . . on over 1,000,000 acres in Canada". These two statements clearly conveyed the impression that SSI had existing customers, and that (with the RFP) was in the process of attempting to secure another. This impression was reinforced by statements concerning the generation of significant revenue from the SRAE/SSI Equipment, with cash flow to SRAE/SSI Purchasers to commence shortly and the SRAE/SSI Return to be earned in 204 days.

[364] The evidence is clear that Cloutier told several SRAE/SSI Purchasers that customer contracts for the use of the SRAE/SSI Equipment had been completed, or were close to being completed:

- The name "Musselman" – either an individual or a business entity – was mentioned by Purchaser witnesses as one such actual or prospective customer. This was consistent with Pickering's testimony that SRAE/SSI Purchasers with whom she spoke mentioned Cloutier telling them that SSI had "an agreement in place" with a Musselman Oil or an individual from Texas named Musselman.

- PR testified that, after his September 2006 purchases but before his January 2007 purchase, Cloutier told him a "couple of times" that "he had a few big contracts" regarding the SRAE/SSI Equipment.

- JM testified that, before he and his wife purchased an SRAE Unit, Cloutier told him and his wife that SRAE or SSI had two prospective clients – "Musselman Oil in Texas" and a northern Canadian diamond mine. Also according to JM, on 26 March 2009 (several months after his and his wife's purchase) Cloutier told JM that Musselman had "committed to use the service", and from then until 20 September 2009 Cloutier periodically repeated to JM that money would soon start flowing to SRAE from Musselman.

- KB testified that, from meeting with Cloutier before KB purchased SRAE Units, KB understood that Cloutier "had some customers lined up for the use of the equipment". These customers – KB recalled the "Canadian government" and "a U.S. customer, Musselman" – were, according to KB, "active customers, ready to go".

[365] The evidence is also clear that Cloutier told prospective SRAE/SSI Purchasers that the SRAE/SSI Equipment was operational and ready for immediate use or in use:

- PR understood, from meeting with Cloutier before PR purchased SRAE Units in September 2006, that the SRAE/SSI Equipment was operational "[b]ecause, in 204 days, we were supposed to expect our return on our money".

- JM told us that Cloutier said the SRAE/SSI Equipment "was an existing, developed piece of equipment that was ready to use".

- RE, who understood that the seismic equipment was still in the developmental stage and did not know whether there was a contract in place, testified that Cloutier told him "they were actually using the technology on [Musselman's] property or land".

- KB said that Cloutier told him the SRAE/SSI Equipment "was ready to go to work".

[366] Cloutier admitted that there were no contracts in place for use of the SRAE/SSI Equipment and that he never saw an RFP for "over 1,000,000 acres in Canada". This was consistent with Youb's evidence that there were "[n]o paying customers" or "clients", and no contracts in place. Cloutier also admitted that the SRAE/SSI Equipment was under development and not commercially ready, which he did not disclose to the majority of the SRAE/SSI Purchasers, and that even by July 2013 there was still no commercially viable product. Youb consistently described the SRAE/SSI Equipment as not "commercially working".

Statements Were Misleading

[367] We are persuaded that neither SRAE nor SSI had any contracts or customers for the SRAE/SSI Equipment that would generate revenue imminently, and that the SRAE/SSI Equipment was not operational and in use. It follows, and we find, that statements to the contrary, discussed above, were misleading.

Expectation of Significant Effect from the Misleading Statements

[368] We find that these misleading statements would reasonably have been expected to have a significant effect on the market price or value of the relevant securities – the SRAE/SSI Agreements. A reasonable investor, based on the information communicated by Cloutier, SRAE and SSI, would have been confident that the SRAE/SSI Equipment was operational, that contracts and customers were in place, and that revenue would be generated imminently. To a reasonable investor, the presence of these factors (individually and together) would have implied significantly more value in the offered securities than would their absence. By way of corroboration, some SRAE/SSI Purchasers testified that the misleading statements did, in fact, influence their decisions to purchase.

Cloutier's, SRAE's and SSI's Knowledge of the Misleading Statements

[369] Cloutier personally made some of these misleading statements. He also admitted to providing the SRAE/SSI Marketing Brochure to, and reviewing it with, SRAE/SSI Purchasers;

and he was admittedly involved in drafting the business and revenue portions of the brochure containing other such misleading statements. In the circumstances, we find that these, too, were his statements. SRAE and SSI acted primarily through their guiding mind, Cloutier. We find that these misleading statements Cloutier made to further the SRAE/SSI Model were also the companies'.

[370] Cloutier seemed to suggest that there may have been events at SRAE and SSI of which he was unaware, or that he imparted information to SRAE/SSI Purchasers that others had told him. However, given his pivotal role, it was incumbent on him to take whatever steps were necessary to ensure that he was conveying truthful information to prospective and existing SRAE/SSI Purchasers. In short, Cloutier's pivotal role and the information available to him make clear that he reasonably ought to have known that these misleading statements were such. Indeed, consistent with his admissions, we are satisfied that he – and SRAE and SSI – did know this.

[371] For the same reasons, we conclude that Cloutier, SRAE and SSI also reasonably ought to have known – and did know – the reasonably expected value effect of these misleading statements on the offered securities.

Conclusion

[372] The foregoing findings establish the breach of section 92(4.1) of the Act by each of Cloutier, SRAE and SSI. We further find that Cloutier, as a director and officer (de facto and then actual) of both SRAE and SSI, authorized, permitted or acquiesced in their breach of this provision.

(ii) Cloutier, Venture and Viva

Allegation

[373] Staff allege that Cloutier, Venture and Viva made misleading statements that Venture and Viva "had contracts or customers for their products which would generate income imminently". Staff pointed to the Viva Brochure, the Viva Website, and testimony of certain Purchaser witnesses.

Evidence

[374] Within the Viva Brochure and on the Viva Website were references to customers, existing and expected, including these:

- "[i]nitial client accounts positioned to begin implementing" (Viva Brochure);
- "VIVA licensed software will continue to improve and we will continue to add new products and services for our clients, customers" (Viva Brochure);
- under the Viva Brochure heading "Who are VIVA's Clients?" appeared specific mention of "intranet providers, Outlook, Sales Force, Hyper Office, Free CRM, Sugar" and other user groups;
- under the Viva Brochure heading "VIVA's Marketing Strategy" appeared "[l]aunch soft phone into large installed customer base at no incremental cost. ie:

Hyper Office (300,000 plus), Sales Force (600,000 plus), Hockey Canada (100,000)"; "[m]otivate customers to upgrade soft phone"; and "[i]ntroduce additional product offerings to installed base"; and

- "VIVA is one of the largest Telco Companies in Canada"; "[o]ur clients range from individuals . . . to large corporations and affinity groups . . . . We cater to companies with ten thousand to hundreds of thousands of users" (Viva Website).

[375] The Viva Brochure included projections of returns of up to 440% on a $10 000 purchase of Venture Softphones.

[376] Venture/Viva Purchasers testified to having been told similar information by Cloutier:

- DG testified: "To begin with, the technology was supposed to be used for some company HyperOffice; [Cloutier] was in talks with them for contracts for them to market the software and introduce it to the marketplace and for people and companies to use it."

- SH told us Cloutier mentioned "that the Re/Max Realty office in Vancouver was either on the brink of or had already signed contracts to have this technology in all of their realtors' offices in Re/Max in Vancouver".

- Information from HK indicated that Cloutier demonstrated or stated that Viva had one million customers.

[377] All of the above statements conveyed the impression that the Venture/Viva Model had existing customers to generate the touted returns.

[378] Cloutier admitted that Venture, Viva and Cell Bridge had no contracts with any customers, apart from Viva's arrangement with Cell Bridge and Cell Bridge's limited arrangement with Shell.

Statements Were Misleading

[379] The only evidence of any customer relationship was Cell Bridge's limited arrangement with Shell (discussed below), which generated relatively insignificant revenue. Apart from this, we are persuaded that there were no contracts or customers for the Venture/Viva Equipment that would generate revenue imminently. It follows, and we find, that statements to the contrary, discussed above, were misleading.

Expectation of Significant Effect from the Misleading Statements

[380] In all the circumstances, we find that these misleading statements would reasonably have been expected to have a significant effect on the market price or value of the relevant securities – the Venture/Viva Agreements. A reasonable investor, based on the information communicated by Cloutier, Venture and Viva, would have been confident that contracts and customers were in place for the Venture/Viva Equipment, and that revenue would be generated imminently. To a reasonable investor, the presence of these factors (individually and together) would surely have

implied significantly more value in the offered securities than would their absence. By way of corroboration, some Venture/Viva Purchasers testified that the misleading statements did, in fact, influence their decisions to purchase.

Cloutier's, Venture's and Viva's Knowledge of the Misleading Statements

[381] Cloutier personally made some of these misleading statements. Others appeared in the Viva Brochure, which Cloutier admitted he co-wrote and provided to Venture/Viva Purchasers; it is also clear from the evidence that he reviewed the brochure with some prospective Venture/Viva Purchasers when soliciting money for the Venture/Viva Model. Yet other of these misleading statements appeared on the Viva Website, for which Cloutier was ultimately responsible in his capacities as a director, an officer and (above all) the guiding mind of Viva. In the circumstances, we find that these misleading statements in the Viva Brochure and on the Viva Website were Cloutier's statements too. Venture and Viva acted through their guiding mind, Cloutier. We find that these misleading statements Cloutier made to further the Venture/Viva Model were also the companies'.

[382] Cloutier's integral role and the information available to him make clear that he reasonably ought to have known that these misleading statements were such. Indeed, consistent with his admissions, we are satisfied that he – and Venture and Viva – did know this.

[383] For the same reasons, we conclude that Cloutier, Venture and Viva also reasonably ought to have known – and did know – the reasonably expected value effect of these misleading statements on the offered securities.

Conclusion

[384] The foregoing findings establish the breach of section 92(4.1) of the Act by each of Cloutier, Venture and Viva. We further find that Cloutier, as a director and officer of both Venture and Viva, authorized, permitted or acquiesced in their breach of this provision.

(b) Statements Regarding Cell Bridge

Allegations

[385] Staff allege additional misleading statements:

- Cell Bridge, "as a customer of Viva, was a 'world leader' in emergency response technology" and "it was not disclosed that Cell Bridge was actually another one of Cloutier's own companies";
- "Viva had a large contract with Cell Bridge which would generate large amounts of income";
- there would be "great demand by the oil and gas industry in Alberta" for "the only emergency response system which was fully compliant with" the ERCB's Directive 71; and
- "Cell Bridge had or was about to enter into a lucrative contract with a major oil and gas company".

[386] Staff pointed to the Viva Website, the Cell Bridge Website, and evidence of certain Purchaser witnesses.

Evidence

[387] The Viva Website described Viva's "partner" Cell Bridge as "a world leader with the most advanced emergency response technology" and touted that their "strategic alliance" would provide Viva with "a unique opportunity to get involved in the booming oil and gas industry".

[388] The Cell Bridge Website emphasized the notion of a uniquely attractive product: "we are one of the only companies with all the equipment and infrastructure needed to meet new stringent government requirements for industry emergency response planning"; and "the only technology to date that is fully compliant with the [ERCB]'s new Directive 71". It also identified Cloutier as the president and CEO of Cell Bridge.

[389] In the MH Viva Letter, Cloutier, for Viva, repeated the description of Cell Bridge as "a world leader in emergency response technology", which "offers [Viva] a unique opportunity to get involved in the billion dollar oil and gas industry". The letter also stated that the Cell Bridge "contract alone has the potential to payout all" the Venture/Viva Purchasers their principal and the promised Venture/Viva Returns "in a reasonable time period".

[390] Venture/Viva Purchasers testified to having been told similar things by Cloutier. For example, HK recalled Cloutier telling him that "this technology . . . was functioning well in Waterton and that Shell was going to take it much broader than their Waterton plant".

[391] Cloutier made some admissions relevant to this allegation, notably that Cell Bridge had no contracts other than the limited Shell arrangement.

[392] As noted, Cloutier was the sole shareholder of Cell Bridge and, as we have found, its guiding mind. It seems that this was not communicated to prospective or existing Venture/Viva Purchasers, although we heard from Venture/Viva Purchasers who understood there to be a connection between Cell Bridge and Viva or the Venture/Viva Model (SH recalled Cloutier giving her and her husband a business card, which she believed identified Cloutier as the CEO of Cell Bridge).

Statements Were Misleading

[393] We consider the alleged misleading statements in turn.

[394] The evidence is insufficient to enable us to determine where Cell Bridge stood in the hierarchy of emergency response technology providers, or what would constitute a "world leader" among them. Thus, the characterization of Cell Bridge as a "world leader" was not proved to have been misleading.

[395] We discuss below the implications of not disclosing to Venture/Viva Purchasers the reality that "Cell Bridge was actually another one of Cloutier's own companies".

[396] The MH Viva Letter, as noted, explicitly touted Viva's contract with Cell Bridge as, alone, having "the potential to payout all" money expected by Venture/Viva Purchasers. This statement, considered in context, cast that potential as highly likely, if not certain. In fact, it was highly uncertain. We find that this statement was misleading. Apart from the limited Shell arrangement and the relatively insignificant revenue from that, Cell Bridge had no contracts, and Viva had no contracts other than with Cell Bridge.

[397] The GeoAlert technology was not uniquely suited to Directive 71 requirements. According to the Shell Employee, Shell found a competing Directive 71-compliant system, and Shell was already compliant before its involvement with Cell Bridge. We therefore find misleading the statement that Cell Bridge had the "only" emergency response technology that "was fully compliant with . . . Directive 71".

[398] Cell Bridge had no contract with any oil and gas company, major or otherwise, apart from its limited arrangement with Shell. We accept that Cloutier hoped to negotiate a much broader contract with Shell. However, when they met, according to the Shell Employee, Shell declined Cloutier's proposal and no other contract ensued. In this light, we find Cloutier's statement to HK that "Shell was going to take it much broader than their Waterton plant", and similar statements to other Purchaser witnesses, were misleading.

Expectation of Significant Effect from the Misleading Statements

[399] We assess in turn certain implications of the misleading statements or nondisclosure.

[400] Regarding the nondisclosure of Cell Bridge being "one of Cloutier's own companies", such information can be important to purchasers of securities. That premise underlies requirements for disclosure, for example, of what are termed "related party transactions" in financial statements and certain offering documents. Here, however, there is no clear evidence that information about Cloutier's control of Cell Bridge would reasonably have been expected to affect significantly the value of the relevant securities – the Venture/Viva Agreements. Nor in all the circumstances here is it obvious to us that such would have been the case.

[401] Turning to the misleading statement as to Viva's contract with Cell Bridge having "the potential to payout all" money expected by Venture/Viva Purchasers, we consider that it would reasonably have produced a strongly favourable impression, in the mind of a reasonable investor, of the business prospects and hence also of the value of the relevant securities – the Venture/Viva Agreements. We therefore find that this statement would reasonably have been expected to have a significant effect on the value of the securities.

[402] Similarly, we consider that misleading statements about Cell Bridge having the "only" Directive 71-compliant system, and about Shell "going to take [the technology] much broader", would each have given a reasonable investor a strongly favourable impression of the business prospects and hence also of the value of the relevant securities – the Venture/Viva Agreements. Each of these statements would reasonably have been expected to have a significant effect on the value of the securities. By way of corroboration, some Venture/Viva Purchasers testified that the latter misleading statement did, in fact, influence their decisions to purchase.

Cloutier's, Venture's and Viva's Knowledge of the Misleading Statements

[403] The misleading "only"-Directive-71-compliant-technology statement appeared on the Cell Bridge Website, for which Cloutier was ultimately responsible in his capacities as a director, an officer and (above all) the guiding mind of Cell Bridge. In the circumstances, we find that this misleading statement was Cloutier's.

[404] The other misleading statements with (as found) a significant expected value effect were made by Cloutier, expressly for Viva (in the MH Viva Letter) or in the course of his fundraising for the Venture/Viva Model. As noted, Venture and Viva acted through their guiding mind, Cloutier. The misleading statement in the MH Viva Letter was, we find, not only Cloutier's but also Viva's. We find that the misleading statements Cloutier made in the course of his fundraising for the Venture/Viva Model were also Venture's and Viva's.

[405] Cloutier's integral role and the information available to him make clear that he reasonably ought to have known that these misleading statements were such. Indeed, given the evidence as a whole, we are satisfied that he – and Viva or Venture and Viva, as the case may be – did know this.

[406] For the same reasons, we conclude that Cloutier and Viva or Venture and Viva, as the case may be, also reasonably ought to have known – and did know – the reasonably expected value effect of these misleading statements on the relevant securities.

Conclusion

[407] Our findings in respect of three of the alleged misleading statements establish the breach of section 92(4.1) of the Act by Cloutier (in respect of all three), Viva (in respect of two) and Venture (in respect of one). We further find that Cloutier, as a director and officer of Venture and Viva, authorized, permitted or acquiesced in their breach of this provision.

(c) Statements as to Amount and Timing of Returns

Allegation

[408] Staff allege that the Respondents made misleading statements "that returns of up to 800% or more would be paid shortly or within a specified period of time".

Evidence

SRAE and SSI

[409] Cloutier testified that he explained to prospective SRAE/SSI Purchasers that they would receive a $70 000 return on a $10 000 purchase – after which they would receive back the $10 000 purchase price and Cloutier would regain ownership of the SRAE Equipment. This is consistent with testimony given by Purchaser witnesses.

[410] Cloutier knew that the SRAE/SSI Equipment was not commercially ready, but admitted that he did not disclose this to the majority of the SRAE/SSI Purchasers. He also admitted that, as of September 2006, he did not know whether the SRAE/SSI Equipment was commercially viable.

[411] Cloutier further testified that he represented to SRAE/SSI Purchasers that their cash flow was expected to begin in July 2007. However, both he and Youb acknowleged that there were no contracts in place. One Purchaser witness, JM, understood, when he and his wife purchased their SRAE Unit, that there were no contracts in place, but he had been told by Cloutier that there "was an existing, developed piece of equipment that was ready to use".

[412] Several Purchaser witnesses testified that they were told their returns would be starting fairly soon. PR understood it would be within 204 days of his initial (27 September 2006) purchases. JM and his wife expected to start receiving money within three to six months of their 12 October 2006 purchase. From 31 July 2008 until 20 September 2009, Cloutier periodically told JM that repayment would start soon. KB expected a time-frame of three to six months from his initial (12 January 2007) purchase.

Venture and Viva

[413] Under the Venture/Viva Agreements, the Venture/Viva Return typically stipulated was 440%. The Viva Brochure stated that the first, second and third sales of "Equipment" would be completed by 31 October, 30 November and 21 December 2007, respectively, with respective "ROI" of 440%, 333% and 200%.

[414] Cloutier admitted that Venture, Viva and Cell Bridge had no contracts with any customers, apart from Viva's arrangement with Cell Bridge and Cell Bridge's limited arrangement with Shell (which, it is clear from the evidence, generated relatively insignificant revenue).

[415] Several Purchasers testified as to the amount and timing of the expected Venture/Viva Returns. RE paid $100 000, $105 000 and $250 000 in October 2007, May 2008 and April 2009 (respectively), for promised returns of $100 000, $940 000 and $1 250 000 (respectively). Although RE expected high returns, he did not appear to expect them in a short time, as he was not aware (at least in October 2007) of any contracts in place. MH understood that Venture and Viva were "just starting", and she did not believe that they had any paying customers. She was expecting a return of $132 000 on a $30 000 purchase made in October 2007. Cloutier told DG that, if he purchased in January 2008, he could start expecting to receive revenue cheques starting "about April 1". DAG paid $30 000 in July 2008, for a $132 000 return – a return which Cloutier told DAG he would receive "anywhere from six months to a year". SH and her husband made their purchases under Venture/Viva Agreements in August and September 2008, with Cloutier promising them returns within days or weeks. HK and his wife paid $40 000 in April 2009, for a $176 000 return on "no specific date".

Statements Were Misleading

[416] The evidence is clear that Cloutier promised SRAE/SSI Purchasers returns of 700% and Venture/Viva Purchasers returns of (typically) 440% and (in some instances) up to 800% or more.

[417] Cloutier promised in many instances that returns would materialize quickly; indeed, some Purchasers were promised returns starting within days, weeks or three to six months. In fact, as

Cloutier admitted, no returns materialized – in days, weeks, months or at all. Instead, Cloutier made new promises, which also were not kept.

[418] Neither the SRAE/SSI Model nor the Venture/Viva Model generated any revenue (apart from the small amount generated by the Cell Bridge-Shell arrangement) from which any returns could be paid to Purchasers.

[419] According to Cloutier, the presentation of costs and expected returns in the Viva Brochure, which he co-wrote and provided to Venture/Viva Purchasers, was never revised.

[420] There simply was no basis for the representations of high returns from the SRAE/SSI Model and the Venture/Viva Model, or that returns would be paid shortly or within a specified period. We find that these statements were misleading.

Expectation of Significant Effect from the Misleading Statements

[421] We consider it self-evident that promises of high or imminent (or both) returns would reasonably have been expected to affect significantly the value of the relevant securities. A reasonable investor would naturally ascribe more value to securities with such attributes than to securities without. Unsurprisingly, in corroboration, Purchasers testified that these misleading statements influenced their decisions to purchase.

The Respondents' Knowledge of the Misleading Statements

[422] These misleading statements were made by Cloutier. He alone dealt with Purchasers in respect of the Venture/Viva Model, and with the majority of Purchasers in respect of the SRAE/SSI Model. He was also admittedly involved in drafting, and responsible for, the relevant content of the SRAE/SSI Marketing Brochure and the Viva Brochure. We find that these misleading statements of Cloutier, the guiding mind of Venture and Viva, were also theirs. We are satisfied that Cloutier – and (through him) the Corporate Respondents – reasonably ought to have known (i) that the above statements were misleading, and (ii) of the reasonably expected value effect of those statements on the relevant securities. Indeed, we are satisfied that the Respondents did know this.

Conclusion

[423] The foregoing findings establish the breach of section 92(4.1) of the Act by each of the Respondents. We further find that Cloutier, as a director and officer (de facto or actual) of the Corporate Respondents, authorized, permitted or acquiesced in their breach of this provision.

(d) Statements as to Time Constraints

Allegation

[424] Staff allege that Cloutier, Venture and Viva made misleading statements that the opportunity to enter into a Venture/Viva Agreement "was of limited duration".

Evidence

[425] As noted in relation to the allegation of unfair practice, Purchaser witnesses DG and SH each testified that Cloutier represented that the Venture/Viva Model was time-limited.

Statements Were Misleading

[426] Contrary to such representations, the evidence is replete with examples of Cloutier extending supposed closing dates or continuing to sell Venture/Viva Agreements beyond such dates. We find his representations to have been misleading.

Expectation of Significant Effect from the Misleading Statements?

[427] We turn now to a further element of the allegation: expected effect on value. As we found in respect of the unfair practice allegation, these misleading statements did have the effect of pressuring Purchasers to purchase. That alone, however, tells us nothing about any effect on the value of the relevant securities. We were pointed to no evidence directly addressing this factor.

[428] In these circumstances, we are not persuaded that the misleading statements regarding time constraints would reasonably have been expected to have a significant effect on the value of the relevant securities.

[429] Accordingly, we do not find here a breach of section 92(4.1) of the Act.

(e) Statements as to Safety of the Venture/Viva Model

Allegation

[430] Staff allege that Cloutier, Venture and Viva made misleading statements that the Venture/Viva Model "was very safe, where there was no reasonable basis for saying so".

Evidence

[431] There is limited evidence on this point from Purchaser witnesses. According to DG, before and after he purchased in January 2008, Cloutier told him that "[t]his was all but a done deal". DAG testified that he "would not have invested" had he known there was a risk of losing all of his purchase money. Cloutier told SH and her husband that the Venture/Viva Model was a "start-up" and because of that considered "a very high risk". However, Cloutier also told SH and her husband that they would be able to get a refund on request.

[432] There was, though, no compelling evidence that Cloutier, Venture or Viva represented the Venture/Viva Model as "very safe". Overall, Cloutier, Venture and Viva did little to alert Purchasers to the risks of participating in the Venture/Viva Model. That, however, is not evidence that they positively stated to Purchasers that the Venture/Viva Model would be "very safe".

[433] This allegation was specific, and it is unproved.

(f) Statements as to Refund

Allegation

[434] Staff allege that Cloutier, Venture and Viva made misleading statements that money put into the Venture/Viva Model would be refunded at any time on request. More specifically, Staff argued that Cloutier's statements to Purchaser witness SH were misleading because there were "insufficient funds available in Venture to give refunds" and because funds taken in by Venture were quickly paid out.

Evidence

[435] As we found in relation to the allegation of a prohibited representation as to the availability of a refund, Cloutier on more than one occasion assured SH and her husband that they could have their purchase money refunded, with "one phone call".

[436] Cloutier, in his testimony, seemed to acknowledge that Purchasers were entitled – although not by contract – to ask for their money back. He admitted that, at times, he was in a position to pay refunds and was asked to do so. However, he acknowledged that he chose not to; "[t]hey could ask, but I wasn't obligated to do that".

[437] There was evidence of Cloutier directing some money to some Purchasers. Those payments, though, he characterized as loans.

Statements Were Misleading

[438] The relevant issue is whether – at the time he made the statements to SH about the availability of a refund – Cloutier was, or at least considered himself to be, bound to pay a refund if and when asked. The evidence persuades us that he did not perceive any such obligation, and no such legal obligation was demonstrated. At most, he may have been willing to consider making a refund if he thought it to be in his or the Corporate Respondents' interest.

[439] Accordingly, we conclude that the statements that SH's and her husband's purchase money paid under Venture/Viva Agreements would be refunded on request was misleading.

Expectation of Significant Effect from the Misleading Statements

[440] We find that these misleading statements would reasonably have been expected to have a significant effect on the value of the relevant securities. A reasonable investor so informed would anticipate being able to receive a refund on request whenever desired – both diminishing perceived investment risk and enhancing liquidity. We are in no doubt that this would have increased significantly the value a reasonable investor would ascribe to the relevant securities. We also note that SH testified that the promise of a refund on request did, in fact, influence her and her husband's decision to sign Venture/Viva Agreements.

Cloutier's, Venture's and Viva's Knowledge of the Misleading Statements

[441] Cloutier personally made the statements to SH and her husband regarding the availability of a refund. Venture and Viva acted through him, their guiding mind. As such, these statements were also theirs.

[442] Cloutier clearly knew that these statements were misleading. For the reasons just given, we conclude that, through him, Venture and Viva also knew this. Similarly, we find that Cloutier, Venture and Viva knew or reasonably ought to have known the reasonably expected value effect of these statements on the relevant securities.

Conclusion

[443] It follows, and we find, that Cloutier, Venture and Viva breached section 92(4.1) of the Act. We further find that Cloutier, as a director and officer of Venture and Viva, authorized, permitted or acquiesced in their breach of this provision.

(g) Statements Regarding Inheritance Funds

Allegation

[444] Staff allege that Cloutier made misleading statements that he would soon receive large amounts of money through the Inheritances, that would enable him to pay Purchasers.

Evidence

[445] The evidence of Cloutier's entanglement in the Inheritances also clearly established how he portrayed them to Purchasers, along with his promised use of Inheritance money to pay Purchasers, repay Lenders and make payments under the Gift Letters.

[446] As noted, Cloutier periodically told Purchaser witness JM that he would be paid with money from "quite an extensive inheritance". Purchaser witness MH repeatedly heard that she would be paid from one or other or both of the Inheritances. When SH asked for but was denied a refund, Cloutier told her "I have no money" but that the Venture/Viva Returns were "right around the corner", to be funded from Zaruba Inheritance money that would be coming "next month".

[447] Some Lenders who entered into Loan Agreements (Purchaser witnesses RE, HK and KB), SSI Repurchase Agreements (KB) and Venture Repurchase Agreements (RE and HK) lent money after they learned of one or both of the supposed Inheritances, and of the plan to pay them using money from the Inheritance money. Not all of the Lenders knew (certainly RE did not know) that Cloutier would be sending their money to Zaruba or Stevenson, or both.

[448] Over many months, Cloutier was given (by Mason and Zaruba) numerous promises for payment under the Zaruba Inheritance, followed always by excuses for nonpayment. He received similar promises and excuses (by Stevenson) regarding the Philippine Inheritance. Cloutier testified that he has still received nothing.

[449] Zaruba denied the existence of any inheritance approaching the extent of the supposed Zaruba Inheritance (as it was described at the Merits Hearing) and any promises to Cloutier, apart from the $1 million owed to Cloutier under the Zaruba Loan Agreement. Stevenson denied having agreed to share any money with Cloutier or even talking to him about the Philippine Inheritance.

[450] Cloutier admitted to conducting no due diligence on the Zaruba Inheritance and having no evidence (apart from the Zaruba Statutory Declaration) supporting a promise by Zaruba to pay Cloutier $290 million from the Zaruba Inheritance. Similarly, Cloutier admitted having no documentation evidencing a promise by Stevenson to pay him $26 million for the financial assistance provided by Cloutier relating to the Philippine Inheritance.

Statements Were Misleading

[451] Clearly, Cloutier never did – and was never going to – receive the promised millions under, or as a result of, the Inheritances. His statements to Purchasers that he would soon receive large amounts of money through the Inheritances, which would enable him to pay Purchasers, were misleading.

Expectation of Significant Effect from the Misleading Statements

[452] Representations of large pools of money soon to become available to enable Cloutier to satisfy promises of payment could not but have a positive effect on the expectations of a reasonable investor. We are in no doubt, and we find, that his misleading statements would reasonably have been expected to affect significantly the value of the SRAE/SSI Agreements, the Venture/Viva Agreements, the Loan Agreements, the Repurchase Agreements and the Gift Letters.

Cloutier's Knowledge of the Misleading Statements

[453] Cloutier still claims that he expects to receive money through the Inheritances: "The Gift Money to Ronald Cloutier from Michael Zaruba and Rand Stevenson is coming". If this reflects his genuine belief, it would imply that he did not have the requisite knowledge that his misleading statements were such.

[454] The evidence persuades us that Cloutier's claimed expectations are, and always were, wholly implausible. Cloutier may have begun with a naïve belief in the stories of the Inheritances and faith in Zaruba, Mason and Stevenson. Even so, their steady stream of broken promises, in our view, amply demonstrated the absurdity of the Inheritances scheme. We find that Cloutier ought reasonably to have known that the Inheritances would not generate money enabling him to pay Purchasers the promised amounts.

[455] We also find that Cloutier ought reasonably to have known the reasonably expected effect of his misleading statements on the value of the relevant securities. Indeed, we find that he knew of this effect, for it was part of his purpose in making such statements.

Conclusion

[456] For these reasons, we find that Cloutier breached section 92(4.1) of the Act.

(h) Conclusions Regarding Alleged Misrepresentations

[457] For these reasons, we find that all of the Respondents variously breached section 92(4.1) of the Act (although not in all particulars alleged).

F. Fraud

[458] Staff allege that the Respondents engaged in a course of conduct relating to securities that they knew or ought to have known perpetrated a fraud on the Purchasers.

1. The Law

[459] Section 93 of the Act states:

> No person or company shall, directly or indirectly, engage or participate in any act, practice or course of conduct relating to a security or exchange contract that the person or company knows or reasonably ought to know will
>
> . . .
>
> (b) perpetrate a fraud on any person or company.

[460] The meaning of "fraud" under the Act has been discussed in several Commission decisions, including *Re Shire International Real Estate Investments Ltd.*, 2011 ABASC 608 at para. 168 (also cited in *Re DeLaet*, 2013 ABASC 42 at para. 80):

> The Act does not define "fraud". The meaning, though, is quite clear in law. This Commission adopted the following characterization of the concept (citing D. Johnston & K.D. Rockwell, *Canadian Securities Regulation*, 4th ed. (Markham: LexisNexis, 2007)) in [*Re Capital Alternatives Inc.*, 2007 ABASC 79] (at para. 309):
>
> > . . . The gist of the meaning is not, however, difficult to discern. Johnston and Rockwell point to the elements of fraud as enunciated at common law by the Supreme Court of Canada in *R. v. Théroux*, [1993] 2 S.C.R. 5 at 27, which has been adopted in the context of securities regulation (for example, in *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7 at para. 27):
> >
> > > . . . the actus reus of the offence of fraud will be established by proof of:
> > >
> > > 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
> > >
> > > 2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.
> > >
> > > Correspondingly, the *mens rea* of fraud is established by proof of:
> > >
> > > 1. subjective knowledge of the prohibited act; and
> > >
> > > 2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).

[461] The required mental element (mens rea) may be inferred from the totality of the evidence, where such an inference is reasonable (*Alberta Securities Commission v. Brost*, 2008 ABCA 326 at para. 48).

2. The Elements of Fraud Are Established

[462] We conclude that Staff have proved both the actus reus and mens rea elements of their fraud allegation against the Respondents.

(a) Securities Were Involved

[463] As discussed above, we found that all of the Respondents' misconduct involved securities. Accordingly, the preliminary threshold for the application of section 93(b) of the Act has been established.

(b) Elements of Fraud

[464] We find that the Respondents engaged in prohibited acts – deceit, falsehoods or other fraudulent means – within the meaning of *Théroux.* As discussed above, the Respondents variously made misleading statements to Purchasers. Further, a considerable amount of purchase money (apparently at least $450 000) received by SRAE and Venture – represented by the Respondents to be for a specific purpose, namely GST remittances – was not in fact used for that purpose. Moreover, money received from Purchasers was handled or used in ways that had not been disclosed to them – ways that would not have been within their reasonable expectations. For example, approximately $1.8 million meant for the Venture/Viva Model made its way to the SRAE/SSI Model – to SSI and to Essential (a company connected to Eichelberger and perhaps also to Cullen). There was undoubtedly intermingling of money received from Purchasers, regardless of the securities involved, and certain of the money received was used by Cloutier for personal purposes.

[465] These prohibited acts unquestionably put the Purchasers' pecuniary interests at risk. Indeed, it is clear from the evidence before us that Purchasers sustained actual financial losses as a result of the Respondents' prohibited acts. We so find.

[466] We are satisfied, and we find, that Cloutier (and the Corporate Respondents through him) had knowledge of these prohibited acts. As we found above, Cloutier (and the Corporate Respondents through him) made numerous misleading statements, and knew them to be misleading. Cloutier admitted that he collected money from Purchasers for the specific purpose of GST remittances, but that he neither remitted money to the CRA nor told any Purchaser that he would not be remitting it. As the sole signatory for the Venture Account and the Viva Accounts, Cloutier knew how the money in those accounts was sourced and used. Cloutier also knew how the money in the Cloutier Accounts was sourced and used. Further, we are satisfied that, as a guiding mind of SRAE and SSI and the recipient of almost all of the SRAE/SSI Purchasers' purchase money, Cloutier knew how the money in the SRAE Accounts and the SSI Accounts was sourced and used. We are also in no doubt, and we find, that Cloutier (and the Corporate Respondents through him) knew that these prohibited acts could put the Purchasers' pecuniary interests at risk.

(c) Conclusion

[467] We accordingly find that the Respondents engaged in a course of conduct relating to securities that they knew perpetrated a fraud in breach of section 93(b) of the Act.

G. Conduct Contrary to the Public Interest

[468] Staff allege that all of the Respondents' breaches of the Act "constitute conduct that is contrary to the public interest".

[469] The Registration Requirements and the Prospectus Requirement are integral to the Alberta securities regulatory regime, which is designed to protect investors and foster capital market fairness and efficiency. To this end, investors (existing and prospective) are to be treated fairly, and given reliable information on which to base investment decisions and the benefit of involvement of proficient and knowledgeable salespersons.

[470] Misrepresentations and fraudulent conduct are self-evidently contrary to the public interest. Prospective investors cannot properly assess an investment and make an informed decision when they are misled.

[471] We therefore find that each of the Respondents, in their illegal trades and distributions of securities, the misrepresentations and the fraudulent course of conduct, also acted contrary to the public interest.

[472] We turn now specifically to Cloutier's, Venture's and Viva's prohibited representations. Certain types of representation – for example, those concerning the availability of a refund – are prohibited under the Act for a reason: they are considered incompatible with the regulatory objectives mentioned. Further, the very nature of an "unfair practice" is such as to be contrary to the public interest.

[473] We find that in making their prohibited representations as to the availability of a refund and by engaging in an unfair practice, Cloutier, Venture and Viva each also acted contrary to the public interest.

[474] Orders such as the Interim Order are issued by the Commission with a view to protecting the public interest. Disregard of such orders cannot but undermine that purpose. We therefore find that in failing to comply with the Interim Order, and thereby breaching the Act, Cloutier also acted contrary to the public interest.

VI. CONCLUSION AND NEXT STEPS

[475] We have found that each of the Respondents breached sections 75(1)(a), 110(1), 92(4.1) and 93(b) of the Act. We have found that Cloutier, Venture and Viva breached sections 92(1)(b) and 92(3)(d), and that Cloutier breached section 93.1. We have also found that all such conduct was contrary to the public interest. We have further found that, as a director and officer, or de facto director and officer, of the Corporate Respondents, Cloutier authorized, permitted or acquiesced in their breaches of the Act.

[476] This proceeding will now move to a second phase, for the determination of what, if any, orders ought to be made against the Respondents.

[477] We direct Staff to provide to the panel (through the Commission Registrar) and to the Respondents any written submissions that Staff wish to make on the issue of appropriate orders **by 16:00 on Tuesday 28 January 2014**.

[478] The Respondents may respond in writing to Staff's written submissions. Any such written submissions by the Respondents must be provided to the panel (through the Registrar) and to Staff **by 16:00 on Tuesday 25 February 2014**.

[479] Staff may reply in writing to any such written submissions by the Respondents, such reply to be provided to the panel (through the Registrar) and to the Respondents **by 16:00 on Friday 7 March 2014**.

[480] If any of these parties wishes to make supplementary oral submissions or to adduce evidence on the issue of appropriate orders, an in-person hearing session will be held on a date to be arranged through the Registrar. Any party requesting such an in-person hearing session must so advise the Registrar **by 16:00 on Wednesday 12 March 2014**, indicating whether that party proposes to adduce evidence (via witnesses or otherwise) and the amount of hearing time that party expects to require. (If a requesting party does propose to adduce evidence, under section 2.3 of Rule 15-501 *Rules of Practice and Procedure for Commission Proceedings* we direct that party to provide to the other parties **at least five business days before the in-person hearing session**: (i) the names of all proposed witnesses; (ii) summaries of the proposed witnesses' anticipated evidence; and (iii) copies of all documents intended to be entered as evidence.) Even if no party requests such an in-person hearing session, one may be required by the panel. The Registrar will inform the parties as to whether an in-person hearing session will proceed.

2 January 2014

For the Commission:

"original signed by"
Ian Beddis

"original signed by"
Daniel McKinley, FCA