ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Hagerty, 2014 ABASC 237 **Date: 20140617**

Sherry Hagerty and Gary Hagerty

Panel:	Richard Shaw, QC Stephen Murison Fred Snell, FCA
Representation:	Natasha Bazant for Commission Staff John Blair, QC for the Respondents
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I. INTRODUCTION

[1] Staff (**Staff**) of the Alberta Securities Commission (the **ASC**) alleged that Sherry Hagerty (**Sherry**) and her spouse, Gary Hagerty (**Gary** and, with Sherry, the **Hagertys**), acted contrary to Alberta securities laws and the public interest, largely in connection with what is commonly termed "illegal insider trading". These allegations centred on the purchase by Gary of shares in Provident Energy Ltd. (**Provident**) on 23 December 2011 (the **Trade**) while that company was engaged in confidential discussions with Pembina Pipeline Corporation (**PPC**) about a potential business combination (the **Combination**).

[2] At the hearing into the merits of Staff's allegations we received documentary evidence and heard testimony from five witnesses and the Hagertys. We also received written and oral submissions from all parties. For the reasons set out below, we find that Sherry contravened Alberta securities laws and acted contrary to the public interest by making an untrue statement to Staff investigators. We find the other allegations against the Hagertys not proved.

[3] This proceeding will now move to a second phase to determine what, if any, orders ought to be made against Sherry.

II. FACTUAL BACKGROUND

A. The Companies

1. PPC

[4] PPC was (and is) an Alberta-based public company with shares listed on the Toronto Stock Exchange (the **TSX**). PPC was a transporter of crude oil and natural gas liquids (**NGLs**) produced in western Canada.

[5] Several past or current PPC personnel testified: the Hagertys; Harold Andersen (**Andersen**), who joined PPC in December 2011 to become general counsel; Kelli Grier (**Grier**), a lawyer employed in PPC's legal department; Peter Robertson (**Robertson**), chief financial officer; and Bryan Simister (**Simister**), a manager involved in marketing and trading.

[6] There were no allegations against PPC, Andersen, Grier, Robertson or Simister.

2. Provident

[7] Provident was an Alberta-based public company with shares (**Provident Shares**) listed on the TSX and the New York Stock Exchange. Provident owned and managed infrastructure and logistics pertaining to NGLs, and was among PPC's customers.

[8] There were no allegations against Provident.

B. The Impugned Trade

[9] At 11:12 (Calgary time) on Friday 23 December 2011 – the last trading day before the Christmas holiday – Gary placed an order from his desk at PPC to buy 5,000 Provident Shares at market price, for a total of $49,458.69, using cash in a locked-in registered retirement savings plan (**RRSP**) trading account. His order was filled immediately. The Trade settled on 30 December.

C. The Hagertys

1. Education and Work History

[10] The Hagertys, Calgary residents, both worked at PPC – she (from February 2009 until her employment was terminated in March 2012) as a corporate risk manager, he (from January 2011 to June 2012) as a consultant.

[11] Sherry has an MBA and completed various securities-related courses, including the Canadian Securities Course. She had worked for (among others) a "discount broker" and a gas marketing business.

[12] Gary, a civil engineer, has been involved generally in the oil and gas industry "in one way or another since 2001"; he has worked in various capacities for various entities, largely in connection with electricity generation, trading and procurement.

2. Securities-Trading History

(a) General

[13] In the period leading up to the Trade, the Hagertys had several securities-trading accounts. The evidence indicated that Gary's trading accounts – certainly the one he used for the Trade – enabled him to place orders electronically without first speaking with a broker. The Hagertys' trading accounts showed sizeable cash balances, with some equity and fixed-income holdings. They also had cash in their bank savings accounts.

[14] In an email to Gary, Sherry referred to "our low risk tolerance". Gary testified to having previously "traded quite actively" and having held "cheaper stock" for short periods, but acknowledged that he generally held securities for more than one year and that he was not "an active trader" by the date of the Trade, only transacting "about two to three times a year". A Staff investigator confirmed that Gary was not "a regular churner or seller of securities".

[15] The evidence before us showed that in the period 1 January 2009 to 31 March 2012, among her six trading accounts, Sherry made three purchases and four sales of various securities ranging in approximate value between $17,000 and $62,000; these included a sale of trust units of a PPC predecessor in May 2010, and a purchase of PPC debentures in November 2010 that she continued to hold to the end of the referenced period. At 31 March 2012 she apparently held eight different securities and cash.

[16] The evidence before us showed that in the same period, among his four trading accounts, Gary made eight purchases and six sales of various securities, including the purchase (the impugned Trade) and his subsequent sale of the Provident Shares. The other twelve transactions ranged in approximate value between $700 and $40,000; these included a $13,000 purchase of trust units of a PPC predecessor in May 2009, and the sale of those trust units in July 2010 for an apparent profit of $5,825.01. At 31 March 2012 he held six different securities and cash.

[17] Gary testified that he would discuss some, but not all, of his securities transactions with Sherry. Sherry testified that Gary engaged in "reasonable investing", but asserted that she never asked him "how much he invests or where he invests". She also said that "we never talked

about" such things as how much Gary would buy, for how much money, what type of order he would place, or in what account.

(b) The Trade in Context

(i) Quantum

[18] At more than $49,000, the Trade was Gary's largest transaction between 1 January 2009 and 31 March 2012, although he testified to having previously bought as much as $60,000 in securities of one issuer. He described the Trade amount as being "in the middle to upper range" of his transaction history. While he said that he might not put more than $20,000 into a penny stock, he also said that he had moved $100,000 into a US-dollar account, "strictly as an FX [foreign exchange] play".

[19] At the end of 2011, the Provident Shares represented approximately 44% of the market value of all securities held by Gary in the applicable RRSP account, and roughly 34% of the market value of all securities held in all of his trading accounts.

(ii) Retention Period

[20] Gary retained the Provident Shares acquired in the Trade for about six weeks. He sold them on 8 February 2012 for a profit of almost $10,000. The account records in evidence showed that his next shortest retention period was just over four months when (in November 2010) he sold half of a holding.

(iii) Cash

[21] Before the Trade, Gary had held more than $50,000 in cash in the applicable RRSP account, with one exception (for only one month).

(iv) Hagertys' Stated Rationale – Substance

[22] Gary testified that the Hagertys had discussed buying Provident securities "for well over a year, probably a year and a half or more" before the Trade. Sherry similarly testified that the Hagertys had contemplated investing in Provident "throughout the balance of 2011", and had discussions on and off throughout 2011 "and definitely through December" leading up to the Trade.

[23] Gary's stated rationale for the Trade "was two-fold: One it had a good yield, and two, that I honestly believed that at some point in time someone would take [Provident] over." He testified that he made the Trade for what he "thought would be a 6- to 12- to 18-month hold" based at least in part on speculation that Provident would "get bought", and he thought "there might be a chance to get a 30 percent return on it".

[24] According to Gary, Provident dividends produced "a nice yield" of 5.7%, which he found attractive. His "biggest concern was the sustainability of the yield", as he had experienced dividend cuts on other of his investments. For this reason, he talked with Sherry about Provident's credit rating. Sherry testified to Provident having successfully sold "almost the exact same convertible debenture" as PPC "at the exact same rate", despite Provident's lower credit rating. This indicated to Sherry that "[t]he market, obviously, really likes Provident", and that "there's probably opportunity there".

[25] According to the Hagertys, industry consolidation led them to focus on Provident. Gary pointed to a 1 December 2011 acquisition, by a buyer unconnected to this proceeding, of certain midstream assets from a major integrated oil company (the **Unrelated Transaction**), as well as another transaction a few days later. He also referred to an analyst report dated 2 December (the **First Energy Report**), which he said played into his decision to purchase Provident; the report stated that the buyer involved in the Unrelated Transaction "has now become an obvious potential buyer of Provident". Gary also mentioned various news articles, which "kept coming back to large U.S. and international companies coming into Canada and buying assets", with Provident among the "potential targets for acquisition". He said that he followed about 20 commentators, characterizing a 15 December article as "[o]ne of the final big ones for me" as it discussed (among other things) Provident's yield and "that it was a high candidate target for takeover". Gary testified: "Just like all these articles, the common view on the street is that Provident was going to be a target at some point in time."

[26] Sherry told us that the Hagertys had a theory that Provident was going to be acquired. She believed that "there started to be industry consolidation in the back half of Q3 and into Q4". She testified that this was confirmed by the Unrelated Transaction (and the First Energy Report), along with two other deals, all of which prompted the Hagertys to look at buying Provident Shares. Given this theory, she said that she periodically followed the Provident Share price.

[27] The Hagertys both ascribed significance to the move by a former PPC director to become chief executive officer (**CEO**) of Provident in April 2010. Sherry also mentioned "chatter" among former co-workers about Provident having sold upstream assets, apparently making it "more clean to be purchased by somebody" as a pure-play NGL company.

(v) Sherry's Claimed State of Knowledge

[28] Despite the Hagertys' theory that Provident might be acquired, Sherry denied knowing that PPC would have been a potential suitor. She also denied having read analyst reports that mentioned PPC's strategic objectives, but said that she instead read those citing Provident as "a likely acquisition candidate". Sherry agreed that "there could have been many potential suitors . . . that would have been interested in Provident", but referred to "general industry speculation" – "not in particular within [PPC] and not in particular in December".

[29] Sherry denied understanding that there could be a "natural integration" between the two companies or that Provident's assets could help PPC leverage its existing assets, acknowledging only that PPC's and Provident's businesses were "somewhat related". She testified that she "found out well after" that PPC's gas services team "were looking at fractionator plants, but at the time, that stuff was kept really tightly under wraps", and said that team "didn't integrate with anybody". She said she knew that PPC was "attempting to build a deep cut plant" but denied understanding the implications or the relevance to Provident; she recalled asking Robertson "on two or three separate occasions to explain what that was to me, how fractionation works, what the barrel looked like, and it was very foreign to me, so I was not in tune with that end of the business when I was at" PPC. She also testified that "we would have manager meetings" that "were five hours in length, once a month, and none of it made any sense to me". Sherry explained that her expertise was "not in the asset side of the business" but "in the downstream

marketing and trading side of the business", so she "had really no idea what kind of plants Provident had". That said, she had told Staff in her investigative interview that:

> I understood Provident's business model really, really well. I understood it probably better than [PPC]'s business model, to be perfectly honest, because it had more to do with buying and selling. That is what Provident did, they bought gas, split it up into pieces and sold it again, and that is a piece of business that I know really, really well.

[30] According to Robertson, Sherry's exposure to Provident was "[l]ikely fairly limited, probably only from a credit perspective".

(vi) Hagertys' Stated Rationale – Timing

[31] Gary testified that there was "no urgency" to buying Provident securities. He acknowledged that he could have done so in the summer of 2011, but he instead bought different securities at that time. He said that the Hagertys had "a large amount of cash sitting around" in the fall of 2011, and after looking into possible financial advisers he "decided to take on doing a few transactions, some investment still on my own".

[32] The Hagertys each testified that Gary maintained a theory (Sherry termed this his "tax selloff theory") that late December offered attractive investment opportunities – "the end of December [being] a good time to transact" – because of tax-motivated selling by other investors that could temporarily depress prices: "there's a couple-of-dollar discount or a couple-of-percent discount on a lot of the stocks". There was no evidence, apart from the Trade, of the Hagertys ever having acted on this claimed "tax selloff" theory.

[33] Gary said that they "had talked about it, and the 23rd ended up being basically the last day, if I was going to do it". Although there remained additional trading days in 2011, both Hagertys indicated that hockey tickets and perhaps other commitments meant that they would not have time to deal with their investments later in the month. In Sherry's testimony, "every year, including [2011], I asked him is there anything you want to do . . . because when we looked at the calendar, it was December 23rd was the next day, and it was really the last day that we would have an opportunity to do anything in the market. . . . and Provident came up as an option".

[34] Gary said that after discussing investing in Provident for several months, he "had, through that previous two weeks, gotten more explicit on Provident". He testified that the Unrelated Transaction in early December 2011 "brought it up as a hot topic to us again". Another transaction occurred within "about five or six days of that . . . . So, again, it came up on topic". Gary also said that based on their past discussions about Provident – "we had talked about it the day before, and we had talked about it on the 15th, and we talked about it on the 1st and 2nd" – he knew Sherry "was in line with me in thinking that [Provident] was a good company" to buy. Gary told us that "because of the amount of conversation we had over it, on it, over the last several months, I just told her what I was going to do" on the morning of 23 December.

D. PPC's Insider Trading Policy

[35] PPC had in place in December 2011 an "Insider Trading and Reporting Policy" (the **PPC Policy**) applicable to, among others, its employees and their family members.

[36] The PPC Policy prohibited the purchase or sale of PPC securities with knowledge of what it termed "inside information" until the information becomes public or ceases to be material. The PPC Policy provided (among other things) that it extended to "trading in the securities of another issuer" and to "communicating such information". It stated that "it does not matter that Personnel may have decided to engage in a transaction before learning of the undisclosed material fact or material change" and that "it also is irrelevant that publicly disclosed information about the Corporation would, without consideration of the undisclosed material fact or material change, provide a substantial basis for engaging in the transaction". The PPC Policy named Robertson as one of its administrators.

[37] The PPC Policy was "readily accessible" to PPC employees: each would be provided a copy at the outset of their employment, and it was accessible via PPC's internal website. We were told that each employee was required to review and sign off on it annually. Sherry questioned whether this annual review was properly administered but acknowledged that she had access to the PPC Policy on the company's "internal web".

[38] Sherry testified to having had – "Absolutely" – an understanding about insider trading restrictions and prohibitions.

[39] Gary had understood that the PPC Policy applied to him as a consultant (and as Sherry's spouse), and he signed off on it when he began consulting with PPC, although he said he did not sign off on it annually.

E. Chronology of Events

1. A Potential Strategic Fit

[40] The evidence indicated that a transaction of some sort between PPC and Provident – given their respective business strategies and asset holdings – might be a good fit. Specifically, certain NGL fractionation assets of Provident might complement PPC's business and help it achieve its strategic objectives in midstream services.

[41] Numerous analyst commentaries were introduced into evidence, from which various themes emerged:

- There was considerable consolidation in Alberta's NGL industry prior to the Combination. Of particular note was the First Energy Report, which reported the Unrelated Transaction.

- PPC was expanding its NGL operations, and it made sense for PPC to either acquire an existing fractionation facility or construct a new one.

- Provident was a potential acquisition target. Indeed, the First Energy Report, which Sherry had read and considered "significant", speculated that the buyer

> involved in the Unrelated Transaction had become "an obvious potential buyer of Provident. While Provident does not need a buyer and is not for sale, a business combination may still make sense at some future date".

[42] Robertson and Andersen both opined that the Combination "made sense" for PPC. Robertson described Provident as a potential acquisition target for PPC, based on PPC's goal of broadening its "capabilities on the NGL side of the business". Andersen told us that PPC's strategy (which "had been out in the public") of potentially constructing its own facilities "had proven a lot more difficult than what they had thought. . . . [s]o the concept came up" to try to acquire a company that had existing facilities that fit PPC's objectives. Andersen gave several reasons to explain why PPC had targeted Provident, stating that it was "the one and only company that made sense". According to Andersen, "some pretty healthy pockets" within PPC's organization – "large parts of the gas services business unit, the corporate finance, and other groups" – "would have been aware of" PPC's strategic objectives relating to the NGL industry.

[43] Robertson testified:

> I think there was a view in industry, and certainly within [PPC], that it made sense to add on to our capabilities on the NGL side of the business, ... So it may well have been generally known that . . . for [PPC] to do this sort of transaction would make sense.

[44] Despite this assertion, we were not pointed to any evidence of third parties positing a transaction between PPC and Provident.

2. Specific Proposals

[45] In late November 2011 an investment firm presented certain of PPC's executive officers with a preliminary analysis of a possible business combination with Provident. At a 1 December 2011 PPC board meeting, PPC management were given board approval to proceed with a review, and a special committee of the board of directors was formed. That afternoon, PPC imposed an immediate trading "black-out" on several individuals.

[46] On 7 December 2011 PPC made Provident a non-binding proposal for what we term the Combination. A revised proposal dated 16 December followed. By 21 December Provident had entered into an exclusive due diligence period with PPC.

3. "Chatter"

[47] Andersen testified to having understood from PPC's general counsel at the time (Jim Watkinson (**Watkinson**)) and others that, by 20 December 2011, "everybody had been treating this [Combination] with the utmost confidence, and we had no issues at that point". Andersen said that only senior management within PPC had been "in the loop on what was going on" by 21 December. Robertson agreed that news of the potential transaction had been "held very tight within [PPC], on a need-to-know basis".

[48] Even so, Andersen testified that a "concern had been brought to [Watkinson's] attention", that Watkinson approached him about "potentially some chatter going on", and that Watkinson attempted "to ascertain where the chatter came from". Robertson recalled that PPC had begun to "populate" its data room, "so other employees within the company may well have started to be

aware of the project". Andersen said that Watkinson, "to confirm what everybody's obligations were", sent an email on 20 December 2011 reminding recipients to communicate, to "insiders", "the need for utmost confidentiality in this matter".

[49] Whether or what "chatter" there actually was about the Combination is unclear. Andersen testified that he "didn't know what the chatter was" because Watkinson had received that information and "was going to handle it". Andersen told us that Grier told him, in May 2012, that Sherry on 22 December 2011 had asked Grier whether PPC was "acquiring Provident". He later speculated that "I think that might have been the basis of the chatter, but I don't know".

4. 22 December 2011 – Daytime

[50] Members of PPC's special committee, other PPC directors and senior management, and financial and legal advisers met in PPC's main boardroom in the morning of 22 December 2011 to discuss the Combination. A third non-binding proposal was presented to Provident later in the day. Robertson believed that the parties "were getting fairly close at that time, subject to due diligence".

[51] The morning meeting appears to have taken place at about the same time as the Hagertys arrived at the PPC offices after attending an early-morning Christmas event at their children's school. Gary testified that he and Sherry arrived at the PPC offices "probably . . . shortly after 10:00" that morning. He denied knowing about the meeting or hearing any related "scuttlebutt". Sherry testified that she "had no clue when the board meetings were", and that she "didn't see any comings and goings" because her office was located on a different floor from the boardroom.

[52] PPC's legal department had begun work to gather information for a "virtual data room" to facilitate due diligence by Provident. Some PPC employees "may" have been notified that work might be required over the Christmas holiday period.

[53] In fact, Grier had been told on 19 December 2011 that her involvement would be required, although her recollection was imprecise: "I was told at the time that there was something in the works, a transaction, and that there might be some due diligence required, and I should sort of sit tight and wait for further instructions." Although her memory was unclear, she did not think she knew at that time the identity of the target company.

[54] Grier's initial task involved gathering contracts from various sources within PPC to populate its data room. To that end, she sent an email (the **Grier Email**) (marked as "High" importance) to Simister (and another PPC employee) at 8:10 on 22 December 2011, asking for "all the documentation that we have on our long-term purchase and sale transactions" as well as "long-term power contracts and any hedge contracts", which Grier would need "for review next week".

[55] Simister testified that the Grier Email "was unusual" and that he "had not received a request of this nature before". Simister replied in an 8:17 email that he did not know of any long-term contracts. He copied both Hagertys (and the other PPC employee) because he thought they "would be better positioned to provide [Grier] with the information she was looking for".

[56] Gary testified that he did not have remote access to emails sent to his PPC email address at that time, so he would not have received the Grier Email before reaching the PPC offices. He never replied to it, and testified that it did not "twig" him about a potential transaction with Provident because the power contracts sought had nothing to do with Provident. He said that the request did not make him think that something was in the works because "the power contracts were scrutinized" regularly.

[57] Sherry was evidently able to send and review work emails on her PPC-issued BlackBerry. She said that these types of requests would typically come to her, so she found it "odd" for Grier to have sent this request to Simister. She surmised that, in retrospect, Grier might have asked Simister because Grier was "new to the company" and "knew very little at the time" about the business. Sherry said that she did not consider the request itself to be "atypical", given "the number of initiatives that [PPC] had going on at year-end". She also testified that the requested contracts were unrelated to Provident; "they're all [PPC]".

[58] At 8:34 Sherry made a brief telephone call to Gary. She initially denied speaking with Gary before responding to Grier, stating that "she didn't need him to answer those questions" as Grier's inquiry involved a topic Sherry "knew at the tip of my fingers". Reminded of this call to Gary, Sherry then testified that she did not remember the reason for it. Gary (whose testimony followed a clarification as to the time zones recorded in various telephone records, which prompted the Hagertys to revise what he termed a "chronology of events") did not recall the telephone conversation and assumed that it related to an attempt to coordinate with Sherry logistics relating to the mentioned school event. Sherry, resuming her testimony after Gary, then told us that she did remember making the call to Gary.

[59] At 8:39 Sherry emailed Grier, Simister and Gary (with a copy to the other employee) with a description of potentially relevant PPC contracts that she could provide. In testimony, she denied understanding "the significance of" Grier's request or thinking that "there was a possibility of a deal".

[60] At 8:40 Sherry sent a short email (the **Data Room Email**) only to Simister: "Where is the data room location? S".

[61] At 9:09 Simister responded to Sherry: "Haha. Took me a minute. Does seem odd doesn't it." In testimony, he explained that he "realiz[ed] that [Sherry] was speculating that there was something larger, potentially, going on".

[62] Asked about the Data Room Email, Sherry testified that it was a "joke" and that it had nothing to do with Provident.

[63] In a subsequent exchange of correspondence between Staff and the Hagertys, the latter's counsel set out in an 18 September 2012 letter (the **Position Letter**) the Hagertys' position regarding various "possible charges" against them. The Position Letter explained: "The day before, December 22, 2011, [Grier] had asked [Simister] to locate some [PPC] power hedge contracts. [Simister] in turn directed the request to [Sherry]. [Sherry] has an outgoing

demeanour and recalls jokingly speculating in the office that perhaps [PPC] was up for sale and might be establishing a data room, as that could be one of several reasons why [Grier] would gather the power hedge contracts." That explanation, of course, casts PPC as the target rather than an acquirer. However, the next sentence of the Position Letter stated: "[Sherry] has some recollection of the discussion turning towards industry consolidation generally . . . with Provident's name coming up as a possible acquisition candidate, a matter already well known to the public."

[64] Grier testified that at some point that day she went to Sherry's office to "get some of the contracts and take a look at what she had to see what might be useful"; we refer to their encounter as the **Grier Meeting**. Grier testified that she did not "have a lot of memory . . . of the specifics of the discussion", but recalled "that there was something odd about the conversation", and being "left . . . with the impression that [Sherry] was aware or suspicious or she had some knowledge that there was something more going on than just me trying to do an end-of-year review on the contracts". Grier testified she could not remember whether her impression was that Sherry knew PPC was going to acquire Provident, whether she thought Sherry had made the connection that the contracts were in connection with due diligence of PPC, or even whether Provident's name was mentioned in their conversation, but she "definitely" recalled that Sherry "was thinking something was up".

[65] Andersen testified that on 14 May 2012 (when he was preparing for an investigative interview by Staff) he spoke with Grier, who told him that when she went to Sherry's office (for the Grier Meeting):

> . . . Sherry shut the door and asked if we're acquiring Provident, asked what was going on, and what [Grier] told me and what my notes reflect is that [Grier] said, No, I'm kind of new here and [just] looking to get up to speed, I've got some time on my hands, and I'm the last person who ever is brought into the loop on these things.

[66] Andersen testified that his recollection was based on "very good notes" that he had taken at the time of his conversation with Grier (just five months after the Grier Meeting). Andersen's testimony on this amounted to hearsay twice removed (he telling us what Grier told him Sherry said to her) and was not confirmed by Grier in her testimony. Further, his notes were not in evidence, and the Hagertys in their submissions asserted that Andersen did not relay the quoted information to Staff in his investigative interview (an assertion not apparently contested by Staff, but which the evidence does not enable us to confirm).

[67] Sherry's testimony about the Grier Meeting was in important respects unresponsive to questions put to her. She recalled Grier coming to her office in relation to the requested contracts. Asked in direct examination about the Grier Meeting, and whether she had told Grier that she thought Provident was acquiring PPC, Sherry responded: "No. [Grier] and I would often have conversations about industry consolidation. Everybody in the industry has these type of conversations, so [Grier] and I often talked about it. I presume we had the same type of exchange that day." Asked in cross-examination whether she "had a discussion with [Grier on 22 December 2011] about industry consolidation, with Provident's name coming up as a possible acquisition candidate", Sherry testified that she and Grier "had those conversations often". Then asked "[t]hat's when it occurred, your comment to [Grier], about Provident being a potential

acquisition [candidate]", Sherry responded: "We had a conversation about a lot of different players in the industry that day." Sherry denied asking Grier whether PPC was acquiring Provident, and denied that her conversation with Grier left her "pretty confident" that PPC was transacting with Provident.

[68] The September 2012 Position Letter could be seen as presenting a rather different picture of the Grier Meeting, one more consistent with Andersen's (and Grier's) testimony. There was, as noted, the reference to "Provident's name coming up as a possible acquisition candidate". There was also a statement in the Position Letter "[t]hat the speculative talk turned to a general discussion including Provident being a possible acquisition prospect". However, the wording of the Position Letter is such that it is unclear whether these references were in relation to the Grier Meeting or to some other discussion at PPC that day. We note that Hagertys' counsel concluded the last-quoted statement with the caution that it was not "proof that [Sherry] received material undisclosed information" on 22 December.

5. 22 December 2011 – Evening

[69] In the evening of 22 December 2011 the Hagertys, according to Sherry, "had a discussion about year-end, the tax selloff, did you want to pick up anything? A couple of different things came up; Provident was one of them." According to their Position Letter, they talked "about Provident as an obvious acquisition target and buying a position prior to year-end."

[70] Sherry testified that Gary "was confident" on 22 December that he was going to buy Provident Shares. According to Gary, nothing that happened or that he learned at work that day, and nothing he talked about with Sherry that day, tied into his views on Provident. He denied having heard, from Sherry or otherwise, that PPC would acquire Provident, and he testified that he "had no knowledge of Sherry's knowledge of a transaction if she had any at that time", and that Sherry did not prompt or urge him to make the Trade.

[71] Also that evening, the Hagertys had dinner with friends (the **Friends**) who themselves would go on to buy Provident Shares on 12 January 2012, before the Combination was publicly announced. Sherry testified that there was that evening no discussion with the Friends about Provident as an acquisition candidate, or about whether Sherry suspected that PPC was contemplating a transaction, and no recommendation that the Friends buy Provident Shares. Indeed, Sherry said "I don't talk about business . . . with my friends". Gary similarly testified that they had no discussions about Provident, the topic of Provident never came up, and the only industry-related discussion would have been about the Unrelated Transaction "and where some of those people were going". A Staff investigator testified that the Friends denied that the Combination was discussed that evening.

6. 23 December 2011

(a) Driving To Work

[72] The Hagertys drove together to work on the morning of 23 December 2011. According to Gary, Sherry asked him whether they were "going to do anything" in terms of investments "so [our] money would start working for us instead of just sitting there". Although Sherry did not testify to having raised the issue at this time, the Hagertys both testified to the effect that Gary told Sherry he was going to buy Provident Shares that morning or that day. Sherry told us that

she responded, "Okay". Gary said that he and Sherry did not discuss the PPC Policy when deciding to buy Provident Shares.

(b) Sherry's Price Email

[73] At 8:55 Sherry emailed Gary a "screen shot" of "Real-Time Quotes" for Provident Shares. She explained that "there it was, and I had it on the screen anyways, so I sent it to [Gary], and I didn't put another thought into it until I sat down with [Andersen]". Sherry testified that her email "was my way of saying, by the way, here's the price". Her cross-examination included the following exchange:

> Q Why did you want to look to see where it was trading?
>
> A Because we had just talked about it.
>
> Q Presumably Gary could have looked at quotes of Provident share prices?
>
> A Maybe he did.
>
> Q And you weren't interested in buying Provident shares?
>
> A I think if he said he was going to there was no need for me to also do that.

[74] Gary testified that, having received Sherry's email, he was "sure that I looked at it, and I'm sure I probably laughed and went on with the rest of my work for the day"; "I don't think I took it as a direct instruction to purchase the [Provident Shares]". He told us that he was not at that moment in a rush to make the Trade, but "watched the stock a little bit" and was "waiting for a push-down" before entering an order.

(c) Andersen Meeting

[75] Soon after, at 9:04, Andersen emailed Sherry: "I need to talk to you ASAP." Sherry met Andersen in his office (the **Andersen Meeting**). Having regard to all the evidence concerning the Andersen Meeting, it seems to have begun by about 9:40. Sherry testified that finding Andersen, attending the Andersen Meeting and returning to her office took, in all, up to half an hour. Andersen testified that the Andersen Meeting would not have lasted more than three to five minutes. Sherry sent an unrelated email at 9:47, the timing of which indicates that the Andersen Meeting had ended by then.

[76] Although important aspects of their testimony about the Andersen Meeting differed sharply, there were commonalities between Andersen's and Sherry's recollections. According to both, he told her that PPC was contemplating a purchase of Provident, that she was now an insider and that, accordingly, trading prohibitions applied to her and to Gary (as her spouse).

[77] These common elements apart, other aspects (of greater or lesser significance) of Andersen's and Sherry's recollections of the Andersen Meeting are difficult to reconcile. For example, Andersen testified that he gave Sherry background information about the Combination, and told her that the due diligence phase would involve her looking at Provident's hedging arrangements and accounts receivable. According to him, Sherry "didn't say a thing", and her

"only reaction" to the news he had delivered, including the prohibition on her trading Provident or PPC securities, was a "nodded acknowledgement".

[78] By contrast, Sherry testified that Andersen told her: "I don't know what's required of you at the moment, sit tight. We will let you know what we need from you as things come through, but just be aware that it's going on and be available for us when we need you." She denied having been told in the Andersen Meeting what was needed from her in connection with Provident's hedging or accounts receivable.

[79] Sherry testified that Andersen "instructed" her – in context, this could only have been in the Andersen Meeting – "not to tell [Gary] and also not to do the [Trade]". Such "instruction" was not part of Andersen's testimony. That said, in part we think their accounts can be reconciled. Andersen certainly informed Sherry of confidentiality obligations arising from her insider status, and he told us of how similar obligations precluded him from telling his own spouse what was happening. It is not illogical to infer that a similar message was conveyed to Sherry, in respect of Gary, in the Andersen Meeting. As to the second part of the supposed instruction, it is clear from both their testimony that Andersen told her that she and Gary could not trade in PPC or Provident securities. However, her version referred explicitly to the Trade, as though Andersen knew of it. They provided irreconcilable testimony on this point.

[80] Sherry said that on being told of her insider status and the associated trading prohibition, she informed Andersen that "Gary and I were going to buy Provident [S]hares this morning", to which Andersen replied: "Well, don't, you can't do that" and "the Securities Commission will find out". She said she responded "Yeah, absolutely", after which (she said) Andersen "went on to talk about his own situation" (being unable to explain to his spouse why he had been summoned to start his new job at PPC early and to work through the Christmas holiday).

[81] Andersen denied that Sherry told him in the Andersen Meeting that the Hagertys had intended to buy Provident Shares, and indeed testified that he did not learn of the Trade until at least April 2012. In respect of his denial, Andersen explained that "I would have taken immediate action around that". He elaborated:

> . . . we would have had to have been required to take immediate action for both [PPC]'s reputation, Provident's reputation, the efficacy of the transaction itself, ensuring that we were able to proceed for a plethora of reasons . . . . So I would have Sherry sit down in my office, I would have had our external counsel . . . on the phone, I would have informed our CEO, and I would have informed Jim Watkinson, and there would have been an immediate marshalling of assets to deal with this.

[82] Questioned about this denial by Andersen, Sherry's response was that he was lying.

[83] According to Sherry, it was in the Andersen Meeting that she first learned that Provident might be acquired by PPC, and that before then she did not consider herself restricted by the PPC Policy from trading in Provident Shares.

(d) Post Andersen Meeting

[84] Sherry testified that after the Andersen Meeting "I was rattled". She said that she was "struggling" with how to proceed, unable to tell Gary about the Combination yet having been

instructed that neither she nor Gary could trade in PPC or Provident securities. She did not review the PPC Policy that morning, but told us her plan was "to interrupt Gary's purchase, had he not [already] done it".

[85] In Sherry's account, she went back down to the office floor on which both she and Gary worked "at a couple of minutes to 10 . . . to look for Gary" but could not find him. She explained that she had previously asked Gary to pick up some wine as Christmas gifts for some of her co-workers, and that he had left the PPC offices to do this. She said that she did not email or "text" Gary, explaining that she "had been specifically instructed not to tell him" (about the Combination, presumably). Sherry testified that "I had made the decision not to e-mail or text Gary any information that could be construed as inside information because I had been explicitly instructed . . . not to do that by [Andersen]", and "that was a very difficult conversation to have on a texting or e-mailing". Instead, she decided to "watch for him" so that she could "have that conversation with him" when he returned to the PPC offices. She testified that in the meantime she "went about [her] day" and was kept busy tracking down personnel to effect certain payments that had to be made by PPC that day. Accordingly, Sherry told us that she "spent a significant amount of time going down up and down the flights of stairs looking for the right people to sign off on those deals that day".

[86] However rattled Sherry might have been, the evidence was that among the first things she did after leaving the Andersen Meeting was to respond to unrelated and seemingly non-urgent emails. She acknowledged that she would not have sent these emails from her BlackBerry during the Andersen Meeting. At 9:47 she sent an email responding to a joke sent to her earlier and suggesting a get-together in the new year. At 9:57 she responded to another email with a Christmas picture, and forwarded it to Gary at 9:58. At 10:11 she emailed one of her Friends about the previous evening's dinner and other Christmas matters. At 11:24 she emailed a response to someone's comment concerning her and Gary's efforts to sell some hockey tickets. Sherry explained that "[p]riority did not factor into my decision to respond to these e-mails. These were quick, two-second e-mails. I was forwarding and responding to on my BlackBerry while I was walking around [PPC] looking for people".

[87] For his part, Gary said that he was at his desk until at least 9:25. He said he had arranged to meet someone outside the office at about 10:00, and then walked to a wine store to pick up the gifts for Sherry's co-workers. A receipt confirmed his purchase from the wine store at 10:34.

[88] Gary told us that he returned to the PPC offices by approximately 11:00 and dropped off the wine gifts in Sherry's office. Gary told us that he then probably checked some emails, checked the price of Provident Shares and placed the order to buy Provident Shares; other evidence confirms that the order was placed at 11:12. Gary testified that entering the order "would take up most of that 10- to 12- minute window". He told us that he "had not seen [Sherry] for the rest of that morning" since their arrival at work, and he denied having been told by Sherry, between 9:00 and 11:00, that she had met with Andersen or that there might be a transaction.

(e) The Trade

[89] As noted, Gary made the Trade in a locked-in RRSP trading account. Gary told us that he chose this account because he was looking to make "a sizable transaction", he had approximately $60,000 cash available in that account and he "wanted to do it inside of an RRSP account, so it didn't impact any of my taxes". He said that he did not want to use all of the cash from that account, but "believe[d] I would be getting a yield for up to a year, year and a half, and then possibly getting a kick, as I referred to it, if someone came and purchased it". He therefore did not consider there to be "a lot of significant downside and, with the dividend, as long as the dividend wasn't cut, I would hold it for term".

(f) Post Trade

[90] Sherry testified that at some point while she "was running around looking for accounting and an officer to sign off on [a] requisition", she returned to her office and found the gifts purchased by Gary. Deducing from this that Gary had returned from his errands, she said she stepped outside her office and saw Gary at his desk, at which point she walked over to him and asked whether he had made the Trade.

[91] Gary testified that Sherry came by his desk "sometime before 12 noon". He too said that Sherry asked him whether he had made the Trade. According to both, when Gary responded in the affirmative, Sherry told him that they "need to talk".

[92] They both testified to then (around noon) going into a nearby meeting room where, according to Sherry, she told Gary she had been "instructed that we couldn't purchase Provident, and . . . that I was an insider on a potential transaction". Gary recalled Sherry telling him she had been "made an insider" that morning "on a potential acquisition of Provident", and said that they did not discuss the PPC Policy at the time. Both Hagertys testified similarly to what followed.

[93] Sherry said that "we decided that I would go speak with" Robertson – he was her boss, he was the PPC executive with whom she had the best relationship, he "would be trained in insider reporting and what the disclosure requirements were", and his presumed insider status meant she would not violate confidentiality by discussing the Combination with him. According to Sherry, they agreed that Gary would stay at his desk until she was able to track Robertson down.

[94] The Hagertys told us that they pondered selling their Provident Shares – at "a marginal loss, maybe a couple of hundred dollars" – but would await Robertson's advice. Sherry told us she told Gary that "I don't want you to [sell]. I want to find [Robertson] first to know what the proper course of action would be". Gary recalled telling Sherry, "Whatever he says, he says. If he says sell it, we'll sell it. If he says sell it and report it, we'll sell it and report it. . . . whatever his advice was, it would be the proper and trained advice for the situation both for ourselves and [PPC]". Gary told us that he returned to his desk and waited there while she "took off to find [Robertson]".

[95] In Sherry's testimony, she went to Robertson's office "two or three different times" without finding him, but concluded that "he hadn't left for the day" because "his coat was still there". Challenged in cross-examination as to why she sought out Robertson, Sherry conceded that giving him a Christmas gift (wine purchased by Gary) before he left for the holiday "was a

reason to go", but she insisted that her "primary reason for looking for [Robertson] . . . was for disclosure". Gary testified that "[a]t some point in time, she came back and communicated to me that she couldn't find [Robertson] and she was told he was out for lunch".

[96] The Hagertys testified that they exchanged "instant messages" (**IMs**) at this time, and Sherry tendered into evidence a document (the **IM Record**) that she said showed the following IM "conversation":

Dec 23 12:11 PM	**Sherry Hagerty:** went up [Robertson's] out
Dec 23 12:12 PM	**gwhagerty:** is he gone?
Dec 23 12:13 PM	**Sherry Hagerty:** no supposed to be back after 1
Dec 23 12:13 PM	**gwhagerty:** k - do you think I should just sell it? checked normal close for tsx at 4 est . . .
Dec 23 12:14 PM	**Sherry Hagerty:** don't know - will ask when I see him
Dec 23 12:29 PM	**Sherry Hagerty:** have to run and get a few things done before everyone goes
Dec 23 12:29 PM	**gwhagerty:** k be here waiting

[97] Staff questioned the authenticity of the IM Record. Sherry testified that mobility companies do not retain IM records, and that she printed the IM Record "from a Yahoo server", having found the IM Record after Staff had issued the notice of hearing. Gary's recollection concerning the IM Record was similar.

[98] There are frailties in the provenance of the IM Record but its tenor is not inconsistent with other evidence of Sherry meeting that day with Robertson. We are not persuaded that the IM Record was fabricated, and we therefore accept it as fairly presenting an IM conversation between Sherry and Gary at the times it indicated.

[99] Gary testified that in this period he and Sherry "were IM'ing each other; she was on her BlackBerry, and we were discussing finding Peter, finding a solution". Telephone records showed Sherry having telephoned Gary at 12:20 (this call lasted about half a minute). Neither Gary nor Sherry could recall what they spoke about in that telephone conversation.

(g) Robertson Meeting

[100] At some point on 23 December 2011 Sherry met with Robertson (the **Robertson Meeting**). According to her (and consistent with the IM Record), this happened "right after lunch". Robertson testified that it was "[l]ikely sometime in the morning of December 23rd", based on PPC "presumably" having "closed the offices early on that day" for the Christmas holiday. The evidence as a whole persuades us that Robertson's recollection on this point of timing was incorrect, but we attribute no significance to this discrepancy.

[101] Here again, we received testimony (from Sherry and Robertson) that is not easily reconciled.

[102] Robertson testified that "Sherry came to me and started asking pointed questions on a project that she was not supposed to be aware of". He told us that he was surprised to learn from Sherry that Andersen had told her about the Combination. Robertson said that their unscheduled meeting lasted only "five minutes at the most", and he did not recall any discussion about the Trade. Had that point been raised, Robertson testified, he immediately would have raised the matter with either Watkinson or Andersen, owing to its importance. He told us that had Sherry disclosed the Trade, it would have been a mistake on his part not to have directed her to PPC's legal department. At no point in the Robertson Meeting did Robertson believe he was acting in his capacity as administrator under the PPC Policy.

[103] Sherry testified:

> . . . very close to the beginning of the conversation, I said, Well, Peter [Robertson], Harry [Andersen] brought me into the loop on the transaction, and [Robertson] denied any knowledge of the transaction, I assume, because he wasn't aware that I knew, and I said, Well, the Provident transaction, and he still denied any knowledge. And then I explained to him, Well, I understand from [Andersen] that we're contemplating or we're at the initial stages of a purchase bid for Provident. And then he kind of said, Oh, okay, yeah. Yes, that's the case.
>
> And I said, Well, I said, That's interesting. I said, you know, I thought that Provident would have been taken over ever since April, and [Robertson] said to me, Well, it hasn't been in the works that long. I said, Well, that was my speculation on Provident, that it was up for potential acquisition since April. And he said, Well, it's not the case. And I said, Oh, okay. Well, [Robertson], I said, Gary bought Provident this morning, and he looked at me, and he said, M'mm. He said, Well, I wouldn't worry about that. He said, You weren't an insider at the time and Gary didn't know, and he still doesn't know. And then he proceeded to say, Well, we've looked at lots of different acquisition candidates, we looked at the BP stuff, we looked at other things, and nothing -- we never transact on anything. We never pull the trigger on anything. . . . Then he said, Well, I hope it was a good trade for you. And I said, Really, is that it? And he said, Yeah, I hope it turns out. I said, Do I need to do anything? No, he said, Go home and have a good Christmas. I said, Okay.

(h) Post Robertson Meeting

[104] According to the Hagertys, Sherry then told Gary of her conversation with Robertson.

[105] Sherry testified that after the Robertson Meeting she did not think about selling the Provident Shares:

> If [Robertson] had said to sell it, we would have sold it. If he said to contact anybody, we would have done that. His instructions were, Have a good Christmas and don't worry about it, and there's nothing more to be done. Given his knowledge, his position, his training, I took that as an informed guidance.

[106] In Gary's testimony:

> My recollection of [Sherry's] words to me [was] -- she went on that [Robertson] had denied it for a bit and he was kind of being very evasive and then when she finally said [Andersen] had made me an insider today. Then he said, Well, okay. Then she went on for a couple of seconds about he had gone on about it being very, very preliminary, most likely won't happen, and his final parting comment she says, when he walked out was, Hope it's a good trade. And that was the last thing that was -- I felt a little odd at it . . . .

[107] With that, according to both Hagertys, they went home for the Christmas holiday. Sherry said, "by the time we left and then got home, the markets were closed, and I didn't think again about it". To similar effect, Gary said that they went home at about 13:30 and did not think about the matter again "until this process started".

7. Completion of the Combination

[108] Negotiations and due diligence on the Combination proved successful. PPC and Provident concluded an agreement in the evening of 15 January 2012.

[109] This agreement was announced by news release (the **News Release**) the next morning (16 January 2012) before market opening. The News Release explained that the directors of both PPC and Provident had unanimously approved the Combination and were expected to recommend that the respective shareholders vote in favour. According to the News Release, the agreed share exchange ratio would produce "a premium of 26.2% to Provident's 20-day weighted average TSX-share price" and give Provident shareholders "a 27.5% increase in monthly cash dividends on a per share basis".

[110] According to Sherry, she did "small bits and pieces" of work relating to the Combination before the public announcement. She testified to "definitely" learning that PPC would take over Provident only on 16 January 2012, the date of the News Release. According to Gary, Sherry "never" talked to him about the progress of the due diligence and her role in it, and he too first learned that PPC was acquiring Provident on 16 January 2012 through the News Release.

[111] Simister testified to a discussion he had with Sherry after the Combination was announced. He told us that she commented: "I told you so, sort of alluding to the fact that she was correct in speculating [in her Data Room Email] that there was something bigger going on." Referred to this "I told you so" comment, Sherry testified: "I made a knee-jerk joke about maybe there was something else going on, and as I stepped through the transaction and after it was announced, I was able to say, clearly, this was tied to this, but that was after the announcement was made."

8. Gary's Sale of Provident Shares

[112] Gary testified that he did not "closely look at" the terms of the Combination when it was announced but at some point "read it" (the News Release, presumably) and learned from it that the completed Combination would provide a "premium" of over 20%.

[113] On 8 February 2012 (some three weeks after the News Release was issued) Gary sold all of the Provident Shares purchased in the Trade, for proceeds of over $59,000. The Combination had yet to receive shareholder approval, but Gary testified that he was "fairly confident" that it would be approved.

[114] As he explained his rationale for the sale, he did not want to receive "a bunch of odd lots" from the exchange of shares under the Combination, he believed that the Hagertys were "overexposed to [PPC]", and he "did not want the PPC shares" even though he acknowledged that their past investments in PPC had been "fairly lucrative".

[115] Gary testified that he did not discuss with Sherry in advance his sale of the Provident Shares, and did not tell her at the time that he had sold them. Sherry testified to similar effect: she had no role in the decision to sell, she did not discuss it with Gary and she only learned of the sale after the fact – "a couple of weeks" later, she thought. Asked whether she knew what Gary did with the money, she said: "I don't have a clue. I assume it would still be sitting there".

9. Staff's Investigation

[116] On 31 January 2012 Staff investigators asked PPC and Provident for information relating to the Combination, including a list of all individuals who had knowledge of it prior to issuance of the News Release, and when each acquired that knowledge.

[117] On 2 February 2012 (a Thursday) a PPC staff member followed up at 15:30 with an email to various PPC personnel, including Sherry (the **PPC 2012 Email**): "We have received requests from both FINRA and Alberta Securities Commission for a list of those involved in the transaction with Provident to review trading of both [PPC] and Provident shares." This email asked recipients to respond with the date on which they "Became Aware of [the] Transaction", and requested a response "as soon as you can", as PPC needed to provide its response by the middle of the following week. The Hagertys each testified that Sherry did not talk to Gary about this email.

[118] Sherry answered the PPC 2012 Email at 10:58 on Monday 6 February 2012. Sherry's response to the PPC staff member was that she became aware of the Combination at "noon on December 23, 2011". This clearly was incorrect, given the undisputed evidence that she learned of the Combination from Andersen before 10:00 that morning. Her response thus inaccurately suggested that she learned of the Combination only after Gary made the Trade, when in fact she knew before. Sherry told us that she answered as she did after looking at her calendar for 23 December 2011 and recalling that "we closed at noon", so she knew that she "had known at least by noon".

[119] Asked about the interval between the PPC 2012 Email and her response, Sherry noted that a weekend intervened and that the PPC email indicated "there was no urgency on the request. . . . it wasn't due Friday or wasn't due immediately".

[120] Asked whether she was concerned on receiving the PPC 2012 Email – having earlier testified to Andersen having told her on 23 December 2011 not to make the Trade because the ASC would find out – Sherry responded: "No. I had disclosed to [Robertson], who was the CFO, and upon reading the insider policy, I wouldn't have any concerns". She described the PPC 2012 Email as "a typical administrative requirement, similar to doing an expense report . . ., it was that type of activity, which I did first thing on Monday". (Gary told us something similar: he "had all expectations that somewhere [the Trade] would be noted, and that when this process began, and I had no surprise that this would be looked at, and so I expected, until we were served with documentation, that both [Andersen and Robertson] would corroborate our testimonies".)

[121] PPC terminated Sherry's employment on 9 March 2012. Robertson, who informed Sherry of her termination, testified that the Trade was not the reason for her termination.

Andersen similarly indicated that Sherry's termination was not prompted by the Trade. Indeed, Andersen testified that he did not know of the Trade until Staff had requested, in an investigation order dated 16 April 2012, copies of electronic communications to and from Sherry (among other things). Sherry testified that PPC was using this proceeding as a defence to her dispute with PPC concerning her termination.

III. THE LAW

[122] Staff alleged contraventions of sections 147(2), (3) and (3.1) and of section 221.1(2) of the *Securities Act* (Alberta) (the **Act**) and conduct contrary to the public interest (associated with and apart from these contraventions).

A. Illegal Insider Trading

[123] The relevant prohibitions under section 147 of the Act are these:

> (2) No person or company in a special relationship with a reporting issuer shall purchase or sell securities of the reporting issuer with the knowledge of a material fact or material change with respect to the reporting issuer that has not been generally disclosed.
>
> (3) No reporting issuer or person or company in a special relationship with a reporting issuer shall, other than when it is necessary in the course of business, inform another person or company of a material fact or material change with respect to the reporting issuer before the material fact or material change has been generally disclosed.
>
> (3.1) No reporting issuer or person or company in a special relationship with a reporting issuer with knowledge of a material fact or material change with respect to the reporting issuer that has not been generally disclosed shall recommend or encourage another person or company to
>
> (a) purchase or sell a security of the reporting issuer . . .

[124] A "material fact" is "a fact that would reasonably be expected to have a significant effect on the market price or value of" a security (section 1(gg) of the Act). The term "generally disclosed", although not defined in the Act, has been found to bear its ordinary meaning, which "connotes information being disseminated so as to reach a general audience not limited to the particular reporting issuer and those in a special relationship with it, but including the market (if any) for the particular securities" (*Re Kapusta*, 2011 ABASC 322 at para. 235). For simplicity, we will sometimes use "**material information**" to denote a material fact about a reporting issuer, and "**inside information**" to denote material information not generally disclosed.

[125] Under the Act, those "in a special relationship with a reporting issuer" include:

- an employee of a company "that is proposing . . . to become a party to a reorganization, amalgamation, merger or arrangement or a similar business combination with the reporting issuer" (sections 9(a) and (c), read together); and
- anyone engaged in business or professional activity with or on behalf of such a company (section 9(b)).

[126] Section 147 of the Act dictates caution on the part of those with inside information. The ASC commented as follows in *Re Holtby*, 2013 ABASC 45 (at para. 503):

> . . . a person need not specifically use insider information to run afoul of the Act. A person who purchases or sells securities with knowledge of non-public material information will have breached the Act regardless of the motivation for the purchasing or selling. Further, there is no requirement that an alleged informer or recommender or encourager know or intend that the recipient will buy or sell the particular securities, thus making use of non-public material information or a recommendation or encouragement. Rather, "[t]he mere fact of informing another person of confidential material information constitutes an offence" (*Re Rankin* (2008), 31 OSCB 3303 at para. 32).

[127] Circumstantial evidence often plays an important role in cases involving allegations of illegal insider trading. It is permissible to draw inferences from such evidence. However, as set out in *Holtby* (at para. 463):

> . . . when drawing an inference from circumstantial evidence, we must ensure that the inference is grounded on proved, not hypothetical or assumed, facts and is a reasonable one – one drawn using common sense, human experience and logic having considered the totality of the evidence and any competing inferences. That said, a reasonable inference need not be the only inference that can be drawn, nor the one that is most obvious or most easily drawn ([*Re Suman* (2012), 35 OSCB 2809] at para. 308). As for considering the totality of the evidence, as noted [by Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst] in *The Law of Evidence in Canada*, 3rd ed. [(Markham: LexisNexis Canada, 2009)] (at para. 2.77), "[p]ieces of evidence, each by itself insufficient, may . . . when combined, justify the inference that the facts exist."

[128] Various factors identified in *Re Suman* (2012), 35 OSCB 2809 (at paras. 323-40) – a respondent's ability and opportunity to obtain knowledge of the inside information; a fundamental shift in the nature of the respondent's trading activity; and subsequent conduct by the respondent that could show consciousness of guilt – are "illustrative of some things that might be considered in assessing whether misconduct [of the sort alleged] occurred" (*Re Somji*, 2012 ABASC 444 at para. 34).

B. Untrue Statements to Staff Investigators

[129] Section 221.1(2) of the Act states:

> No person . . . shall make a statement, whether oral or written, in any document, material, information or evidence provided to the [ASC], that, in a material respect and at the time and in light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading.

[130] This prohibition thus has three key elements. First, it applies to a statement – oral or written – in any document, material, information or evidence provided to the ASC. Second (adopting Staff's focus on allegedly untrue statements), at the time and in light of the circumstances under which it was made, the statement was untrue. Third, the statement was untrue in a material respect.

C. Conduct Contrary to the Public Interest

[131] Conduct can be found to have been contrary to the public interest even if it did not contravene the Act. The ASC, after all, is exercising a public interest jurisdiction. This jurisdiction will be exercised with restraint and caution. This topic was addressed in *Re Fletcher,* 2012 ABASC 222 (at paras. 96, 98):

> The [ASC] has the power, via its public interest jurisdiction, to intervene even when no breach of Alberta securities laws has been found (*Re [ARC] Equity Management (Fund 4) Ltd.*, 2009 ABASC 390). In considering the public interest jurisdiction of the Ontario Securities Commission (the "OSC"), the Supreme Court of Canada noted that the OSC has "a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so" but that, in exercising its public interest discretion, the OSC "should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally" (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at para. 45). In *Re Canadian Tire Corp.* (1987), 10 OSCB 857 (affirmed (1987), 59 O.R. (2d) 79 (Div. Ct.), leave to appeal to Ont. C.A. refused (1987), 35 B.L.R. xx), the OSC had earlier determined that its public interest jurisdiction would be appropriately exercised "to deal with situations that are inconsistent with the best interests of investors or where a transaction constitutes a flagrant abuse of the marketplace".
>
> . . .
>
> Clearly, in determining whether to exercise our public interest jurisdiction, we must . . . consider all relevant circumstances, mindful that such jurisdiction is to be exercised with restraint and caution. We adopt the following statement of the OSC in *Re Sterling Centrecorp Inc.* (2007), 30 OSCB 6683 (at para. 212):
>
> > The [OSC's] "public interest" jurisdiction is broad and powerful, and must be exercised with caution, as recognized in the *Re Canadian Tire* decision. When considering the exercise of this jurisdiction, the [OSC] needs to have regard to all of the facts, all of the policy consideration[s] at play, all of the underlying circumstances of the case, and all of the interests affected by the matter and the remedy sought. . . .

D. Standard of Proof

[132] The burden of proof in this administrative proceeding rests with Staff. The relevant standard is the balance of probabilities. To succeed on any of their allegations, therefore, Staff must establish, through "sufficiently clear, convincing and cogent evidence", that it is more likely than not that misconduct occurred as alleged (*F.H. v. McDougall*, 2008 SCC 53 at paras. 46, 49).

IV. DISCUSSION CONCERNING THE EVIDENCE

A. Documentary Evidence

[133] Among the documentary evidence were excerpts from transcripts of the Hagertys' investigative interviews, certain of these central to Staff's allegations that the Hagertys' made untrue statements to Staff investigators. The documentary evidence generally speaks for itself. One exception – an ambiguity concerning the timing of calls listed in certain telephone records – was resolved in the course of the hearing, as discussed below. Further, as discussed, we accept the IM Record as fairly presenting an IM conversation between Sherry and Gary at the times it indicated.

B. Testimony

[134] We note in our reasons specific conclusions on credibility and conflicting evidence, but here provide some general conclusions on credibility.

[135] We find the testimony of the witnesses, other than the Hagertys, generally credible. Where such testimony was vague or uncertain, that generally was reasonably attributable to frailty of memory concerning events more than two years in the past.

[136] As for the Hagertys, we find their testimony concerning non-controversial matters generally credible.

[137] However, it is clear, and the Hagertys acknowledged, that elements of what they told us (certain of these importantly concerning events on the day of, and the day preceding, the Trade) constituted a reconstruction rather than actual recollection of events. Gary acknowledged that his testimony was based on a chronology he had created after receiving and reviewing Staff's "evidence", a reference we understand to mean the prehearing disclosure provided by Staff to the Hagertys. Both he and Sherry spoke of "prep" or "prepping" for the hearing, a process which, given how their testimony unfolded, went beyond merely a review of pertinent information to enable informed testimony in the hearing.

[138] For example, it became clear that the Hagertys inferred incorrectly that times stated in certain telephone records disclosed to them before the hearing reflected Eastern time (not Calgary time), so Sherry presented a scenario to us in the hearing to account for the evidence thus misunderstood. Specifically, in respect of the crucial morning of 23 December 2011, Sherry initially testified that she had missed a call from Gary (which because unanswered would not have shown up in the telephone records) and returned the missed call at 10:20 Calgary time. This was when Gary was away from the PPC offices to buy wine. Sherry described that conversation in considerable – indeed, given the time elapsed since, remarkable – detail:

> [Gary] informed me that he had picked up a Spanish wine for [one co-worker] because [his] family vacationed half the year in Spain, and he had picked up a German for [another co-worker], because she is German, and he didn't know what to get [Robertson]. And I said well, and he didn't know how much to spend. I said, Keep it reasonable; I didn't want it to be excessive, so 50, 75 bucks, and that was it.

[139] Later in the hearing it was determined that the telephone call in question was actually made at 12:20 Calgary time – at a time when Gary was not at the wine store but had already returned to the PPC offices.

[140] Testifying again, after the incorrectness of her original testimony had become plain, Sherry offered an explanation. She said that she had "thought about that last night" and "felt obligated to disclose to the panel . . . what I thought at the time was an error in timing":

> A So we received copious amounts of information from the ASC staff upon commencement of these proceedings. I think -- my understanding is the documents we have in front of us is a subset of the original boxes of information that we received from them. It was a lot of information. Included in the information sent from the ASC was a file of text and phone records from Telus, and it was all contained in the same file. . . .
>
> . . . in prep for the week that we have had here, clearly one of the things I had done was go through those files and that information and gone through my recollection of what had happened on those days. And so when I looked at that 12:20 phone call on December 23rd and backed that into Mountain Time, which I assumed was 10:20, I knew that Gary

> was in the wine store at that time. I knew because we had a wine receipt from the wine store. So I was able to tie those two pieces together.
>
> One thing I also very clearly remember is having that conversation about wine with Gary that day. So when I looked at those two pieces, I assumed that that was the reason that I had -- that I would have spoken to him at 10:20.
>
> Q When Ms. Bazant asked you about a 12:20 call yesterday, you were thinking the call was at 10:20; you surmised, in the preparation, it had to have been about the wine call?
>
> A Correct.

[141] When subsequently cross-examined, Sherry acknowledged that "I can't remember making a 10:20 phone call" and that her testimony was not entirely accurate, but maintained "I think that there are pieces that are accurate".

[142] Gary for his part testified that "I know that I talked to [Sherry] about it [the wine purchase for Robertson]. It may have been after the purchase or before the purchase, and that chronology made me believe, and I still to this day believe, that I had talked to her on my cell phone in that wine store during this time prior to the purchase." Gary subsequently testified that "my recollection still is that I talked to [Sherry] about that wine" and that "[m]y recollection based on prepping was I must have talked to [Sherry] in the wine store on that phone at that time [10:20 Calgary time]".

[143] In summary, some of the Hagertys' testimony was clearly contrived or manufactured, and certain of Sherry's plainly wrong. These flaws in some of their testimony call into question the reliability of other of their testimony regarding matters in controversy. Thus, we are generally disinclined to rely on their testimony concerning controversial matters except where it is consistent, or at least not inconsistent, with other evidence.

V. ILLEGAL INSIDER TRADING

A. The Allegations

[144] Staff alleged that the Hagertys engaged, in different ways, in illegal insider trading. Specifically, Staff alleged that Sherry, while in a "special relationship" with Provident and with knowledge of a material fact concerning Provident that had not been generally disclosed, either: (i) contravened section 147(3) of the Act by informing Gary of the material fact; or (ii) contravened section 147(3.1) by recommending or encouraging him to purchase Provident Shares. Staff further alleged that Gary contravened section 147(2) by purchasing Provident Shares while in a "special relationship" with Provident and with knowledge of the material fact that had not been generally disclosed. All such claimed contraventions of the Act were also alleged to have been contrary to the public interest.

[145] The notice of hearing specified that the material information in question was "the potential transaction between [PPC] and Provident" or PPC's "potential acquisition of Provident" – the Combination – and Staff's allegations were predicated on Sherry having become aware of the Combination on 22 December 2011.

B. Analysis

1. Non-contentious Elements

[146] Important elements of the insider trading allegations were not, or seem not to have been, disputed. Gary purchased Provident Shares in the Trade, at 11:12 on 23 December 2011. Provident was a reporting issuer under the Act at the relevant time. Provident Shares were securities within the meaning of the Act. Sherry (as an employee of PPC) and Gary (as a consultant engaged in business or professional activity with or on behalf of PPC) were each in a special relationship with Provident at the relevant time – throughout 22 and 23 December.

[147] We think it obvious, and there was also no dispute, that the Combination, if known to market participants before it was generally disclosed via the News Release on 16 January 2012, would reasonably have been expected to have a significant effect on the market price or value of Provident Shares. Such information thus constituted a non-public material fact with respect to Provident, or what we here term inside information, at the relevant time.

[148] All of this we find.

2. Knowledge

[149] Our analysis therefore focuses on the remaining elements of the insider trading allegations:

- *section 147(3) – Sherry informing of inside information*: Staff alleged that Sherry "became aware", and informed Gary, of the Combination on 22 December 2011.

- *section 147(3.1) – Sherry recommending or encouraging*: Alternatively, Staff alleged that Sherry learned of the Combination (on 22 December 2011) and recommended or encouraged Gary to purchase Provident Shares. Staff, not having specified the timing of that purported recommendation or encouragement, need establish only that it occurred sometime between Sherry having learned of the Combination and Gary making the Trade (at 11:12 on 23 December).

- *section 147(2) – Gary purchasing with knowledge of inside information*: This allegation requires a finding that Gary knew of the Combination when he made the Trade. Staff's position apparently was that Gary learned of the Combination directly from Sherry – was informed of the Combination by her contrary to section 147(3) of the Act – on 22 December 2011.

[150] Central to each of these allegations was Staff's contention – denied by the Hagertys – that Sherry learned of the Combination on 22 December 2011.

[151] Sherry argued that there was "no clear and cogent evidence" that she knew of the Combination before the Andersen Meeting. Staff acknowledged that their case in relation to the insider trading allegations is based on circumstantial evidence, and "rests on whether inferences may be appropriately drawn from other facts established by evidence". Staff pointed to no particular event as having informed Sherry of the Combination on 22 December 2011. Rather, Staff invoked the following statement of the Ontario Securities Commission in *Suman* (at

para. 307): "Knowledge of an undisclosed material fact may be properly inferred based on circumstantial evidence that includes proof of the ability and opportunity to acquire the information combined with evidence of well-timed, highly uncharacteristic, risky and highly profitable trades."

[152] Thus, in contending that we are entitled to draw an inference of knowledge, Staff asserted (among other things) that the Trade was uncharacteristic and highly profitable for the Hagertys, its timing was suspicious and the Hagertys' rationale for it (and for Gary's subsequent sale of the Provident Shares) lacked credibility; that the Hagertys' subsequent conduct demonstrated consciousness of guilt; and that Sherry had ability and opportunity to learn of the Combination on the day before the Trade. The Hagertys sought to persuade us to the contrary, and submitted that Staff's case was founded on "the mere possibility that something nefarious happened".

(a) The Nature and Timing of the Trade

[153] Having carefully considered the evidence (including the Hagertys' testimony) and the submissions, we conclude that the Trade was somewhat uncharacteristic and its timing noteworthy.

[154] The Trade was a relatively large securities purchase for Gary – not unprecedented, but well toward the upper end of his trading experience. It was also not unprecedented for Sherry to engage in a securities transaction (albeit, a sale) of such value.

[155] The Trade was easily funded from cash in the applicable RRSP account. There was no sudden liquidation of assets to fund the Trade, which might have been considered a "red flag". This, though, tells us little about the legitimacy of the Trade. A variety of reasons might prompt a limit on the size of a nefarious securities purchase, just as for a bona fide purchase. In the circumstances, the Hagertys' ready ability to have funded a purchase much larger than the Trade is a neutral factor.

[156] Staff pointed to the Trade as having been the Hagertys' first investment in Provident securities. As a foundation for a finding of impropriety, this is too tenuous.

[157] The timing of the Trade was in context conspicuous, having been made on the same day that Andersen advised Sherry about the Combination. Moreover, the Hagertys were not active traders, yet the Trade – only the third transaction made by Gary in 2011 – occurred the day after the Grier Email and the Grier Meeting (the import of which we discuss below), all of this against a backdrop of industry consolidation, with Provident among named potential acquisition candidates.

[158] The Hagertys' claimed rationale for the timing of the Trade is unpersuasive. There was no evidence, apart from the Trade itself, of either of them ever having acted on the claimed "tax selloff" theory. Theory or no theory, we disbelieve the Hagertys' assertions that Gary needed to act on 23 December 2011. We are satisfied that Gary's trading accounts enabled him to place orders by computer at any time on any day, and there was no suggestion that the actual trade settlement date was important to him. The Hagertys' suggestion that other commitments would

have precluded him from placing an order (a task of mere minutes, at most) in the final week of the year is unconvincing.

(b) The Profit Generated by the Trade

[159] When Gary sold the Provident Shares in February 2012 he realized a profit of almost $10,000, an approximate 20% profit on his investment of about six weeks. Staff termed this his "single most profitable trade in terms of dollar amount . . . within the previous 3 years". That it was so profitable seems in our view reasonably attributable, largely or wholly, to market reaction to the terms of the announced Combination.

[160] Gary's explanations for selling are not particularly compelling. However, nothing in the evidence indicated that his effective profit would have differed much even had he simply retained the Provident Shares until they were exchanged under the Combination. It is difficult in the circumstances to view his profit as a basis for a finding of misconduct.

(c) Subsequent Conduct

[161] Staff asserted that the Hagertys' subsequent conduct demonstrated consciousness of guilt concerning the Trade. Staff pointed specifically to the Hagertys' alleged "[l]ying about purported conversations on 23 December 2011" with Andersen and Robertson. This assertion was also the subject of specific allegations that we analyze separately below.

[162] For present purposes, we adopt the comments of the ASC in *Holtby* (at para. 466):

> Circumstantial evidence of a respondent's after-the-fact conduct – the conduct of a respondent following his or her alleged breach of the Act – may reflect a consciousness of guilt and may reasonably raise an inference of guilt. However, such circumstantial evidence "must be analyzed with care and not over-emphasized, as it is easily misinterpreted" and "must not be analyzed in isolation, but rather weighed with all of the evidence" in determining whether a breach of the Act has been proved (*The Law of Evidence in Canada*, 3rd ed. at para. 6.436).

[163] In that light, we again find it difficult in the circumstances to view the alleged lying (not all of which, as will be seen, was proved) as a foundation for a finding of illegal insider trading.

(d) Ability and Opportunity

(i) Prior Knowledge

[164] That the Trade was somewhat uncharacteristic and profitable, and its timing conspicuous, does not make it illegal. Nor does this enable us to infer, as illegality would require, that Sherry had inside information – specifically, under Staff's theory, that she learned of the Combination on 22 December 2011 (the day before the Trade). We turn now to a consideration of other evidence pertaining to this issue of knowledge.

[165] The parties seemed to concur that even before 22 December 2011 Sherry (and Gary) had access to, and had absorbed, a good deal of non-confidential information – facts and speculation, either in the public domain or from contact with individuals outside PPC – about the industry sector in which Provident was a player. This included awareness of consolidation of midstream and marketing NGL companies in 2011 (including in the final quarter) through publicly-known transactions involving players other than PPC and Provident, speculation that more consolidation

was likely, awareness of a move to Provident by a former PPC director, and Provident's divestiture of some upstream assets supposedly rendering it "a pure-play NGL player".

[166] Staff ascribed to Sherry even more – and more specific – knowledge, some of it public and some perhaps gleaned through her work in assessing credit risk for various PPC business units and her related access to certain communications, including: (i) PPC management had discussed expanding PPC's NGL business "by getting into the fractionation market"; and (ii) "there was a view in the industry that it made sense" for PPC to build or buy a fractionation facility at Fort Saskatchewan, where such infrastructure was controlled by three entities – one of which PPC "had looked at" but "did not transact" with, another of which had recently (early in December 2011) sold its facility in the publicly-known Unrelated Transaction, and the third of which was Provident. Accordingly, Staff submitted that Sherry knew Provident was the "likely acquisition target", based on PPC's "own business plan for growth and development, the nature of its business being on a fee-for-service basis, and the general consolidation of midstream and marketing NGL companies in 2011, particularly the last quarter that year".

[167] Sherry claimed to be uninformed about the NGL business, although – noting the Hagertys' work histories, Sherry's own job at PPC, and her contact with former co-workers from other companies and their social conversations about the industry – we believe that she knew more than she was willing to reveal to us and would have understood information to the extent that it did come her way. However, there was no cogent evidence that she was actually exposed to information about non-public PPC management-level strategizing concerning fractionation plants or PPC's having "looked at" but "not transact[ing]" with one of the three fractionation operators at Fort Saskatchewan.

[168] In the result, we are satisfied on the balance of probabilities that Sherry began 22 December 2011 with a fair understanding that further transactions involving NGL players and Alberta NGL facilities could be anticipated, that PPC might be involved in such a transaction, and that Provident was among a limited group of industry players with particular strengths in that sector.

[169] Even so, it is far from clear that all of this – much of it merely speculative – would have constituted knowledge of a material fact. In any event, little of it was confidential. To establish any of the insider trading allegations here, Staff must prove on the balance of probabilities that inside information – material and non-public – supplemented Sherry's existing knowledge to the point that, sometime on 22 December, she came to be aware that PPC was proposing to acquire Provident.

(ii) Knowledge from Observing Office Activity on 22 December

[170] There was a suggestion that activity in the PPC offices on 22 December 2011 might have communicated something to Sherry. Mention was made, for example, of the layout of the offices and of a boardroom meeting of some senior personnel in connection with the Combination, but there was no evidence to suggest that Sherry knew of it (or, if she did, drew any conclusion). As noted in the Hagertys' submissions, there was no evidence of anything like a secret Combination-related document left lying about. In the circumstances, we draw no conclusion from the mere fact of Sherry's (or Gary's) presence in the PPC offices on 22 December.

(iii) The Grier Email

[171] Staff ascribed considerable importance to the Grier Email (sent at 8:10 on 22 December 2011), to which Simister replied, copying Sherry and Gary, at 8:17. At 8:39 Sherry responded with an email to Grier, Simister and Gary, then a minute later sent the Data Room Email ("Where is the data room location? S").

[172] The Grier Email, on its face, is arguably innocuous. It mentioned a search for certain types of contracts, but gave no reason and referred to no particular industry participant (other than, by obvious implication, PPC).

[173] That said, on this topic (as on others) Sherry was not as naïve as she pretended. She is not unintelligent. She was alert and curious. We are satisfied (notwithstanding her characterization of her Data Room Email as a joke) that Sherry promptly discerned that Grier's request for information was out of the ordinary, that it indicated something interesting percolating at PPC, and specifically that it might portend PPC setting up a data room. We are in no doubt that Sherry (as someone whose background would have given her some familiarity with Calgary business practices) understood that the establishment of a data room often portends that a significant transaction is under consideration.

[174] However, a data room is a feature of many types of transaction. A transaction might or might not involve securities: large asset transactions are sometimes paid for in cash. As Sherry suggested, even were this inferred data room to signal a business acquisition, it might involve PPC as target rather than acquirer.

[175] We would not disagree that the "fact that [PPC] was transacting was material information" in respect of PPC. However, Staff submitted that it was "material information about Provident". In the circumstances, that is not established.

[176] While we believe that the Grier Email led Sherry immediately to speculate about a data room and, by implication, about the prospect of a transaction in the works, we do not consider that the Grier Email – even coupled with Sherry's prior knowledge – informed Sherry of the Combination (that is, that PPC was planning an acquisition with Provident as the target).

[177] There was no evidence of any other particular source of such information prior to the Grier Meeting, to which we now turn.

(iv) The Grier Meeting

[178] At some point after Sherry reached the PPC offices on 22 December 2011, she and Grier met in Sherry's office. There was no evidence that Grier identified Provident, or disclosed the Combination, on this occasion. However, Staff pointed to Andersen's testimony that Sherry mentioned Provident in the Grier Meeting, asking Grier "if we're acquiring Provident". As discussed, Andersen told us that this testimony was based on notes he took of a May 2012 conversation with Grier. Such a conversation would obviously have been much closer in time to the Grier Meeting than is the hearing, and potentially therefore more reliable. This might be all the more so were the actual notes in evidence; they were not.

[179] The individuals best placed to describe their conversation – Sherry and Grier – were at best equivocal in their testimony. While Grier "definitely" recalled that Sherry "was thinking something was up", Grier could not remember specifics of the conversation, including whether Provident's name was even mentioned. For her part, Sherry recalled meeting with Grier that day but denied asking Grier whether PPC was acquiring Provident.

[180] Prior to the Grier Meeting, the Grier Email had (we believe) prompted Sherry to surmise that a data room, and hence a transaction, might be in the works. Having regard to the totality of the evidence concerning the Grier Meeting, we think it more probable than not, and we therefore find, that Sherry made a statement to Grier in the Grier Meeting (whether as a question or speculative statement we think immaterial) positing the possibility of some sort of consolidating transaction involving PPC. We also think it more probable than not, and we therefore find, that Provident's name came up in some context during that conversation. In short, we conclude that Sherry demonstrated in the Grier Meeting a degree of alertness to the possibility of a transaction that heightens the conspicuous timing of the next day's Trade.

[181] That said, we are unable to conclude from the evidence as a whole that Sherry, in the Grier Meeting, identified Provident as being on the other side of the suspected transaction with PPC. Had Sherry done so, we think Grier would have remembered and so testified.

[182] The evidence does not persuade us that Sherry, at the time of the Grier Meeting, actually knew that a transaction between PPC and Provident was being contemplated. Nor do we believe that Grier provided any confirmation of Sherry's question or speculation: there was no suggestion that Grier would have been so careless (even Andersen's account had Grier avoiding a response to Sherry); and the evidence as a whole does not establish that Grier herself knew at the time of the Grier Meeting that Provident was PPC's acquisition target.

[183] In the result, we find that Sherry combined her prior knowledge from non-confidential sources together with a hard (and confidential) fact disclosed in the Grier Email – that Grier wanted to look at some contracts – to make some perspicacious speculations.

[184] That, however, barely qualifies as "abstract expectation", let alone "concrete knowledge", of the Combination (to use the terminology of *Somji* at para. 63). No other source of inside information having been identified on 22 December 2011, we lack clear and cogent evidence that Sherry learned of the Combination on that day.

[185] In sum, having regard to the totality of the evidence, and our analysis of the several factors just canvassed (whether considered individually or collectively), we are unable to draw the key inference of knowledge asked of us by Staff.

3. Conclusions

[186] Because we cannot conclude from the evidence that Sherry knew of the Combination on 22 December 2011, it follows that she was not in a position to inform, or recommend or encourage, Gary while possessed of such inside information, in the sense of the section 147 allegations against her. Those allegations are therefore not proved.

[187] It further follows that the allegation of illegal insider trading by Gary – predicated on being informed by Sherry – is also not proved.

[188] As mentioned, Staff further alleged that the claimed contraventions of section 147 of the Act were also contrary to the public interest. Such contraventions not having been proved, the associated allegations of conduct contrary to the public interest are also not proved.

VI. UNTRUE STATEMENTS TO STAFF INVESTIGATORS

A. The Allegations

[189] Staff alleged that Sherry and Gary, when interviewed by Staff investigators, "provided false and misleading statements regarding Sherry's conversations on 23 December 2011 with [Andersen] and [Robertson] in relation to [the Hagertys'] intended and actual purchase of Provident [S]hares", contending both that these statements contravened section 221.1 of the Act and that the contraventions were contrary to the public interest. In their submissions Staff referred (almost exclusively) to the impugned interview statements as "untrue", and cast these allegations in plain-English terms as "lying".

[190] The Hagertys were alleged to have lied about the conversations that took place in the Andersen Meeting and the Robertson Meeting (from the evidence, the only occasions on 23 December 2011 on which Sherry spoke with Andersen or Robertson). The lying allegations turn, essentially, on what (if anything) Sherry told the two PPC officers about the Trade and how they responded.

B. Analysis

1. Statements to Staff Investigators

[191] In the course of their investigation Staff investigators interviewed each of the Hagertys (under oath and with counsel present) on 16 May 2012. Sherry and Gary each answered questions posed by Staff investigators. In so doing, Sherry and Gary each provided information or evidence to the ASC in the form of oral statements.

[192] The first of the three elements of the section 221.1(2) allegation is established. Our analysis therefore focuses on whether the statements were untrue and, if so, whether they were untrue in a material respect as contemplated by section 221.1(2).

2. Statements Concerning the Andersen Meeting

(a) Sherry's Interview Account

[193] Explaining to Staff investigators in her investigative interview what had been said by Andersen and her in the Andersen Meeting, Sherry stated:

> Okay. So I finally found [Andersen], and I went into his office.
>
> He closed the door, and -- I don't remember exactly what he said, but I remember him saying "You are now an insider." And I said okay.
>
> He didn't explain why they were telling me, or what they needed, and I said "Okay." And I said "Well, [Andersen], Gary and I were going to buy Provident this morning," and he got right into my space, and he said "Well, you can't do that."

> I said "Absolutely I can't do that. No problem," and he just --
>
> He said, "You know, the Securities Commission, they will find out about this, and you can't do it." And I said "I know." It was very clear. I said "Absolutely."

(b) Gary's Interview Account

[194] Gary gave Staff investigators a similar impression of that conversation between Sherry and Andersen:

> A . . . We went into a side office room and she told me that some time shortly after she came in, [Andersen] sent her an email to come up and talk to her, and he said "You are now an insider. We are doing our due diligence on Provident," and she told --
>
> This is hearsay, but she told me that she told him that I was going to buy that morning; and he basically said "Don't. Don't do it. You are now an insider," and I don't know the exact -- I don't know him, and I don't know the conversation, but she said, much after the fact, that he said "You will get caught, and -- or it will be screened by the ISE [sic], and you will get caught."
>
> She is like, kind of, "caught for what?" And he berated her, for about ten minutes, and then that was -- that was what she told me when we sat down, right around lunch time.
>
> Q And did she indicate what time that she spoke with [Andersen?]
>
> A Yeah, it was -- recollection, I think it was shortly after we got in, like 9:30 or something.

(c) Andersen's Account

[195] As noted, Andersen testified in the hearing that "Sherry didn't say a thing", and gave "just simply a nod", when he informed her she would be working on the Combination and of her insider status and the trading ban. Andersen told us that, had Sherry told him she and Gary were intending to trade in Provident Shares, Andersen "would have taken immediate action around that" and "there would have been an immediate marshalling of assets to deal with this".

(d) Accounts of the Andersen Meeting Are Irreconcilable

[196] Cross-examined on the inconsistency between her account and Andersen's – asked directly whether Andersen was lying – Sherry replied, "That is correct." In submissions, Sherry reiterated her position that Andersen's account was mistaken, offering the possibility of flawed memory but also questioning his motivations. In the latter regard there were references to the litigation over the termination of her employment by PPC. The Hagertys termed this more than "a trifle" for PPC, whereas Andersen testified that the outcome of the termination litigation would be insignificant or de minimis to PPC.

[197] Aspects of Andersen's account of the Andersen Meeting are in our view simply, and wholly, irreconcilable with either Sherry's or Gary's quoted interview statements or their corresponding testimony in the hearing. Someone's version is untrue.

[198] The Hagertys' suggestions concerning Andersen's motivations for false testimony are not persuasive. In respect of the termination litigation, even were the outcome of this proceeding as central to that litigation as the Hagertys suggest (which is not established), and even accepting as

true the Hagertys' contention that PPC kept a very close eye on the investigation and this hearing, we consider it highly unlikely that any outcome of the termination litigation (monetary or otherwise) would be so significant to PPC or to Andersen as to prompt a person in his position to give false testimony here.

[199] As to whether Andersen might have testified falsely in an effort to disguise a mishandling of the Andersen Meeting on his part, this is not plausible. There was no dispute that he told Sherry that she and Gary could not trade in Provident (or PPC) securities. That was an appropriate thing to have said. Even by Sherry's account – according to her, she told him of the intended Trade and he vociferously warned against it – Anderson's response was not inappropriate.

[200] Sherry, on the other hand, had plausible reason to mischaracterize what was said in the Andersen Meeting. In Sherry's account, she did the right thing: promptly and accurately informing a responsible PPC official (Andersen) of the intended Trade, as soon as she learned it could be problematic. Andersen's account, by contrast, has her sitting silently while knowing that a problem was brewing. Sherry's account obviously portrays her in a more favourable light. That said, however, potential motive does not prove dishonesty.

[201] More importantly, as discussed, we have serious concerns about Sherry's credibility. By contrast, we found Andersen forthright and credible.

[202] Given that Andersen, at the time of the Andersen Meeting, was a newly-arrived general counsel, just brought in to work on a significant transaction, and mindful enough of the business and legal needs for confidentiality to have summoned Sherry to inform her about the Combination and the associated trading ban, we simply do not believe that he would have failed to appreciate how problematic the intended Trade might be. We accept that, had he known of the intended Trade, Andersen (as he testified) would have responded vigorously and immediately to deal with and resolve the matter. We do not think he would have failed to notice, and address, any disclosure concerning the intended Trade (and in Sherry's account, her disclosure was neither vague nor ambiguous). Andersen's own words – "I would have taken immediate action" and "there would have been an immediate marshalling of assets to deal with this" – ring true. Foreseeable responses might have included contacting Gary during the Andersen Meeting to determine whether he had already made the Trade, or Andersen alerting Watkinson or contacting external counsel. Not plausible, in our view, would be Andersen accepting news of the intended Trade without being satisfied that it truly was forestalled.

[203] We next consider the Hagertys' alternative suggestion that Andersen might, without contrivance but owing to frailty of memory, have inaccurately recalled what happened in the Andersen Meeting. We are asked to believe that the very employee Andersen had expressly banned (with her spouse) from trading in Provident Shares – in a meeting convened by Andersen largely for that purpose – promptly responded that they were planning to do just that. To anyone in Andersen's position, that claimed response would have been remarkable, and troubling. It simply does not strike us as the sort of thing plausibly to be forgotten.

[204] We find Andersen's account that Sherry did not tell him about the Trade to be plausible and "in . . . harmony . . . with the preponderance of probabilities disclosed by the facts and circumstances" (to adopt the terminology of *R. v. Pressley*, 1948 CarswellBC 123 at para. 13, referenced in *Holtby* at para. 471), and Sherry's contrary account to lack such harmony and therefore plausibility.

(e) Untrue Statement

[205] For the reasons discussed, Andersen's account of the Andersen Meeting is believable, and we accept it as true. We therefore find that Sherry did not tell Andersen on 23 December 2011 about the intended Trade.

[206] It follows, and we find, that Sherry's contrary statement to Staff investigators in her investigative interview was untrue at the time and in light of the circumstances under which it was made.

[207] Gary's account in his investigative interview clearly paralleled Sherry's in hers on this point. However, he expressly characterized it as a second-hand account – "she told me".

[208] There is, therefore, no clear and cogent evidence that Gary made untrue statements to Staff investigators about what Sherry had told him of the Andersen Meeting. This allegation that Gary made untrue statements to Staff investigators is accordingly not proved.

(f) Materiality of Sherry's Untrue Statement

[209] It remains to be determined whether Sherry's untrue interview statement about the Andersen Meeting was untrue "in a material respect".

[210] That her untrue statement to Staff did not ultimately affect our findings on the insider trading allegations has no bearing on whether she contravened section 221.1(2) of the Act. For purposes of that provision, we consider that the materiality of her untruth is to be determined in the context in which it was made. She spoke in a formal, clearly serious, interview forming part of a regulatory investigation. The formality and seriousness could not have been misunderstood: she was accompanied by counsel and she was under oath. She was asked by Staff investigators what had been said by her and Andersen in the Andersen Meeting, not long before the Trade. Her response would foreseeably have a bearing on the course of the investigation and anything that followed. The response she gave departed markedly from the truth, and portrayed her in a more favourable light than the reality.

[211] The untruth was clear and significant, on a topic pertinent to the context in which it was uttered. We therefore find that it was material.

[212] It follows, and we find, that Sherry contravened section 221.1(2) of the Act.

(g) Public Interest

[213] Staff alleged that each claimed contravention of section 221.1(2) of the Act was also contrary to the public interest.

[214] Staff are responsible for monitoring and enforcing compliance with Alberta securities laws, in pursuit of the ASC's mandate to maintain the integrity of the Alberta capital market and investor confidence in that market. It is expected that persons will provide truthful statements to the ASC. Whenever Staff's oversight function is impeded by the provision of untrue statements to the ASC, the public interest is put at risk.

[215] It follows, and we find, that Sherry's making of a material untrue statement to Staff in the course of her investigative interview was contrary to the public interest.

3. Statements Concerning the Robertson Meeting

[216] The Robertson Meeting took place, we find, after lunch on 23 December 2011. Consistent with the IM Record – which we accept – the Hagertys intended that Sherry would use that opportunity to mention the Trade to Robertson.

(a) Sherry's Interview Account

[217] Explaining to Staff investigators in her investigative interview what had been said by Robertson and her in the Robertson Meeting, Sherry stated:

> So I went up to talk to [Robertson], and first [Robertson] denied the Provident transaction flat out; and I said "Well, [Andersen] talked to me this morning about it, and he brought me into the loop," and he is "What are you talking about? I have no idea what you are talking about."
>
> So after a few minutes of that, we were talking about, you know, I guess, yeah, and I said "Oh, you know, I have been saying this since [a named former PPC director] resigned from the board, that Provident was going to be bought," and I said "It was just odd that he would resign. He is such a young director. He was trying to build his -- himself as a director, and for him to leave [PPC], because it is a desirable board, then there must be something in it for him."
>
> Provident had parsed off their upstream assets. They had sold that oil side, and bringing [the former PPC director] in, in my mind, signalled that they were up for sale.
>
> So I made -- I said this to [Robertson], and [Robertson] said "Well, this wasn't in the works back in April of last year." And I said "Oh, well, I thought it was." And I said I just --
>
> This has been my position.
>
> Near the end of that conversation, . . . I said to Peter [Robertson] "Peter, Gary bought Provident this morning," and he said "Well, I hope it was a good trade."
>
> I said, you know, "Is that it? Do I just go home for Christmas, or what do I do?" And he said "Yeah, go have a good Christmas." So we did. I didn't do anything else.

(b) Gary's Interview Account

[218] Gary in his investigative interview told Staff investigators the following about the Robertson Meeting:

> . . . The only quote that I directly remember, Sherry coming back and "[Robertson] said 'Well, you guys did it -- he [in context, Gary] wasn't part of -- you weren't an -- he wasn't an insider, and you hadn't communicated to him.' He said 'Hope it was a good trade.'"

> She told me that he went on about "Well, and it is very preliminary. . . . They looked at all these other assets, and they have looked at stuff for the last six months, and everything they have looked at, they didn't execute on." So he said "There is probably not much of --"
>
> This is hearsay, but "Not much of a chance that this will go through." . . .

[219] Gary elaborated:

> So she went upstairs for half an hour or something and talked to [Robertson]. She came back down, and we again went back into that room and said -- and she basically gave me a synopsis of what her conversation was -- with [Robertson] was.
>
> . . .
>
> So she came back down and basically said "[Robertson] said 'Well, he wasn't an insider. He didn't have any material knowledge.' He went on."
>
> She says he went on ad nauseam about that this probably isn't going to happen. It is just preliminary stages of a deal, blah, blah, blah; and the quote was, and he is Scottish, and he is kind of a little cheeky at times. He said "Hope it was a good -- hope it ends up being a good trade."
>
> And we were, like, okay.

(c) Robertson's Account

[220] Robertson acknowledged in testimony that Sherry approached him on 23 December 2011. He told us that in their conversation Sherry asked "pointed questions on a project [the Combination] that she was not supposed to be aware of", explaining to him that Andersen "had told her about the project". This much is consistent with Sherry's account of the Robertson Meeting.

[221] As to what next transpired in the Robertson Meeting, Robertson's testimony was often vague: there were frequent instances of either limited recall or recourse to presumption or speculation. He told us that he "presume[d] the conversation revolved around the attributes of Provident's assets and how they might fit into [PPC's] assets", but cautioned that he did not "recall specifically". Asked whether he recalled any conversation about trading occurring that day, he responded: "None whatsoever." He also testified that, "if it had been discussed, I would have raised [the] issue with either" Watkinson or Andersen "[b]ecause it's an important issue", and acknowledged in cross-examination that he presumably would have either given Sherry some advice or directed her to PPC's legal department.

(d) Conclusions

[222] Clearly Sherry's and Gary's accounts of the Robertson Meeting differ from Robertson's, again on the issue of what Sherry disclosed about the Trade, and the response she received.

[223] Having regard to the totality of the evidence concerning the Robertson Meeting, and having accepted the IM Record, we are satisfied on balance that Sherry meant to raise the topic of the Trade in the Robertson Meeting. Robertson testified more than once to having no recollection of Sherry doing so – these were among the instances of either limited recall or recourse to presumption or speculation in Robertson's testimony about the Robertson Meeting.

[224] Robertson, as noted, told us what he would have done had Sherry plainly disclosed the Trade to him. His likely responses had she done so, as he described them, strike us as plausible. He having taken no such action, we think it improbable that he left the Robertson Meeting with a clear understanding of the facts about the Trade.

[225] This does not rule out the possibility that Sherry did broach the topic of the Trade in the Robertson Meeting, but that somehow the disclosure did not elicit Robertson's full attention. The Robertson Meeting was not convened by Robertson and he was clearly taken by surprise by Sherry's unexpected knowledge of something confidential (the Combination). That may have distracted his focus. Perhaps Sherry downplayed key facts about the Trade – its timing, for example – lulling Robertson into perceiving no problem. There might have been a simple miscommunication: perhaps Sherry was unclear, or Robertson did not appreciate the sequence of Sherry's recruitment to work on the Combination and the Trade.

[226] The evidence does not suffice for us to conclude that Sherry made untrue statements to Staff about the Robertson Meeting. This alleged contravention of section 221.1(2) by Sherry is not proved.

[227] Here again, Gary's statement in his Staff interview took the form of a recitation of what Sherry told him – "She told me". As we concluded in respect of his interview statements about the Andersen Meeting, there is no clear and cogent evidence that Gary made untrue statements to Staff investigators about what Sherry had told him of the Robertson Meeting. This allegation that Gary made untrue statements to Staff investigators is accordingly also not proved.

[228] These alleged contraventions of section 221.1(2) of the Act not having been proved, it follows that the associated allegations that such contraventions were conduct contrary to the public interest are also not proved.

VII. FAILURE TO PREVENT THE TRADE

A. The Allegation

[229] Staff alleged that Sherry acted contrary to the public interest by "fail[ing] to take any reasonable steps to prevent the [Trade] from occurring while she was in a special relationship with Provident".

B. Analysis

[230] This allegation has several elements: (i) Sherry "had jointly made a decision with [Gary] in relation to the imminent purchase of Provident [S]hares"; (ii) she was in a special relationship with Provident; (iii) whatever she did fell short of "reasonable steps to prevent" the Trade; and (iv) this failing was, by its nature or in its extent (or both), contrary to the public interest.

1. Parties' Positions

[231] Staff submitted that each of these elements is established. Staff contended that: Sherry "knew that [Gary] was going to buy [Provident Shares] that morning"; she knew this because "they had discussed purchasing [Provident Shares] together" – it was a "joint decision"; and after the Andersen Meeting she made no sufficient attempt to find Gary "to stop the [T]rade", even though they typically communicated with one another by multiple means and she used the

interval for several seemingly non-urgent communications with others. Staff asserted that Sherry "completely disregarded" the PPC Policy and that her background and position with PPC meant that she "should have done more than nothing". Staff characterized her conduct on 23 December 2011 as "abusive of the capital market".

[232] Sherry asserted that she did not act contrary to the public interest, arguing (among other things) that the Trade was not illegal, little time elapsed between the Andersen Meeting and the Trade, and she was limited in what she could legally have told Gary.

2. Allegation Elements

[233] We discuss the four elements of the allegation in turn.

(a) Joint Decision to Trade

[234] Although Gary made the Trade in one of his trading accounts, not a joint account, and although Sherry had her own separate trading accounts, we are satisfied that the two of them regarded the Trade as a joint enterprise. In addition to other evidence from the Hagertys on this point, Sherry told us that "when you're married, a lot of decisions become joint decisions", and that specifically in respect of the Trade, "at the end of the day, it became a joint decision because we were in agreement".

[235] We conclude that the Trade reflected the joint decision of Gary and Sherry. The first element of the allegation is established.

(b) Special Relationship

[236] For reasons discussed in connection with the insider trading allegations, we found Sherry to have been in a special relationship with Provident on 23 December 2011. The second element of the allegation is established.

(c) Reasonable Steps to Prevent the Trade

[237] In the circumstances, we consider that our assessment of the reasonableness of any steps taken by Sherry to prevent the Trade should be focused on the interval – approximately 90 minutes on the morning of 23 December 2011 – between the Andersen Meeting (during which Andersen told her of the Combination and forbade her and her spouse from trading in Provident Shares, and which ended by 9:47) and the time of the Trade (11:12).

[238] Sherry's actions in that interval were discussed above. Summarized briefly, she decided not to contact Gary about the Trade through electronic means – despite understanding that he was doing errands away from the PPC offices. Rather, by her own account, Sherry decided to watch for him so she could have a conversation with him. She did not see Gary immediately on his return, and he proceeded to make the Trade. Only after – toward noon – did Sherry spot him, at which point they finally spoke (and she divulged the Combination to him).

[239] Staff asked us to reject Sherry's claim to have struggled with how to tell Gary not to make the Trade without, in so doing, improperly disclosing the (confidential) Combination. Staff pointed out that she actually did nothing – spoke with no one, and consulted nothing (the PPC Policy, notably) – before eventually encountering Gary and learning from him that he had by

then made the Trade. Staff contended that, despite Sherry's claim to want to speak to Gary in person, he was at his desk approximately 15 minutes before making the Trade at 11:12, and Sherry did not speak with him until right before lunch. Then, Staff noted, when speaking with Gary, Sherry told him about the Combination – the very information whose confidentiality, she claimed, precluded her from acting sooner.

[240] For her part, Sherry's position was that she faced a "real conundrum" in having been told both not to disclose the Combination to Gary and that he (and she) must not buy Provident Shares. She submitted that the interval in question "was 90 minutes, during which both [Sherry and Gary] were very busy (and for all she knew he had already effected the [T]rade)", she was "constantly checking" for Gary's return to the PPC offices, and one cannot "know that it was 15 minutes after he got back" before Gary made the Trade. Sherry contended that she disclosed the Combination to Gary only after learning that he had already made the Trade, whereupon they came up "with the solution of, Let's go ask [Robertson] what to do". In all, Sherry submitted that "the Hagertys tried to do the right thing, not the wrong thing", and that her behaviour was not "the least bit bizarre", but rather "very natural", "perfectly understandable" and "perfectly reasonable". She argued that, in the circumstances we should not "second-guess her" for having waited to speak to Gary in person rather than trying to reach him electronically.

[241] The plain fact is that Sherry did not respond well to the situation, or with anything approaching the alacrity it demanded. Ideally, Sherry would have told Andersen everything about the intended Trade immediately; she did not. Failing that, if she were to stop the intended Trade, she had to reach Gary. However, she declined to use any of the multiple means of telephonic or electronic communication available – to which the Hagertys had frequent recourse – to do so until it was too late. Further troubling is that, as time passed without her encountering Gary, Sherry made no effort to alert Andersen – or Robertson or anyone else.

[242] When eventually Sherry's and Gary's paths did cross – after the Trade – she divulged the Combination. This undermines her claimed justification for delaying action.

[243] Sherry's failure to respond more promptly and vigorously during or following the Andersen Meeting was in our view inappropriate, and inexcusable.

[244] For the reasons discussed, we conclude that Sherry failed to take reasonable steps to prevent the Trade. The third element of the allegation is established.

(d) Public Interest

[245] Whether Sherry's failure to take reasonable steps to prevent the Trade amounts to conduct contrary to the public interest remains to be determined.

[246] Sherry's failure clearly resulted in contravention of the trading ban imposed on her and Gary in the Andersen Meeting, and of the PPC Policy. We do not condone that.

[247] That said, we are mindful of the caution and restraint with which we are to exercise our public interest jurisdiction in the absence of illegality. The making of the Trade unsurprisingly invited Staff's investigation and led ultimately to this proceeding. However, the Trade was not

shown to have been made on the basis of inside information, nor otherwise to have been made illegally. In all the circumstances we are not persuaded that Sherry's failure was so deleterious of capital market fairness and integrity – the focus of our regulatory regime – as to warrant the finding sought by Staff.

[248] We find the allegation that Sherry's failure to prevent the Trade amounted to conduct contrary to the public interest is not proved.

VIII. CONCLUSION AND NEXT STEPS

[249] In summary, we found that Sherry contravened Alberta securities laws and acted contrary to the public interest by making an untrue statement to Staff investigators.

[250] This proceeding now moves to a second phase, for the determination of whether – and, if so, what – orders for sanctions and costs ought to be made against Sherry.

[251] Once Staff and Sherry have familiarized themselves with our findings above, the hearing will reconvene briefly for the purpose of scheduling a timetable for the delivery and hearing of evidence (if any) and submissions on the issue of appropriate orders.

[252] To that end, Staff and Sherry are directed to communicate to one another and to the ASC Registrar by **16:00 on Tuesday 24 June 2014** either their respective availability for such a session at **10:00 on Wednesday 2 July 2014** or their suggestions (with reasons) for an alternative time or date for this session.

17 June 2014

For the Commission:

"original signed by"
Richard Shaw, QC

"original signed by"
Stephen Murison

"original signed by"
Fred Snell, FCA