

ALBERTA SECURITIES COMMISSION

DECISION

Citation: TransCap Corporation, Re, 2013 ABASC 201

Date: 20130509

**TransCap Corporation, Strata-Trade Corporation,
Dale Joseph Edgar St. Jean and Gregory Dennis Tindall**

Panel:

Stephen Murison
Roderick McKay, FCA
Daniel McKinley, FCA

Appearing:

Tom McCartney
for Commission Staff

Mark Klassen
for TransCap Corporation,
Strata-Trade Corporation and
Dale Joseph Edgar St. Jean

Dates of Hearing:

4, 5, 6 and 21 March 2013

Date of Decision:

9 May 2013

I. INTRODUCTION

[1] TransCap Corporation (**TCC**), Strata-Trade Corporation (**STC**), Dale Joseph Edgar St. Jean (**St. Jean**) and Gregory Dennis Tindall (**Tindall**) were alleged by staff (**Staff**) of the Alberta Securities Commission (the **Commission**) to have contravened Alberta securities laws and to have acted contrary to the public interest by, among other things, making misleading or untrue statements to investors and perpetrating a fraud on Alberta investors.

[2] A hearing into the merits of the allegations (the **Merits Hearing**) was held in March 2013. We received documentary evidence (including extensive admissions from TCC, STC and St. Jean, which we will refer to as the **Admission**) and heard the testimony of seven witnesses, including four Alberta investors. We also received submissions from Staff and from TCC, STC and St. Jean. Tindall – whose current whereabouts are unknown – did not participate in the Merits Hearing, although we are satisfied that he was given reasonable notice of this proceeding.

[3] For the reasons that follow, we find several (albeit not all) allegations against TCC, STC, St. Jean and Tindall (together, the **Respondents**) to have been proved. The hearing of this proceeding will therefore move to a second phase, for the determination of what, if any, orders ought to be made against the Respondents.

II. BACKGROUND

A. The Respondents

[4] TCC is an Alberta corporation. During the period 1 March 2005 to 10 December 2009 (the **Relevant Period**), TCC held itself out as being in the business of bond trading and bridge financing. St. Jean and Tindall were the directors and officers of TCC, and each owned 50% of its shares.

[5] STC is an Alberta corporation. In the Relevant Period, STC raised money for the purpose of lending it to TCC. St. Jean and Tindall were the directors and officers of STC, and each owned 20% of its shares.

[6] St. Jean resided in Calgary. He was a cofounder, and at all times material to this proceeding a shareholder, director and officer, of TCC and STC. He was also a founder or principal of several other entities, including TransCap Corporation Custody LLC (**TransCap Custody**), TransCap Corporation UK Ltd. (**TransCap UK**), Arcanum Equity Fund LLC (**Arcanum**) and Palladium Management Corp. (**Palladium**).

[7] Tindall was resident in Alberta, but (as noted) his current whereabouts are unknown. He was a cofounder, and at all times material to this proceeding a shareholder, director and officer, of TCC and STC. Like St. Jean, Tindall was also a founder or principal of TransCap UK, Arcanum and Palladium.

B. Raising Money from Investors

[8] TCC and STC raised approximately \$52 million in the Relevant Period, at least \$25.03 million of that from at least 133 Alberta investors. (Numbers presented by Staff at the Merits Hearing differ, but not significantly, from those set out in the Admission.)

[9] Some of this money was raised directly by TCC, by way of loans to TCC evidenced by TCC promissory notes bearing interest at rates from 18% to 22% per annum. In connection with this activity, TCC did not file any prospectus or offering memorandum with the Commission but did file several reports of exempt distribution (**Distribution Reports**, required to be filed by National Instrument 45-106 *Prospectus and Registration Exemptions* – **NI 45-106** – in respect of securities distributions made in reliance on various exemptions from the prospectus requirement).

[10] Some of this money was raised by STC – through the sale of bonds bearing interest at rates from 15% to 18% per annum under an offering memorandum dated 26 March 2008 (the **STC OM**) – and then lent to TCC. This was presented as an indirect way of investing in TCC, the two-step process apparently rendering the investments eligible for purchase by a registered retirement savings plan (**RRSP**). In connection with this activity, STC did not file the STC OM (or any other offering memorandum) or any Distribution Reports with the Commission.

[11] Prospective investors, whether in TCC or STC, received similar information about how their money would be applied by TCC, and thus about how profits would be generated to pay investors the sizeable interest rates promised and repay their invested principal. This information was conveyed through marketing material, sales seminars, the TCC website and the STC OM.

[12] As stated in the STC OM:

[TCC] is engaged in the business of providing bridge financing to its commercial borrowers and in bond trading, the buying and selling of investment grade bonds. The principal business of [TCC] is bond trading. At times in [TCC's] business cycle, it may hold excess funds that have not been committed to bond trading. In these instances, [TCC] may alone or in conjunction with other lenders, lend its excess funds [to] its commercial borrowers on a bridge financing basis.

...

[TCC's] business involves the purchase of bonds below market value, which are rated by Standards & Poor's and/or Moody's of A+ or better and then reselling these bonds on a forward commitment contract (pre-arranged sale), typically to an institutional investor at a profit.

The significant difference with [TCC's] bond trading activity is that it is not subject to the same risk profile as would typically be found in market based bond trading for the following reasons:

1. [TCC], through its market relationships, has secured access to certain institutional and government bonds at a discount, or below market value, from the fixed income desk of major financial institutions.
2. [TCC] has also established relationships with institutional buyers such as pension and insurance companies as purchasers who typically purchase bonds from [TCC] and hold institutional bonds until maturity. Institutional purchasers often are not able to purchase bonds that are initially issued by a bond issuer, due to certain internal investment restrictions of such purchasers. Often times such purchasers can only purchase bonds after such bonds have been issued within the bond market.
3. [TCC] acts as an intermediary for such purchasers, by agreeing to purchase bonds from an issuer on the basis that [TCC] will then in turn sell the bonds

acquired by it to an institutional purchaser based on a pre-arranged forward commitment contract.

4. [TCC] will not purchase bonds until and unless it has first secured a forward commitment contract (pre-arranged sale) from a purchaser with a pre-determined price and at a pre-determined date.
5. [TCC] will typically purchase bonds [at] a slight discount from the bond issuer and then sell them to an institutional purchaser at market value. The difference between what [TCC] acquires the bond for and what it sells it for is the profit that [TCC] makes in such a sale.
6. [TCC] also utilizes margin in its trading strategy where possible as trading with margin can substantially enhance the overall profitability. Margin is short term debt supplied by bond trading brokers or financial institutions based on the value of bonds owned by [TCC]. [TCC] may obtain margin loans of up to 4 times the principal value of bonds owned by it to purchase additional bonds to allow it to increase its profit in the purchase and sale [of] bonds.

...

Should circumstances warrant, [TCC] may use excess funds available to it to provide bridge loans to commercial real estate purchasers ... on a bridge financing basis. The location of the commercial clients is not known at present but may include clients in North America or Western Europe.

...

Bridge loans are typically more expensive than conventional financing because of a higher interest rate, potential profit sharing,* [although a footnote was indicated, there was none] and other fees and costs that are amortized over a shorter period.

...

[TCC] on its own or through its contractual arrangement with other entities may provide bridge financing to its commercial borrowers on the following basis:

- Loans-to-value ratios will not exceed 50% based on appraised value.
- Loans will carry interest rates of between 8% and 20% per loan.
- Security for the loans may include mortgages, security interests and personal guarantees.
- Loan terms typically range from 60 to 90 days.

[TCC] intends to provide bridge financing through the issuance of short-term loans to commercial borrowers. These loans are not rated by any rating agency and therefore such loans may be below investment grade and can be regarded as having predominantly speculative characteristics.

[TCC] may make loans to commercial borrowers that may be considered "middle-market" or start up companies who may have limited financial resources which may be accompanied by deterioration in the value of any collateral.

Additionally, these companies have shorter operating histories, which may render them more vulnerable to competitor's actions and market conditions.

[TCC] will extend bridge financing primarily to private-held commercial borrowers that may have little public information and as a result adequate information to evaluate these companies may not be available perhaps compromising a fully informed investment decision.

...

[TCC] will solely determine the allocation of funds received pursuant to the Loan [the loan of money – the proceeds of the bonds offered under the STC OM – to TCC from STC] in bond trading or financing.

[13] Prospective TCC and STC investors were given a favourable impression of St. Jean's and Tindall's respective experience and expertise pertinent to TCC's business. For example, the STC OM stated:

Over the past 20 years [St. Jean] has been a business development specialist in corporate training and development, investor relations, and has owned and operated a number of businesses. [St. Jean] is a co-founder and President of [TCC], a Canadian based company engaged in the purchasing of real and personal property, including goods, chattel paper, securities, documents of title, instruments, money and intangibles for resale.

[St. Jean] is responsible for all business development including product and infrastructure development, recruiting, training, and support of management and agents to coordinate sales and marketing efforts of [TCC]. He is also responsible for managing the overall affairs of the businesses, including such aspects as security issues, legal and accounting matters.

Over the past twenty years [Tindall], as a private sector entrepreneur has been active as a market trader for approximately 20 years both on his own behalf and on behalf of corporate and individual clients. In May 2001, [Tindall] co-founded and became President of [Palladium], a Canadian based company engaged in the trading [in] the financial markets, namely, equities (stock), commodities, and currency markets both in Canada and elsewhere.

[Tindall] will also be responsible for the overseeing, review and approval of all trading / investment decisions of [TCC]

[14] Although – as he acknowledged in the Admission, and as we find as fact – the guiding mind of TCC and STC was St. Jean, marketing material and the STC OM also presented Tindall as a principal of both companies actively engaged in their business, notably his responsibility for all trading and investment decisions of TCC. Both St. Jean and Tindall executed the STC OM as STC's president and vice-president respectively, as directors on behalf of STC's board of directors, and on behalf of STC's (unidentified) promoters. In so doing, St. Jean and Tindall also expressly certified that the STC OM "does not contain a misrepresentation".

[15] As was clear from other evidence – and acknowledged in the Admission – much of the STC OM disclosure quoted above was also presented, verbatim or in substance, by TCC and STC in their respective marketing material, and by TCC in its contracts with investors and on its website. The TCC website also included the following statements:

... to attract private capital it was well understood that the investment had to be not only lucrative it had to be safe. Therefore, the Principals of [TCC] engaged the services of certain law firms in order to develop a structure in which private individuals and corporations could participate in

these types of financial transactions and realize a better than average rate of return while maintaining preservation of their capital.

[16] The evidence before us indicated that prospective TCC and STC investors often dealt directly only with sales agents for TCC or STC, not with St. Jean or Tindall. In such cases, these agents also conveyed to investors the gist of the information discussed above. Although none of these agents testified, it was clear from the evidence that these agents, when communicating information about and soliciting investments in TCC and STC, were working (directly or through intervening companies, or both) for TCC, STC or both.

C. Investors' Experiences

[17] We heard the testimony of five Alberta residents concerning their personal or family investment experiences with TCC and STC. We found all these witnesses credible; any testimonial uncertainties or inconsistencies (primarily relating to the timing of certain events) we attribute simply to the lapse of time. We thus accept these witnesses' testimony as generally reliable.

1. Investor TL

[18] TL, an engineer from Edmonton, was introduced early in 2005 to TCC through his accountant, who shared office space with a Jim Lantz (**Lantz**).

[19] TL was highly educated in his field but had limited investment experience and what he termed "below average" investment knowledge. TL recalled Lantz telling him that TCC was in the business of offering short-term loans at high interest, that St. Jean was its president, and that an investment in TCC was "without . . . risk" – it was "supposed to be solid", and "there was no threat of losing principal or interest".

[20] Through Lantz, TL and his wife made four investments in TCC – by way of loans – from February 2005 to February 2009. Not counting a \$120 000 investment made jointly with their son-in-law (discussed below), TL and his wife invested a total of \$1 220 000 in TCC, for which they received TCC promissory notes signed by St. Jean. Two of these loans were for a five-year term bearing interest at 22% per annum payable at maturity, and two were one-year loans bearing interest at 18% per annum stated to be repayable "early on 90 days notice". Their payment for one of these loans was directed, as instructed by Lantz, to a Colorado bank account to the benefit of TransCap Custody.

[21] TL realized in September 2009 that things were not as they should be when he requested early repayment of the two one-year loans. He spoke with Lantz, "but after a while, [Lantz ran] out of excuses, and he provided a direct phone number for . . . St. Jean". TL, unable to reach St. Jean, was given a telephone number for Tindall, with whom TL had a single conversation – in which, TL told us, he found Tindall "[v]ery unpleasant, very rough, . . . rude".

[22] From their \$1 220 000 investment in TCC, TL and his wife have received nothing – no interest, and no return of any of their principal. In consequence, TL cannot retire as planned, and he and his wife cannot assist "our future generation" as they had hoped. As TL pithily stated: "It stinks."

2. Investor CD

[23] CD is the son-in-law of TL. CD is also an engineer from Edmonton. Also highly educated, CD described his level of investment knowledge as "average", although his investment experience seemed limited. CD, who learned of TCC from TL, met with Lantz in spring 2005.

[24] Lantz told CD that TCC was in the business of bridge financing and also dealt in bonds, and that investing money in TCC would be "very safe, as safe as putting the money in the bank". Lantz gave CD various TCC marketing material and investment-related documentation.

[25] With his parents-in-law (who provided \$20 000 and were originally identified as the only investors), CD invested, through Lantz, \$120 000 in TCC by way of a one-year loan bearing interest at 18% per annum. CD testified to having received his share of the interest he expected on this investment to its maturity.

[26] Through Lantz, CD and his parents-in-law then reinvested their \$120 000 in a new, five-year loan to TCC, bearing interest at 22% payable annually from April 2006. CD received three of the promised annual \$22 000 interest payments. In December 2008 TL and his wife, who had decided to gift their share of this investment to CD and their daughter, gave written instructions to St. Jean (via Lantz) to "transfer" this investment to CD and his wife. CD understood that this was done.

[27] In December 2008 CD and his wife invested, through Lantz, a further \$300 000 in TCC by way of two five-year loans – \$100 000 to pay interest at 1.5% (\$1500) each month, and \$200 000 to pay interest at 22% annually. For these, CD and his wife received TCC promissory notes signed by St. Jean.

[28] In summer 2009 CD and his wife invested, again through Lantz, \$12 000 of RRSP money in STC bonds, which were to pay interest at 18% interest per annum for three years. Lantz gave CD STC marketing material and a copy of the STC OM, and CD understood that STC would be lending his and his wife's money to TCC for its business purposes.

[29] CD and his wife received several monthly interest payments on their \$100 000 investment, some by direct deposit to their bank account. They received no interest payments on their \$200 000 investment, and apparently none on their STC bonds. In total, they received interest of approximately \$99 000. None of the principal of their investments – \$420 000 with TCC and \$12 000 with STC – has been repaid to them.

[30] CD was told by Lantz, around Christmas 2009, that payments coming due would not be made, purportedly owing to "difficulties with some transaction" and to St. Jean being in the United States on a family matter. CD stayed in contact with Lantz, "who was trying to keep us up to date [on] the status of our funds".

3. Investor LR

[31] LR, a heavy-equipment operator from northwest of Edmonton, is part of a family that ran a large farming operation. Their sale of that operation triggered an interest, in 2005, in tax-saving opportunities. LR was therefore intrigued by an advertisement he saw in an Alberta

newspaper for an investment and tax-planning seminar to be presented in December 2005 by "Lifetime Financial" and a Blair Carmichael (**Carmichael**). LR, his brother TR and their mother attended the advertised seminar.

[32] LR testified that this seminar dealt very little with tax savings, but instead was "about 90 percent" devoted to Carmichael pitching investments in TCC. Lantz – described by LR as Carmichael's "sidekick" – was also at the seminar. LR asked questions about taxes, both during and after Carmichael's presentation, but found Carmichael rather uninterested in the topic – "he more or less went back to [TCC] and their rate of returns and things like that", saying "if you do invest in [TCC], you're going to make so much money that you're not even going to worry about taxes, they won't be an issue".

[33] LR attended a second Carmichael seminar. LR recalled that on this occasion Carmichael emphasized the safety of an investment in TCC, the supposed equivalent of a GIC.

[34] LR, his brother and their mother then met with Carmichael at Carmichael's Edmonton office. LR recalled Carmichael encouraging the family to invest up to \$1.2 million in TCC. Carmichael subsequently met with LR in the town where LR was then living, at which meeting they again discussed investing in TCC.

[35] From his dealings with Carmichael, LR understood that TCC was involved in buying and selling commodities, and lending money to larger companies; that it was led by St. Jean, who was very busy doing business transactions "all over the world" and who had "a 10-year perfect track record, never missed a payment to any clients"; and that an investment in TCC was "as safe as money in the bank". LR testified that Carmichael said: "You shouldn't be afraid to put all your eggs in one basket. . . . This is a secure one."

[36] At a Carmichael seminar LR received TCC marketing material and investment-related documentation – some printed from the TCC website – including a document titled "TCC Master Loan Agreement" to be entered into between TCC and its investor-lenders (the **TCC Agreement**). Among the terms of the TCC Agreement were the following (absent from another document titled "TCC Master Loan Agreement" also in evidence):

3.3 . . . the loaned funds can only be utilized for "Qualified Transactions" which are defined as the acquisitions of assets only where [TCC] has first acquired "Forward Commitment Contracts" with organizations or institutions with the financial strength to provide guaranteed purchases of those assets at a predetermined price and date, which will allow [TCC] to make a profit in the transaction. . . .

. . .

5.1 The Borrower [TCC] covenants with the Lender [the investor] that it will:

. . .

5.1.2 Keep the loaned funds in "TransCap Corporation ESCROW" and be managed according to the conditions as stated in Article 3.3 herein.

[37] Among the TCC marketing material received by LR were two documents bearing the TCC name and logo, one headed "TCC PROCEDURES" and the other (in diagram form) headed "TCC LOAN PROGRAM". Each document provided a similar summary of how a TCC investment would be effected and then operate. According to the diagram document, in step 1 of a TCC loan investment, an investor who has completed loan documentation "wire-transfers the funds to TransCap Corporation ESCROW". In steps 2 and 3, TCC uses the investor's money as described – and only as described – in the extracts from the TCC Agreement quoted above. In step 4, TCC sells the "assets" it has purchased "to Institution(s) based on the 'Forward Commitment Contracts'", whereupon:

The Institution(s) that purchase these assets forward the funds, under trust conditions, directly to the TransCap Corporation ESCROW, resulting in the loaned funds being immediately replaced upon the transaction closing.

[38] Step 5 completes the circuit back to the investor-lender:

1. As "qualified transactions" are completed, [TCC] pays the Lender their interest payments
....
2. Upon maturity of the loan contract [TCC] wire transfers to the Lender, from TransCap Corporation ESCROW Account, the principal loaned amount.

[39] LR initially invested, through Carmichael, \$100 000 for a five-year term with 1.5% interest payable monthly, and with the option of getting his investment back in three months if he wished. LR paid his money, in February 2006, to a Toronto bank account to the benefit of "TRANSCAP CAPITAL CORP ESCROW", for which he received a TCC promissory note signed by St. Jean. LR then began receiving monthly interest payments.

[40] Carmichael telephoned LR periodically, saying "You're sleeping good at night ... Knowing your money's coming in on a regular basis, there's no glitches", and urging that LR make additional TCC investments. LR did invest further money in TCC – including money that he had securely invested elsewhere – in monthly-interest loans in May 2006 and January 2007 and, in October 2007, in a five-year loan to pay 22% interest annually. For these loans, LR received TCC promissory notes signed by St. Jean. LR's payment for the first of these loans was directed as was his February 2006 payment, and his payments for the other two loans were directed to a Colorado bank account to the benefit of TransCap Custody.

[41] LR invested a total of \$800 000 in TCC. He received some \$400 000 in interest payments before they ended in November 2009, and has received no repayment of his principal.

[42] LR never met, or spoke with, St. Jean or Tindall. When LR asked Carmichael about repayment of his principal, Carmichael said: "It's not your money, it's [St. Jean's] money, and [St. Jean's] working hard with the money to generate your money, a cash flow down the road."

[43] LR stated that losing the money he invested in TCC has affected his life "[v]ery seriously". Moreover, as will become apparent, his initially positive impression of TCC was a factor in his mother's decisions to invest in TCC.

4. Investor LR's Brother TR

[44] TR is LR's brother. LR, having seen the advertisement mentioned above, encouraged TR and their mother to join LR at Carmichael's investment and tax-planning seminar. TR recalled the presenters as having been Carmichael – who did most of the speaking – and Lantz. Like his brother, TR described this seminar as having been mostly about investing in TCC. At the seminar, St. Jean was described as "a business man . . . with an impeccable 10-year business track record" who purchased and sold commodities profitably for TCC, and investing in TCC was portrayed as "very safe" and "almost as secure as a GIC". When TR questioned Carmichael and Lantz after the presentation – specifically about tax savings – Lantz said, "You'll be making so much money, you won't have to worry about saving on taxes". TR indicated that he left this seminar unimpressed, but that he and his mother were persuaded by LR to attend a second seminar, which TR characterized as "identical".

[45] Nevertheless, TR, LR and their mother then met with Carmichael at Carmichael's Edmonton office. TR testified that he was most concerned about the safety of their money, and conveyed that to Carmichael at this meeting: "I asked him, . . . could we ever lose our funds. And his response was, Absolutely not, it's as safe as in the bank. And he was almost mad, adamant about it."

[46] TR received, from Carmichael, TCC website material and the TCC Agreement (each including statements quoted above). TCC website material headed "TransCap Background" described the concept of acquiring "an asset . . . while securing a forward commitment contract to sell the asset at a predetermined price and date, realizing a spread (profit)".

[47] Still, TR was uncomfortable, and he and his mother had other plans for their money. They walked away from TCC at the time.

[48] However, in late April or early May 2006, after LR had invested in TCC, he showed TR and their mother that he was receiving the interest payments he had been promised, and indicated that he now considered Carmichael and Lantz to be his friends.

[49] From June 2006 to February 2008 TR's mother made four five-year loan investments in TCC, through Carmichael, totalling \$850 000 – three promising monthly 1.5% interest payments, and the fourth promising annual 22% interest payments. For these, TR's mother received TCC promissory notes signed by St. Jean. TR's mother's payments for two of these loans were directed to a Colorado bank account to the benefit of TransCap Custody.

[50] TR testified that his mother – who, he said, "kept very good paperwork" – received a total of \$405 000 in monthly interest payments before they stopped in November 2009, and that she has received no repayment of her principal.

[51] TR never met, or spoke with, Tindall. TR testified to one unhelpful telephone conversation with St. Jean that occurred after prospects of recovering his family's money seemed bleak, and to some unpleasant communications between himself and Carmichael about the status of his family's money. TR also testified to the considerable harm done to him and his family by the loss of his family's money.

5. Investor RC

[52] RC is a paralegal from Calgary, with limited investment experience and what she described as "[p]retty limited" investment knowledge. Tindall is related to RC by marriage.

[53] In the latter part of 2008 Tindall spoke to RC about investing in STC. Tindall characterized STC as "a really good investment opportunity . . . that . . . would pay us a high rate of interest". RC understood that STC was raising money for TCC, which TCC would use for bridge financing – "interim financing for corporations" – and, with any money not so used, for investing in bonds. Tindall gave RC a copy of the STC OM, and RC thought that she got another copy when she invested. Asked whether Tindall ever spoke with her about his role with TCC or STC, RC testified: "Just that he was a business partner, and he was involved with dealing with any of the trading that was going to go on."

[54] RC invested \$130 000 in May 2009 in a four-year STC bond bearing interest at 15% per annum, payable quarterly, for which she received a document titled "Series B – 15% Redeemable Bond" and signed, for STC, by St. Jean. The money for this investment came from borrowing against the family home. RC received three interest payments (the first prorated to reflect the mid-month investment date), and has received no repayment of her principal.

[55] In September 2010 RC spoke via telephone with St. Jean, who "kept reiterating there were problems with redeeming". RC recalled last speaking with Tindall on 2 September 2010, and she has no knowledge of his current whereabouts.

[56] RC testified to the effect on her family of the loss of her investment in STC – they are slowly paying off the debt on the family home, and she must work full-time rather than part-time as planned.

6. Form Letters Subsequently Received by Investors

[57] After the Relevant Period, TCC and STC investors received (directly or through sales agents or TCC's office) form letters (the **Form Letters**) from St. Jean, for TCC or STC, and from a Grant McCartney (who identified himself as an Australian lawyer). Although postdating the activities which are the subject of Staff's allegations, the Form Letters offered indications of St. Jean's, TCC's and STC's approach to carrying on business and dealing with investors. The Form Letters alluded to a series of claimed obstacles, to various efforts supposedly under way to preserve investments and to make overdue payments, and to certain developments such as a purported assignment by TCC (on unclear authority) of investors' promissory notes to a new entity for which McCartney apparently acted. None of what was described in the Form Letters generated payments to any of the investor witnesses or, apparently, to any other TCC or STC investors.

D. Banking Records and Other Information Obtained by Staff Investigators

1. St. Jean's May 2009 Communication to a Staff Investigator

[58] On 20 May 2009 St. Jean responded to a Staff investigator with some information about TCC's activities:

- Asked for a list of "all salespersons for [TCC]", St. Jean named four – Lantz, Carmichael and a Ron Little (all Albertans), and a Calvin Fitzpatrick (**Fitzpatrick**) based in Vanuatu (identified by St. Jean as his brother-in-law, formerly from Australia).
- St. Jean identified 18 sales to "domestic investors" and 266 sales to "foreign investors" that had not been reported in filed Distribution Reports. Almost all of these foreign sales were made to one or another of five named companies, among them Select Services Corporation (**Select**, which St. Jean indicated was operated by Fitzpatrick, a TCC investor and seemingly an intermediary for other TCC investors). The foreign sales were effected in Canadian, United States or New Zealand dollars, in Euros, or (mostly) in Australian dollars. In Staff's computation, after correcting for an apparent overstatement of one domestic sale (to investor witness TL) and converting all amounts to Canadian currency, the domestic sales totalled \$9 610 000 and the foreign sales totalled \$16 155 309.67.
- Asked for a list of all financial-institution accounts through which TCC conducted business, St. Jean identified two accounts (the **TCC Accounts**) at a Calgary branch of a chartered bank (the **Bank**), one denominated in Canadian currency (the **C\$ Account**) and the other in United States currency (the **US\$ Account**).
- In response to a Staff demand for documents evidencing contracts for securities purchases, "forward committing contracts" and bridge financing contracts, St. Jean responded that TCC was "engaged in these business activities through other entities under private and confidential agreements" and "[t]herefore [did] not have any specific documentation respecting any specific trade transaction".

2. TCC Banking Records

[59] The evidence included voluminous records obtained from the Bank (the **TCC Banking Records**) relating to the TCC Accounts.

[60] A 10 May 2001 "Client Agreement" between the Bank and TCC (then using a different name) was signed by St. Jean and Tindall, who were identified as owners and directors of, and signing officers for, TCC. The C\$ Account was opened around that time. The US\$ Account was opened in July 2006.

[61] The TCC Banking Records included monthly account statements, as well as supporting documents for all transactions over \$20 000 for the five years to 23 December 2007 and for all transactions from 24 December 2007 to 23 January 2009. A Staff investigative accountant, who testified and provided a written report (the **Report**), undertook a detailed analysis for the latter period and a more general analysis for the broader period 1 March 2006 to 31 May 2009. She indicated that no significant differences in patterns of deposits and withdrawals were observed as between the periods analyzed. Her testimony and that of another Staff investigator assisted us in understanding the TCC Banking Records and Staff's analyses.

[62] The Report was not without weaknesses. Notably, certain aggregations of data were derived using inconsistent methodology, such that quantifications by percentages of total deposits to or withdrawals from the TCC Accounts were not entirely reliable. Moreover, the Report expressed some conclusions on the very allegations before us – issues which, of course, are for the panel to decide. Nevertheless, based on our own review of the TCC Banking Records in light of the Report and the Staff investigators' testimony, we find the Report generally reliable. Accordingly, having regard to that testimony, the Report and the TCC Banking Records, we find as follows concerning the periods analyzed by Staff:

- The total amount deposited to the TCC Accounts roughly equalled the total amount withdrawn from them.
- A large portion – perhaps the majority – of the money deposited to the C\$ Account came from the US\$ Account, which in turn was funded largely by money from investors. Other notable sources of deposits to the C\$ Account were STC and the TransCap Custody bank account (to which, as mentioned, some TCC investors directed their payments).

Only a minute portion of deposits to the US\$ Account – US\$12 500 – came from an identified investment made by TCC. According to Staff, St. Jean in his investigative interview indicated that TCC had invested its money in eight different companies; however, Staff's review of the TCC Banking Records identified only two such investments by TCC. One involved the transfer of US\$1 million, for several months in 2008, to Triton Mezzanine Fund LP (**Triton**), with TCC receiving back just US\$12 500 more than it had transferred. The second, an apparent joint venture with Arcanum, involved the transfer by TCC of US\$10 million (half apparently provided by Arcanum) to TransCap UK and the return of the same amount in two months, also in 2008.

- A large portion – perhaps the majority – of the money withdrawn from the US\$ Account went to the C\$ Account. Other recipients of significant amounts from the US\$ Account were St. Jean and Tindall – to the extent of US\$655 000 – and apparent investors.
- A large portion of the money withdrawn from the C\$ Account went either to identified investors or to Select, operated (as mentioned) by TCC's Vanuatu-based sales agent. Other recipients of significant amounts from this account were sales agents, apparent investors and – to the extent of \$150 000 – St. Jean and Tindall; their company Palladium also received a lesser amount.

[63] In short, information derived from the TCC Banking Records showed (most pertinently, in view of the allegations) that, while TCC paid considerable amounts to investors – as well as to sales agents and to St. Jean and Tindall – essentially none of that money was funded by TCC's own investments or business operations. Overwhelmingly, the money paid out came from investors in TCC and STC. We so find.

3. Investigative Interviews

[64] In the course of their investigation, Staff investigators interviewed St. Jean (on 29 April 2010) and Tindall (on 8 January 2010), under oath and with counsel present. The transcript of Tindall's interview, and excerpts from the transcript of St. Jean's, were in evidence.

[65] Investigative interview evidence is generally accorded less weight than testimony given at a hearing, but that does not mean it will be disregarded. Here, with the interviews of St. Jean and Tindall having been conducted under oath, in the presence of their respective counsel, potential concerns that St. Jean or Tindall might not have appreciated either the seriousness of the process or the importance of their answers are largely assuaged. Further, we note that the investigative interview evidence of St. Jean and Tindall was generally consistent with and supported by other evidence before us, including (in the case of St. Jean) the Admission. In all the circumstances, therefore, we are satisfied that considerable weight can be assigned to the investigative interview evidence.

(a) St. Jean's Investigative Interview

[66] In his investigative interview St. Jean said that he was "[e]ssentially . . . responsible for pretty much everything that happens" in TCC, including its investment decisions, that he was "solely" its controlling mind, and that only one signature (his) was required to withdraw money from the TCC Accounts.

[67] Asked whether Tindall ever received "remuneration for services rendered for [TCC]", St. Jean answered: "Well, I can't say for services rendered, but he's certainly received some remuneration, along with myself." More specifically, St. Jean stated that his (St. Jean's) salary began at \$5000 per month and "eventually" reached \$25 000 (per month, presumably) – some of it to cover "travel expenses, stuff like that I traveled and looked at different things" – and that Tindall's salary "would be the same thing as mine".

[68] St. Jean spoke of a varied work and business career since leaving high school in the 1970s, involving construction work, the jewellery business, mutual fund sales (supposedly as a "licensed" dealer), training facilitation, computer sales, sales training and management, computer training, factoring, and finally his business with TCC (and STC). He said that he had known Tindall since 1993 or 1994 and described Tindall as a business partner and "close friend".

[69] St. Jean said that TransCap Custody had a Colorado bank account but at some point it was closed.

[70] St. Jean confirmed that TCC was offering investors rates of return of 15% to 22% (annually) and that, coupled with 6% commissions paid to sales agents, TCC had to generate at least 21% from its investments. He said that the information given to most prospective investors probably came from "finders" (TCC's sales agents) and the TCC website.

[71] St. Jean expressed the view that in taking loans from investors TCC was merely borrowing money. He distinguished this from selling investments – the borrowed money "then became ours", and he did not have to account for its application because "[i]t was strictly a loan"

and "[m]y only obligation to [the lenders] was to pay a rate of return" – but he conceded he had since begun to understand that such a distinction might not be well-founded.

[72] There was an exchange between a Staff investigator and St. Jean about the recording of TCC's investments – TCC's application of the money it raised from investors:

Q Now, how do you keep track of who you've loaned money to and who owes you money?
Who does that on a day-to-day basis?

...

A I do.

Q Where do you maintain that record?

A At home

Q And that's separate from the general ledger of the company?

A Yes, but . . . I don't have records right now on past transactions.

Q Why is that?

A I don't know. I've always . . . done it that way. . . . [O]nce a transaction is done, I don't keep a record or track of it. . . .

[redacted]

Q Now, if you don't keep track of these investments, how do you ensure that your investments are earning the 15 to 22 percent that you require so you can continue to pay your investors their returns?

A I don't know.

[73] As for investments by TCC, St. Jean spoke about a joint venture with Arcanum involving a commodity transaction in Europe in which TCC invested \$5 million in October 2008 (presumably the above-mentioned joint venture with Arcanum that, according to the TCC Banking Records, produced no revenue for TCC). St. Jean said that he did not have copies of any bridge-financing contracts "other than what I have with Triton". He indicated that TCC invested \$1 million, perhaps \$2 million, with Triton (presumably the above-mentioned investment that, according to the TCC Banking Records, generated a profit of only US\$12 500). A Staff investigator asked St. Jean, "Have you had any investments that you made money on?" The meandering responses included "[n]ot a lot of investments" until, asked "[s]o nothing?", St. Jean's answer was a succinct "[c]orrect".

[74] St. Jean estimated that TCC had raised "in the neighbourhood" of \$50 million from investors, confirmed that they were TCC's only source of money, and believed at the time of his interview that TCC had "zero" cash.

(b) Tindall's Investigative Interview

[75] Tindall gave an Okotoks address. Asked about his educational and work history, he described himself as a high-school graduate with work experience predominantly in the hot-water floor-heating industry, swimming pool servicing and construction. He said that he was working at the time of his interview as a manager for a Saskatchewan land development company.

[76] Tindall said that his involvement with TCC came about as a reward for his having provided some personal financial assistance to St. Jean. Tindall stated that he was secretary/treasurer of TCC, and that he owned half of its shares and was therefore also a director. Asked about his responsibilities at TCC, he answered, "basically nothing", and described the role of TCC's only other principal – St. Jean – as "everything".

[77] Asked to describe TCC's primary business activities, Tindall responded: "To find appropriate investments, and then it raised or borrowed money to put into those investments, as long as there was a -- just a profitable spread." Concerning the type of investments TCC made to generate the returns it promised, Tindall claimed "[v]ery limited" knowledge – "I think that would be best answered by [St. Jean]." Asked whether he had any discussions with St. Jean about what would be done with money raised from investors, Tindall said "[n]ot in any great detail". Tindall denied direct involvement in the investments made by TCC, or personally initiating any of TCC's bond trading or bridge financing – that, he stated, would be done by St. Jean. However, pointed to documentation concerning TransCap UK's apparent receipt of \$10 million from TCC, Tindall described TransCap UK as a company formed by St. Jean and himself "in order to do a European transaction" that, Tindall believed, "never went forward". Tindall said that he did not know what happened to the transferred \$10 million.

[78] Concerning dealings with TCC investors, Tindall said he that knew of "[a] few" sales agents but did not know the "structure" under which they might be remunerated for bringing in investors. Tindall said he believed that money was invested in TCC by way of "a loan agreement with promissory notes". He also said that he did not know TCC's "procedures of investment", how the maturity date of a loan to TCC was determined, or over what period TCC investors were typically repaid. Tindall disavowed knowledge of how TCC investors were solicited, "[o]ther than by word of mouth". However, he acknowledged that there had been a TCC website – in respect of which he said he had no input – and confirmed his understanding that Lantz, Carmichael and Little were all involved in the sale and marketing of investments in TCC. Tindall denied knowledge of Select, or of TCC conducting business with Select in Vanuatu. He acknowledged having attended meetings – "a couple" or "[m]aybe two or three" – "[d]iscussing the sales of [TCC]", that is, discussion "[o]f finding lenders to the corporation", but primarily "[j]ust to observe". Tindall stated that he himself had "never talked to an investor".

[79] Tindall denied knowledge of whether TCC had any sources of revenue other than bond trading and bridge financing.

[80] Tindall said that TCC's business records – including those related to banking – were St. Jean's responsibility. Tindall acknowledged that annual financial statements were prepared for TCC, and that this involved St. Jean and external accountants. However, Tindall claimed not

to know whether these financial statements were ever audited, nor to recall whether he himself was required to "sign off" on the statements, or had ever done so. He also said that he "look[ed] at the statements that the accountant has provided", "like[d] to think" that he understood what he was looking at, and reviewed the statements because, for "the annual return filing, I would have to sign off that I've reviewed them". He did not think that he had any questions about any of the financial statements, and he said he had no concerns when he reviewed them. While claiming no financial background or training in preparing financial statements, Tindall stated that he believed he did get a sense, from reviewing the financial statements, of how the business was doing and whether there was income. He thought that in some years there was some profit, and in others losses.

[81] While Tindall acknowledged that he was a signing officer for the TCC Accounts, he denied ever having signed a cheque. Pointed to certain transfers of money from STC to TCC, he denied knowledge of them. He claimed not to know whether all investor money was deposited to the TCC Accounts, whether investor money was ever pooled and then paid to TCC, or how often payments were made to investors.

[82] Asked about STC's principal business activity, Tindall stated: "I believe it was or is to raise funds . . . using the offering memorandum." He acknowledged that he and St. Jean were the directors and officers of STC. He also acknowledged that the business of STC was related to the business of TCC, but said that he did not know if there was a direct relationship.

[83] There was, as well, an exchange between a Staff investigator and Tindall concerning payment from TCC to him:

Q And do you receive any payment for your role with the company [TCC]?

A No.

...

Q So you receive no funds from the company, to your knowledge?

A. No.

E. The Admission

[84] The Admission, relating to all Respondents but Tindall, was generally consistent with and supported by other evidence before us. It included the following admissions:

- "At all material times, [St. Jean] was the guiding mind of, and authorised, permitted or acquiesced in the conduct of [TCC] and [STC]."
- In the Relevant Period, TCC and STC "raised approximately \$51.6 million, of which at least \$25.03 million came from at least 133 Alberta investors".
- TCC raised this money by selling "loans secured by promissory notes", STC by selling bonds in "purported" reliance on the STC OM and the associated

prospectus exemption under Alberta securities laws. These loans, promissory notes and bonds were all "securities" within the meaning of the Act.

- Numerous identified statements in the STC OM, the substance of which was also conveyed by TCC and STC in their respective "promotional literature" and by TCC in its contracts with investors and on its website, "were misleading or untrue, or failed to state all of the facts necessary to be stated to make the statements not misleading". Among these were descriptions of TCC's bond-trading business and practice, its bridge-financing business and practice, St. Jean's and Tindall's respective business experience and expertise, and Tindall's responsibility for "all trading / investment decisions" of TCC.
- Also cast as misleading or untrue was the TCC website statement about law firm involvement in developing a business or investment structure for TCC investors.
- The Admission acknowledged a markedly different reality:
 - (a) [TCC]'s business was not primarily related to bond trading or bridge financing. Rather, most of the investors' funds were used to administer a process wherein money received from investors was directly used to pay returns to investors[;]
 - (b) [St. Jean] had worked at many different jobs with lower levels of seniority in construction and retail (selling variously computers, mutual funds and computer training), and owned and operated a jewellery store and sales training franchise. A bankruptcy occurred in connection with the sales training franchise;
 - (c) Tindall did not oversee, review or approve the bond trading. St. Jean made the investment decisions for [TCC]. St. Jean had minimal training in bond trading or bridge financing;
 - (d) Tindall had a high school education, no training in securities or investments and no professional designations; and
 - (e) there was no structure developed by a law firm to preserve investor[s'] capital.
- TCC, STC and St. Jean "knew or ought to have known, that the [mentioned] misrepresentations and omissions . . . would reasonably be expected to have a significant effect on the market price or value of the [TCC] and [STC] securities".
- Although St. Jean and Tindall certified that the STC OM did not contain a misrepresentation, it "contained numerous false and misleading statements" as mentioned.
- STC "never filed the [STC OM] or any [Distribution Reports]".
- "Instead of investing all of the funds raised from investors in bond trading and bridge financing, [TCC] and [STC] used most of the funds to administer a process wherein money received from investors was directly used to pay returns to

investors. The payment of investor funds to other investors was not a purpose disclosed to investors in the various loan agreements."

- "At all material times, [TCC], [STC] and St. Jean engaged in these activities without informing or seeking the approval of the investors."
- "As of about April 29, 2010, [TCC] and [STC] were indebted to investors in the approximate amount of \$51.6 million, and had no funds left to pay investors any principal or returns."

III. THE ALLEGATIONS AND THE LAW

A. The Allegations

[85] Staff alleged that:

- STC, St. Jean and Tindall:
 - made misleading or untrue statements in the STC OM in breach of section 92(4.1) of the Act;
 - falsely certified that the STC OM did not contain a misrepresentation in breach of section 221.1 of the Act; and
 - failed to file with the Commission the STC OM and Distribution Reports in breach of sections 2.9(17) and 6.1 of NI 45-106;
- TCC, St. Jean and Tindall made misleading or untrue statements in contracts with investors, on the TCC website and in TCC "promotional literature" in breach of section 92(4.1) of the Act;
- Tindall made false statements under oath to Staff investigators which were made to conceal or withhold information reasonably required for the investigation in breach of section 93.4(1) of the Act;
- all Respondents engaged in a course of conduct relating to TCC and STC securities that they knew or ought to have known perpetrated a fraud on Alberta investors in breach of section 93(b) of the Act;
- St. Jean and Tindall authorized, permitted or acquiesced in the alleged misconduct of TCC and STC; and
- the Respondents' conduct in breach of Alberta securities laws was also contrary to the public interest.

B. The Law

1. Misleading or Untrue Statements

[86] Section 92(4.1) of the Act (as it applied from 8 June 2005) states:

(4.1) No person or company shall make a statement that the person or company knows or reasonably ought to know

(a) in any material respect and at the time and in the light of the circumstances in which it is made,

(i) is misleading or untrue, or

(ii) does not state a fact that is required to be stated or that is necessary to make the statement not misleading,

and

(b) would reasonably be expected to have a significant effect on the market price or value of a security

2. False Certification

[87] Section 221.1 of the Act (as it applied from 4 November 2008) states:

221.1(1) In this section, "Commission" includes the Executive Director and any member, officer, employee, appointee or agent of the Commission.

(2) No person or company shall make a statement, whether oral or written, in any document, material, information or evidence provided to the Commission, 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.

[88] In respect of the STM OM certificate, the term "misrepresentation" used therein has the meaning ascribed by section 1(ii) of the Act:

(i) an untrue statement of a material fact, or

(ii) an omission to state a material fact that is required to be stated, or

(iii) an omission to state a material fact that is necessary to be stated in order for a statement not to be misleading; . . .

[89] A "material fact" is one that "would reasonably be expected to have a significant effect on the market price or value of [particular] securities" (section 1(gg) of the Act). A close parallel to section 92(4.1) is evident – what sections 92(4.1) and 221.1 prohibit is essentially a "misrepresentation" as defined in section 1.

3. NI 41-106 Filing Requirements

[90] A distribution of securities triggers the requirement for a prospectus (section 110 of the Act), absent an exemption. One such exemption is the offering memorandum exemption (the **OM Exemption**) under section 2.9 of NI 45-106, for distributions effected by way of qualifying offering memorandum. The onus of demonstrating the availability of any exemption, including the OM Exemption, and adherence to all its conditions and requirements rests with those claiming its benefit – those making the distribution (*Re Bartel*, 2008 ABASC 141 at para. 109).

Among the requirements relevant to the OM Exemption are the obligations to file with the Commission, within 10 days after any distribution made in reliance on the exemption, the offering memorandum (section 2.9(17) of NI 45-106, as renumbered toward the end of the Relevant Period; it had been numbered section 2.9(16)) and a Distribution Report (section 6.1 of NI 45-106).

4. Concealing or Withholding Information

[91] Section 93.4(1) of the Act (as it applied from 8 June 2005) prohibits anyone from "destroy[ing], conceal[ing] or withhold[ing] any information, property or thing reasonably required for a hearing, review or investigation" under the Act.

[92] To find a contravention of section 93.4(1) of the Act, we must determine first whether Tindall concealed or withheld information and, second, whether that information was reasonably required for an investigation under the Act. Concerning the latter element, we need not find that Tindall knew that such information was reasonably required for Staff's investigation (*Re Fletcher*, 2012 ABASC 222 at para. 113).

5. Fraud

[93] Section 93 of the Act (as it applied from 8 June 2005) prohibits anyone from:

directly or indirectly, engag[ing] or participat[ing] in any act, practice or course of conduct relating to a security . . . that the person or company knows or reasonably ought to know will

...

(b) perpetrate a fraud on any person or company.

[94] Before 8 June 2005 section 93 of the Act prohibited anyone from:

directly or indirectly, trad[ing] in or purchas[ing] a security . . . if the person or company knows or ought reasonably to know that the trade or purchase does one or more of the following:

...

(c) perpetrates or may perpetrate a fraud.

[95] For purposes of this proceeding, we perceive no significant difference between section 93(b) of the Act and its predecessor (*Re Arbour Energy Inc.*, 2012 ABASC 131 at para. 974).

[96] Staff submitted (and TCC, STC and St. Jean did not dispute) that the applicable law and principles are as set out in *Re Capital Alternatives Inc.*, 2007 ABASC 79 at para. 309 (affirmed *sub nom. Alberta Securities Commission v. Brost*, 2008 ABCA 326), and as followed in several subsequent Commission decisions:

The term "fraud" is not defined in the Act. The gist of the meaning is not, however, difficult to discern. Johnston and Rockwell [in *Canadian Securities Regulation*, 4th ed. (Markham: LexisNexis, 2006) at 421] point to the elements of fraud as enunciated at common law by the Supreme Court of Canada in *R. v. Thérault*, [1993] 2 S.C.R. 5 at 27 [**Thérault**], which has been

adopted in the context of securities regulation (for example, in *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7 [leave to appeal refused [2004] S.C.C.A. No. 81] at para. 27):

... the actus reus of the offence of fraud will be established by proof of:

1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.

Correspondingly, the *mens rea* of fraud is established by proof of:

1. subjective knowledge of the prohibited act; and
2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).

[97] The mental element required for fraud may be inferred from the totality of the evidence, provided the inference drawn is reasonable (*Brost* at para. 48).

[98] Concerning this mental element within the meaning of a statutory provision similar to section 93(b) of the Act and its predecessor, the British Columbia Court of Appeal in *Anderson* stated (at para. 26):

... I find that it is clear that s. 57(b) does not dispense with proof of fraud, including proof of a guilty mind. *Derry v. Peek* (1889), 14 A.C. 337 (H.L.) confirmed that a dishonest intent is required for fraud. Section 57(b) simply widens the prohibition against participation in transactions to include participants who know or ought to know that a fraud is being perpetrated by others, as well as those who participate in perpetrating the fraud. It does not eliminate proof of fraud, including proof of subjective knowledge of the facts constituting the dishonest act, by someone involved in the transactions. ... [Emphasis in original.]

[99] Referring to this statement, the Ontario Securities Commission (the **OSC**) in *Re Pogachar* (2012), 35 OSCB 3389 said (at para. 89):

This Commission has adopted the interpretation of fraud as enunciated by the British Columbia Court of Appeal in *Anderson* [citation omitted], wherein the Court dealt with a similar provincial securities fraud provision. In *Anderson* at paragraph 26, Justice Mackenzie notes, and this Commission has agreed, that such a fraud provision includes a prohibition against participation in transactions where participants know or ought to know that fraud is being perpetrated by others as well as against those who participate in perpetrating the fraud itself. ...

[100] The OSC similarly said in *Re McErlean* (2012), 35 OSCB 7474 (at para. 180):

In previous decisions, this Commission has adopted the interpretation of the fraud provision in provincial securities legislation as set out by the British Columbia Court of Appeal in the *Anderson* decision. In *Anderson*, the British Columbia Court of Appeal held that the fraud provision in the British Columbia *Securities Act*, which is similar to the Ontario provision, requires proof of the same elements of fraud as in a prosecution under the *Criminal Code*. The fraud provision in the [Ontario *Securities*] Act merely broadens the ambit of liability to those who

knew or reasonably ought to have known that a person or company engaged in conduct that perpetrated a fraud. The words "knows or reasonably ought to know" do not diminish the requirement of Staff to prove subjective knowledge of the facts concerning the dishonest act by someone accused of fraud. . . .

IV. ANALYSIS AND FINDINGS

[101] The facts acknowledged in the Admission were generally consistent with and supported by other evidence before us. We therefore accept them as true, in respect of the providers of the Admission – TCC, STC and St. Jean – and, to the extent relevant, in respect of Tindall.

[102] Consistent with the preponderance of the evidence and with (apart from one qualification, discussed below) the law, TCC, STC and St. Jean further admitted, in consequence of the facts they acknowledged in the Admission, the following contraventions of Alberta securities laws, also constituting conduct contrary to the public interest:

- breaching section 92(4.1) of the Act in respect of misleading or untrue statements "in contracts with investors and promotional literature" (in the case of TCC and St. Jean), and "in the [STC OM] and promotional literature" (in the case of STC and St. Jean);
- in the case of STC and St. Jean, breaching:
 - sections 2.9(17) and 6.1 of NI 45-106 by not filing the STC OM and Distribution Reports; and
 - section 221.1 of the Act by falsely certifying the STC OM; and
- breaching section 93(b) of the Act by "engag[ing] in a course of conduct relating to the [TCC] and [STC] securities that they knew or ought to have known perpetrated a fraud on investors".

A. Threshold Issues: "Securities", "Trades" and "Distributions"

[103] The Admission was clearly correct in declaring TCC's loan arrangement with its investors, the associated TCC promissory notes, and the STC bonds to be securities. They are clearly such, according to the definition of "security" in section 1(ggg) of the Act.

[104] The Admission also correctly acknowledged that, in offering and selling TCC and STC securities, TCC, STC and St. Jean – and also, we find, Tindall – were engaged in "trades" and "distributions" as defined in sections 1(jjj) and (p) of the Act, respectively (a "trade" including any sale of a security for valuable consideration, and any act in furtherance thereof; a "distribution" including a trade of a security not previously issued).

B. Section 92(4.1) of the Act

1. Predecessor Provision

[105] As noted, section 92(4.1) of the Act applied only from 8 June 2005. Its predecessor, section 92(3)(c), was in force for the early portion of the Relevant Period. These provisions, in our view, differ little in substance apart from the earlier one's scope having been limited to

statements made with intent to effect a trade. However, given that the allegations of misleading or untrue statements were framed by reference only to section 92(4.1), we do not address or make findings as to the applicability of its predecessor. Our findings on the issue of misleading or untrue statements, therefore, relate to that portion of the Relevant Period beginning 8 June 2005.

2. Misleading or Untrue Statements and Materiality

[106] The impugned statements in the STC OM, the substance of which was also conveyed by TCC and STC in their respective marketing material and by TCC in its contracts with investors and on its website, included descriptions of TCC's bond-trading business and practice, its bridge-financing business and practice, St. Jean's and Tindall's respective business experience and expertise, and Tindall's responsibility for "all trading / investment decisions" of TCC. As aptly summarized in the Admission and clearly demonstrated by other evidence before us, these statements were gross distortions of the reality. When they were not blatant untruths, they were very misleading (expressly, by omission, or both).

[107] These were statements that went to the heart of what investors were seeking (as we heard from witnesses) and were promised: safe investments, with lucrative returns that would be generated by a business operated by sophisticated, knowledgeable and experienced principals. However, St. Jean and Tindall had very little useful experience – and they clearly had no expertise – relating to the business of bond trading or bridge financing touted by TCC and STC, and they did not enlist the assistance of law firms. Although Tindall was identified as the one responsible for TCC's investing, it was actually left to St. Jean, who did very few, if any, of the promised transactions (it was not clear that the identified transactions done were in the nature of bond trading or bridge financing), claimed not to have kept records of what was done, and told Staff that no money was generated from anything done.

[108] The use to which money raised from investors will be put is, logically, of great importance to those deciding whether to invest in a security at the price offered. Here, unbeknownst to TCC and STC investors, the only real source of money to pay investors' returns (and to repay their principal) was the money they and their fellow investors subscribed for their securities – by definition, an unsustainable "Ponzi" scheme. Although the investments delivered were not those promised, interest was in fact paid to investors, for a time. While these payments minimized certain investors' losses, there was a pernicious aspect to the payments: they gave a comforting impression that the investments made were sound and otherwise as represented. As we heard from witnesses, this in turn prompted some investors to reinvest or to add – sometimes significantly – to their investments, and also enticed other more sceptical investors (such as TR's mother) to invest when they might otherwise not. When investor subscriptions slowed to an extent that they could no longer sustain outlays – for sales commissions, salaries for St. Jean and Tindall, and, above all, interest payments and principal repayments due – the scheme began to collapse. With any failures to pay interest (or repay principal) impairing the impression of soundness, and with no profits being generated from any operating business, the scheme was bound to fail – and did.

[109] The experience and expertise of the principals of an issuer – particularly, as was touted here, claimed experience and expertise with a strong correlation to the business to be conducted

by the issuer – are also important to those deciding whether to invest in the issuer's securities at the price offered. We do not doubt that the purported experience and expertise of St. Jean and Tindall (who was to be responsible for TCC's investing) – and their purported engagement of law firm services – lent significant credence to the claims of investments in TCC and STC being safe and lucrative, thereby rendering such investments attractive at the prices offered.

[110] These misleading or untrue statements were material. As just discussed, they concerned matters that in our view would, self-evidently, affect significantly the market price or value that a reasonable investor would ascribe to TCC and STC securities – indeed, the decision to invest any money at all.

[111] We therefore find that these misleading or untrue statements in TCC's contracts with investors, on its website and in its marketing material would reasonably be expected to have a significant effect on the market price or value of STC (and TCC) securities. We similarly find that these misleading or untrue statements in the STC OM (and in its marketing material) would reasonably be expected to have a significant effect on the market price or value of STC securities. These statements were, essentially, misrepresentations within the meaning of section 1 of the Act, and we will at times below refer to them as such.

3. Making of Statements, Knowledge and Conclusions on Section 92(4.1)

[112] TCC's contracts with investors, its website and its marketing material were TCC's, as were the misrepresentations therein or thereon. The STC OM (and the STC marketing material) and the misrepresentations therein were STC's. We find (as each company admitted) that each knew or reasonably ought to have known them to be misrepresentations.

[113] It follows, and we find (consistent with the Admission), that TCC and STC each breached section 92(4.1) of the Act.

[114] St. Jean was the guiding mind of TCC and STC. He signed the STC OM. Even without the Admission, other evidence demonstrated that the misrepresentations were also his, and that he knew or reasonably ought to have known them to be misrepresentations. In the event, he conceded this in the Admission.

[115] We accordingly find (consistent with the Admission) that St. Jean also breached section 92(4.1) of the Act. We further find (as admitted) that he, as a director and officer (president) of TCC and of STC, authorized, permitted or acquiesced in TCC's and STC's breaches of section 92(4.1).

[116] As for Tindall, the evidence (including St. Jean's admission that he was the guiding mind of TCC, and Tindall's and St. Jean's respective investigative interview evidence that St. Jean was essentially in charge of everything in relation to TCC) made clear that Tindall played very much a secondary role to St. Jean in relation to TCC. In the circumstances, we cannot find that the misrepresentations in TCC's contracts with investors, on its website and in its marketing material were Tindall's. Nonetheless, like St. Jean, Tindall held – and presented himself as holding – director and officer (secretary/treasurer) positions with TCC, positions with significant and important responsibilities. Having allowed St. Jean to take on the bulk of these responsibilities,

Tindall authorized, permitted or acquiesced in TCC's breaches of section 92(4.1) of the Act. We so find.

[117] The evidence similarly made clear that Tindall played very much a secondary role to St. Jean in relation to STC. However, like St. Jean, Tindall held – and presented himself as holding – director and officer (vice-president) positions with STC, and Tindall signed and certified as free of misrepresentation the STC OM. Thus, we find, the misrepresentations in the STC OM (and those to similar effect in STC's marketing material) were also Tindall's.

[118] As a director and officer of STC who certified the STC OM as free of misrepresentation, Tindall should have carefully read it. It would have been immediately obvious to him, on reading the STC OM, that some of what it disclosed – concerning his business experience and expertise, and his responsibility for "all trading / investment decisions" of TCC – was misleading or untrue and materially so. It also should have been obvious to him that the business experience and expertise therein attributed to St. Jean, a business partner and close friend of several years, was misleading or untrue and materially so. Further, Tindall knew that the STC OM was being used to raise money from investors. Indeed, we know that (contrary to what he said in his investigative interview) he dealt directly with at least one prospective investor – his relative-by-marriage RC – and gave her a copy of the STC OM. We also know that Tindall reviewed financial statements prepared for TCC; although these were not before us, we consider that even a cursory review of such material ought to have informed Tindall that, while interest was being paid to TCC investors, the company had negligible or non-existent earnings from bond trading and bridge financing.

[119] In any event, had Tindall properly performed his duties as a director and officer of STC, he would have known the misrepresentations in the STC OM (and those to similar effect in STC's marketing material) to be such. Thus, he reasonably ought to have known these misrepresentations were such. This Commission has had occasion to comment on the responsibility borne even by a distinctly passive and uninvolved director and officer; the following was stated in *Re Aurora*, 2011 ABASC 501 (at paras. 202-04):

... In his testimony, Aurora could identify no significant responsibility, or work, that he undertook beyond co-signing documents (including offering memoranda) placed in front of him for signature, and securing (from family members or contacts) bridge financing for some Concrete Group Projects. Indeed, Aurora was not a full-time presence in the CEI offices, even after Humeniuk's departure from CEI. Be that as it may, deference to a stronger personality, and an absence of work, do not of themselves relieve a person of the responsibilities associated with being a director or officer.

The evidence satisfies us that neither Aurora nor Jones did much work at CEI that might be expected of individuals bearing their impressive executive titles. We do not, however, accept that ignoring or shirking the duties of a directorship or office voluntarily assumed – and announced to the world – suffices to discharge one of the associated responsibilities.

Aurora and Jones share with Humeniuk responsibility for CEI's role in the illegal trades and distributions, by virtue of their positions as directors and officers of CEI.

[120] In all the circumstances, we are satisfied that Tindall either knew, or reasonably ought to have known, that the misrepresentations in the STC OM (and those to similar effect in STC's marketing material) were such.

[121] For these reasons, we find that Tindall also breached section 92(4.1) of the Act. We further find that he, as a director and officer of STC, authorized, permitted or acquiesced in STC's breaches of section 92(4.1).

[122] The fundamental purposes of the Act are to protect investors and foster a fair and efficient capital market that warrants investor confidence. Essential to these objectives is the opportunity for prospective investors to make reasonably informed investment decisions. That is thwarted when, instead, investors are given information that materially misleads or deceives. Foreseeable consequences of the resulting ill-informed or misinformed investment decisions include direct financial harm to identifiable investors and broader impairment of the integrity of, and confidence in, our capital market.

[123] We therefore find that, in breaching section 92(4.1) of the Act, the Respondents also engaged in conduct contrary to the public interest.

C. Filing Failures

[124] There was no dispute that STC, purporting to rely on the OM Exemption to distribute securities, was required to file the STC OM and associated Distribution Reports. Nor was there any dispute that the filings were not made. STC and St. Jean conceded these filing failures, and the associated breaches of NI 45-106, in the Admission.

[125] Sections 2.9(16) or (17) and 6.1 of NI 45-106 explicitly impose the filing requirements on the issuer. The required filings not having been made, we find that STC breached these sections.

[126] St. Jean was a director and officer, as well as the guiding mind, of STC. Thus, STC's filing failures were also his. Thus, we find, St. Jean also breached sections 2.9(16) or (17) and 6.1 of NI 45-106. We further find (as admitted) that he, as a director and officer of STC, authorized, permitted or acquiesced in STC's breaches of these sections.

[127] As for Tindall, the evidence was that it was St. Jean, not Tindall, who guided (or controlled) STC. We accept, on the evidence, that between them there was no expectation that Tindall would see to the company's compliance with filing obligations. In the circumstances, we do not find Tindall to have breached the filing requirements. However, Tindall did hold – and presented himself as holding – director and officer positions with STC. We therefore find that, as such, Tindall authorized, permitted or acquiesced in STC's breaches of sections 2.9(16) or (17) and 6.1 of NI 45-106.

[128] The filing of offering memoranda and Distribution Reports serves multiple purposes. Investors may obtain useful information about the issuers in which they have invested. Staff, and other market observers, can gain information potentially useful to general assessments of the state of our capital market. The filings can also assist Staff in monitoring and assessing

compliance with Alberta securities laws. The filing requirements are, in short, important. Their breach here by STC and St. Jean was also conduct contrary to the public interest, and we so find.

D. Section 221.1 of the Act

[129] As noted, section 221.1 of the Act, in essence, prohibits the making of a misrepresentation "in any document . . . provided to the Commission".

[130] Staff alleged that STC, St. Jean and Tindall breached section 221.1 of the Act "when they falsely certified" the STC OM as free of misrepresentation. In the Admission, STC and St. Jean conceded this breach.

[131] As discussed, the STC OM contained multiple misrepresentations, so the certificate was clearly false (untrue). It was signed by St. Jean and Tindall, each in their capacities as officers of STC, again as directors on behalf of STC's board of directors, and a third time on behalf of its promoters. St. Jean and Tindall thereby "falsely certified" the document. For present purposes – given that the document containing the certificate was STC's and that St. Jean and Tindall signed the certificate in their capacities as its directors and officers – we are satisfied that STC itself falsely certified the document.

[132] What is less clear is whether this false certification was in a document "provided" to the Commission within the meaning of section 221.1 of the Act. Clearly it was supposed to have been filed. But the evidence was that it was not. It did eventually reach the Commission, in the course of Staff's investigation. Someone provided it to Staff, who in turn provided it to this panel.

[133] Section 221.1 of the Act is broadly worded. Clearly it would apply to a document containing a misrepresentation and given, by or on behalf of the author, the preparer or a signatory, to the Commission, whether by way of mandatory filing or other type of delivery. It is less obvious that the section was intended to apply to a situation such as here, where the document in question – which it was alleged, and admitted, was never filed – seems to have reached Staff from a third party, investor witness CD, in the course of the investigation. We do not determine that the section is incapable of such an interpretation. However, we are disinclined to decide the scope of the section in the absence of argument on the point. Moreover, given our other findings, we do not believe that this present disinclination will be misunderstood as an invitation to false certification of offering memoranda.

[134] For these reasons, therefore – even in the face of an admission by three of the Respondents – we make no finding on this allegation, or on the associated allegation of conduct contrary to the public interest, against any of the Respondents.

E. Concealing or Withholding Information

[135] As noted, in his investigative interview, Tindall told a Staff investigator that he received no payment for his role with TCC. In fact, he was asked twice about receiving money, and twice responded "No". The questions were clear and simple, and would have been easily understood.

[136] The facts were equally clear. Tindall received a considerable amount of money from TCC. The TCC Banking Records in evidence demonstrated this, consistent with St. Jean's investigative interview evidence concerning his and Tindall's monthly salaries from TCC.

[137] Tindall thus made false statements under oath – lied – to a Staff investigator.

[138] We find that this lie constituted concealment or withholding of information.

[139] The two questions posed to Tindall were asked in the course of an investigation into securities distributions. Such an investigation can foreseeably involve inquiry into how money raised from investors was used – to assess the accuracy of offering disclosure, the propriety of the money's use, or the likelihood of the money's recovery. Information about remuneration might also be indicative of an individual's roles and responsibilities in distributions. All of this leads us to conclude that the information about which Tindall lied was reasonably required for an investigation under the Act.

[140] It follows, and we find, that Tindall breached section 93.4(1) of the Act.

[141] Given the importance of effective enforcement to the fair and efficient operation of our capital market, and investor confidence therein, it is self-evident that an effort to frustrate that process by impeding an investigation is inconsistent with the public interest. We therefore find that, by breaching section 93.4(1) of the Act, Tindall also engaged in conduct contrary to the public interest.

F. Fraud

1. *Actus Reus*

[142] Concerning the fraud allegations, we first determine whether the *actus reus* of fraud, as set out in *Théroux* and summarized above, has been proved.

[143] The "prohibited act" asserted by Staff was, essentially, the misrepresentations to Alberta investors that their money would be applied in bond trading and bridge financing that would fund interest payments and principal repayments on TCC and STC securities, whereas in fact payments to investors in this Ponzi scheme were funded from their own and their fellow investors' subscription money – something sustainable only for so long as investment subscriptions covered the payments out. In our findings above on section 92(4.1) of the Act, we ascribed these (among other) misrepresentations to each of the Respondents. For present purposes, we find that the same misrepresentations were deceptions or falsehoods (or both) that constituted a prohibited act on the part of each of the Respondents.

[144] Investors (Albertans among them) having been lured by deceptive or false information into investing in a Ponzi scheme, their pecuniary interests were placed at serious risk. Indeed, there appears to be no money remaining to pay them any interest owing or repay their principal investments. Investors in TCC and STC thus face deprivation caused by the Respondents' prohibited act, and we so find.

[145] It follows, and we find, that the *actus reus* of fraud has been established in respect of each of the Respondents.

2. *Mens Rea* and Conclusions on Section 93(b)

[146] We turn next to a consideration of the *mens rea* – subjective knowledge – aspect of fraud, as set out in *Théroux*.

[147] We deal first with TCC, STC and St. Jean. They each conceded in the Admission that they engaged in a course of conduct relating to TCC and STC securities that they knew or ought to have known perpetrated a fraud on investors. They also conceded in the Admission that TCC and STC used most of the money they raised from investors "to pay returns to investors", and that they did this "without informing or seeking the approval of the investors". The evidence as a whole satisfies us that each of St. Jean and (through him) TCC and STC actually knew they were making materially deceptive or false statements to Alberta investors concerning the use to which investor money would be put and how payments to investors would be funded. It follows – and we find – that TCC, STC and St. Jean had subjective knowledge of their prohibited act.

[148] Further, TCC and STC, under St. Jean's guidance and control, for a time made the promised interest payments to investors, while earning little or nothing from bond trading or bridge financing (or from any other revenue-generating operating business) – the unsustainable Ponzi scheme. We find that St. Jean and (through him) TCC and STC knew this. We therefore find that TCC, STC and St. Jean knew their prohibited act could put the pecuniary interests of Alberta investors at risk – in other words, they had subjective knowledge that their prohibited act could result in deprivation to others.

[149] It follows that the *mens rea* of fraud has been established in respect of TCC, STC and St. Jean. Accordingly, we find that each of TCC, STC and St. Jean breached section 93(b) of the Act (and its predecessor).

[150] As for Tindall, we found above that he knew or reasonably ought to have known that his misrepresentations to investors (including Albertans) in the STC OM (and those to similar effect in STC's marketing material) – including misrepresentations concerning the use to which investor money would be put and the funding of payments to investors – were such. To the extent that he did not have actual knowledge of his prohibited act and that it could put the pecuniary interests of Alberta investors at risk, that was a consequence of his thoroughly neglectful performance of his duties as a director and officer of STC (and TCC), and as a certifier of the STC OM. While there is nothing redeeming in this dereliction of duty, the evidence before us concerning Tindall's state of knowledge was scant and insufficient to permit a finding of subjective knowledge on Tindall's part.

[151] That said, it is important to recognize that, like its predecessor, section 93(b) of the Act expressly prohibits conduct that a person knows or *reasonably ought to know* will perpetrate a fraud. Words in legislation must be given meaning.

[152] Having found that TCC, STC and St. Jean engaged in a course of conduct relating to TCC and STC securities that they subjectively knew perpetrated a fraud on Alberta investors,

thereby breaching section 93(b) of the Act (and its predecessor), the existence of a fraudulent course of conduct by others (Tindall's fellow Respondents) has been established. The evidence clearly established – and we find – that Tindall did participate, to some extent at least, in this course of conduct. For example: he sold at least one investment in STC; he certified the STC OM as free of misrepresentation, and he knew that the STC OM was used (he so used it himself, with RC) to solicit investments in STC; and he directly held himself out (to RC) as being "involved with dealing with any of the trading" that TCC was to undertake. Indeed, this participation by Tindall facilitated the impugned course of conduct. For the reasons discussed above, we find that Tindall, as a director and officer of TCC and STC, had both opportunity and a responsibility to discern what the business of TCC and STC actually was, the use to which money raised from investors was being put by the companies and how payments to investors would be funded. To the extent that he did not actually know these things – that TCC and STC were operating what we have found to be a Ponzi scheme – we find that he reasonably ought to have known them. We therefore further find that he, a participant in the impugned course of conduct, reasonably ought to have known that a fraud was being perpetrated by others.

[153] For these reasons, and having regard to *Anderson* (and *Pogachar* and *McErlean*), we find that Tindall, too, breached section 93(b) of the Act (and its predecessor).

[154] We further find that St. Jean (as admitted) and Tindall, as directors and officers of TCC and STC, authorized, permitted or acquiesced in TCC's and STC's breaches of section 93(b) of the Act (and its predecessor).

[155] We also think it self-evident that conduct that perpetrates a fraud on Alberta investors is wholly inconsistent with the welfare of investors and the integrity of our capital market. We therefore find that each of the Respondents, by breaching section 93(b) of the Act (and its predecessor), also engaged in conduct contrary to the public interest.

V. CONCLUSION AND NEXT STEPS

[156] We have found, in summary, as follows:

TCC

TCC made material misleading or untrue statements to investors and perpetrated a fraud on Alberta investors, contrary to sections 92(4.1) and 93(b) (and its predecessor section 93(c)) of the Act, respectively, and contrary to the public interest.

STC

STC made material misleading or untrue statements to investors, breached filing requirements and perpetrated a fraud on Alberta investors, contrary to sections 92(4.1) of the Act, 2.9(16) or (17) and 6.1 of NI 45-106 and 93(b) (and 93(c)) of the Act, respectively, and contrary to the public interest.

St. Jean

St. Jean made material misleading or untrue statements to investors, breached filing requirements and perpetrated a fraud on Alberta investors, contrary to sections 92(4.1) of the Act, 2.9(16) or (17) and 6.1 of NI 45-106 and 93(b) (and 93(c)) of the Act,

respectively, and contrary to the public interest; and he authorized, permitted or acquiesced in TCC's and STC's breaches of Alberta securities laws.

Tindall

Tindall made material misleading or untrue statements to investors, concealed or withheld information reasonably required for an investigation and perpetrated a fraud on Alberta investors, contrary to sections 92(4.1), 93.4(1) and 93(b) (and 93(c)) of the Act, respectively, and contrary to the public interest; and he authorized, permitted or acquiesced in TCC's and STC's breaches of Alberta securities laws.

[157] The hearing of this proceeding will therefore move to a second phase, for the determination of what, if any, orders for sanctions and costs ought to be made against the Respondents.

[158] Once the parties have familiarized themselves with our findings above, they should address themselves to the next phase of the hearing of this proceeding. We direct the parties to communicate in writing, **by 16:00 on Monday 27 May 2013**, to one another (including Tindall if he has by that date advised the Commission Registrar that he wishes to participate in the second phase of the hearing and provided to the Registrar and to the other parties an address to which material can be sent to him) and (through the Registrar) to the panel, whether they (respectively) propose to adduce evidence (via witnesses or otherwise) on the issue of appropriate orders, their respective wishes to make submissions on that issue (orally, in writing, or both), and any associated scheduling preferences. With that information, the panel will determine and communicate a timetable for the delivery and hearing of evidence (if any) and submissions.

9 May 2013

For the Commission:

"original signed by"
Stephen Murison

"original signed by"
Roderick McKay, FCA

"original signed by"
Daniel McKinley, FCA