ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Aitkens, 2019 ABASC 151 **Date: 20191002**

Ronald James Aitkens, Roy Juergen Beyer,
Foundation Group Capital Trust, 0865701 B.C. Ltd.,
Harvest Capital Management Inc.,
Stoney View Crossing Inc. and
Harbour View Landing Inc.

Panel:	Tom Cotter Terry Allen, CFA Webster Macdonald, QC
Representation:	Tom McCartney Peter Verschoote for Commission Staff Ronald James Aitkens for himself Roy Juergen Beyer for himself
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I. INTRODUCTION

[1] Ronald James Aitkens (**Aitkens**), Roy Juergen Beyer (**Beyer**), Foundation Group Capital Trust (the **Trust**), 0865701 B.C. Ltd. (**0865701**) and Harvest Capital Management Inc. (**HCMI**) each breached s. 92(4.1) of the *Securities Act* (Alberta) (the **Act**) by making materially misleading omissions in two of four Trust offering memoranda. Aitkens authorized, permitted or acquiesced in those breaches by the Trust, 0865701 and HCMI. Beyer authorized, permitted or acquiesced in those breaches by the Trust and 0865701. Aitkens also breached s. 93(b) (now s. 93(1)(b)) of the Act, as did Stoney View Crossing Inc. (**SV Crossing**) and Harbour View Landing Inc. (**HV Landing**). Aitkens authorized, permitted or acquiesced in those breaches by SV Crossing and HV Landing.

[2] The facts and the findings of this misconduct, which were based on evidence received during the first phase of this hearing (the **Merits Hearing**), are discussed in a February 15, 2018 decision of this Alberta Securities Commission (**ASC**) panel (the **Merits Decision**, cited as *Re Aitkens*, 2018 ABASC 27).

[3] Upon issuance of the Merits Decision, the proceeding moved into this phase – the **Sanction Hearing** – for the determination of what, if any, orders are appropriate against Aitkens, Beyer, the Trust, 0865701, HCMI, SV Crossing and HV Landing (collectively, the **Respondents**). We received written and oral submissions from ASC Staff (**Staff**), Aitkens and Beyer. Aitkens and Beyer were not represented by counsel for the Sanction Hearing. None of the other Respondents participated in the Sanction Hearing. (Although Aitkens' counsel also acted for 0865701 during the Merits Hearing, Aitkens did not appear to act for that company during the Sanction Hearing.) Staff and Beyer each called some witnesses during the Sanction Hearing, and both Aitkens and Beyer testified.

[4] During their testimony and submissions, Aitkens and Beyer reiterated and expanded on some of the points they made during the Merits Hearing, stating that such points were intended to inform the sanction process, not to re-litigate the panel's findings in the Merits Decision. We considered that information only in that context. To the extent that evidence and submissions at the Sanction Hearing were intended to persuade us that conclusions in the Merits Decision were wrong, we did not consider such evidence and submissions. As in the Merits Decision, we also did not consider Aitkens' and Beyer's references to purported inadequacies or unfairness in the investigation process leading to Merits Hearing.

[5] For the reasons set out below, we are ordering certain market-access bans against each of the Respondents and are ordering administrative penalties against Aitkens and Beyer.

II. BRIEF SUMMARY OF MERITS DECISION

[6] We briefly summarize here certain information concerning the Respondents and our findings on Staff's allegations. Details of the facts, law and analysis are in the Merits Decision.

[7] Staff made allegations in connection with three projects, which we defined in the Merits Decision as the **Trust Project** (relating to oil and gas), and the **SV Project** and the **HV Project** (each relating to land development).

[8] Aitkens was the central individual in all three projects, and we found that he was the guiding mind of and controlled most of the entities involved, including those against which we

made findings – the Trust, 0865701, HCMI, SV Crossing and HV Landing. Beyer was primarily involved in marketing aspects of several entities involved in the Trust Project. He was a director and officer of 0865701 (the trustee of the Trust). No allegations relating to the SV Project or the HV Project were made against Beyer, and no fraud allegations were made against him at any point in this proceeding.

[9] Regarding the Trust Project, we found that there were materially misleading omissions in two offering memoranda (**OMs**) issued by the Trust, specifically in the OMs dated December 10, 2009 (**Trust OM1**) and April 30, 2010 (**Trust OM2**). Those materially misleading omissions were the failures to disclose information about the cost to or profit made by Exen Resources Inc. and Harvest Group Limited Partnership when they sold shares (the **Neo Shares**) of Neo Exploration Inc. (**Neo**) to Foundation Resources Limited Partnership (**Foundation Resources LP**). We defined this information in the Merits Decision as the **Neo Shares Profit**. The acquisitions of Neo Shares by Foundation Resources LP were indirect acquisitions by the Trust. Aitkens, Beyer, the Trust, 0865701 and HCMI were responsible for these omissions, thus breaching s. 92(4.1) of the Act. Aitkens authorized, permitted or acquiesced in the breaches by the Trust, 0865701 and HCMI; Beyer authorized, permitted or acquiesced in the breaches by the Trust and 0865701.

[10] We did not find materially misleading omissions of the Neo Shares Profit in the other two OMs issued by the Trust (**Trust OM3**, dated August 18, 2010 and **Trust OM4**, dated May 12, 2011 – together with Trust OM1 and Trust OM2, the **Trust OMs**). We also did not find that any of the Trust OMs had materially misleading omissions relating to the **Neo Working Interest**, a 5% working interest and a contingent 20% working interest which Neo could have over certain Foundation Resources LP properties under the Neo Consulting Agreement. We did not find illegal distributions under the Trust OMs, and we made no findings on Staff's allegations of falsely certifying that the Trust OMs contained no misrepresentations or of providing false Trust OMs to the ASC.

[11] Regarding the SV Project and the HV Project, we found that a fraud had been perpetrated in that some of the money raised from investors – which was to be used for purchasing and developing land for the SV Project and the HV Project – was instead used for other business purposes. Aitkens, SV Crossing and HV Landing were responsible for this fraud, thus breaching what was then s. 93(b) of the Act. Aitkens authorized, permitted or acquiesced in the breaches by SV Crossing and HV Landing.

III. SANCTIONS

A. The Law

1. Rationale and Principles

[12] Under ss. 198 and 199 of the Act, an ASC panel is authorized to make certain orders in the public interest. Such orders are to be protective and preventive, not punitive or remedial (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at paras. 39-45). This is consistent with the ASC's mandate to protect investors and to foster a fair and efficient capital market and confidence in that market.

[13] In assessing appropriate sanctions in a particular case, a panel considers both specific deterrence (deterring future misconduct by the same respondent) and general deterrence (deterring future misconduct by others) – see *Re Cartaway Resources Corp.*, 2004 SCC 26 at paras. 52-62

and *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 at para. 154. The level of deterrence required will reflect the panel's assessment of the risk posed to investors and the capital market by the particular respondent and by others who may be tempted to emulate the misconduct at issue.

[14] Sanctions "must be proportionate and reasonable", with the principle of general deterrence not warranting "imposing a crushing or unfit sanction on" a respondent (*Walton* at para. 154). In discussing administrative penalties, the court in *Walton* stated that an administrative penalty must "be proportionate to the offence, and fit and proper for the individual offender" (at para. 156). Impecuniosity is, therefore, a relevant consideration when considering the sanctions appropriate for a particular respondent.

[15] The panel in *Re Homerun International Inc.*, 2016 ABASC 95 discussed claimed impecuniosity (at paras. 17-18):

> Panels may be faced with assessing the proportionality of contemplated sanctions against a respondent claiming impecuniosity, or at least a constrained ability to satisfy any monetary order. In this regard, we note the statements in *Walton* that an administrative penalty "beyond the capacity of the individual offender cannot be justified on the basis that it will deter others who are in a better financial condition" (at para. 165) and that the amount of an administrative penalty should not be "determined after overemphasizing the requirement of general deterrence, without having sufficient regard to the individual circumstances" (at para. 166).
>
> We do not understand these statements to preclude consideration of general deterrence in assessing either the need for, or the appropriate extent of, an administrative penalty against an individual respondent. Rather, this was an admonition not to focus exclusively, or excessively, on general deterrence. The Court of Appeal explained this, and the danger to be avoided, as follows (*Walton* at para. 156): "An administrative penalty [focused] purely on general deterrence of an unidentified and amorphous sector of the public could easily become disproportionate to the circumstances of the individual involved". We are mindful, however, that a monetary sanction almost inevitably involves (and indeed that a sanction of any type might impose) a burden on a respondent. This does not in itself demonstrate disproportion or unreasonableness in the *Walton* sense; an order with no real effect on the recipient may be no sanction at all.

2. Factors

[16] ASC panels have often set out factors to evaluate when considering appropriate sanctions. Staff directed us to five factors as set out in *Re Hagerty*, 2014 ABASC 348 at para. 11 (cited in *Re Global Social Capital Partners, Inc.*, 2016 ABASC 97 at para. 12). Aitkens and Beyer did not refer to specific factors in their submissions.

[17] We prefer the restatement of factors in *Homerun* at para. 20:

- the seriousness of the respondent's misconduct;
- the respondent's pertinent characteristics and history;
- any benefit sought or obtained by the respondent; and
- any mitigating or aggravating considerations.

[18] *Homerun* discussed each of these factors in detail (at paras. 22-46). We adopt that and highlight some of the points made, although we do not reproduce the entire *Homerun* discussion here.

(a) Seriousness of the Misconduct

[19] *Homerun* set out three aspects to consider when assessing the seriousness of the misconduct found in a particular case (at para. 22):

> . . . the nature of the misconduct; intention (whether the misconduct was planned and deliberate, not deliberate but attributable to recklessness, or simply inadvertent); and the harm to which the misconduct exposed identifiable investors or the capital market generally.

[20] Fraud and misrepresentations are among the most serious types of market misconduct. In particular, fraud is serious because it "involves a combination of deceit or falsehood and the risk of pecuniary loss to its victims" (*Homerun* at para. 23). As noted in *Homerun* at para. 24, although intentional misconduct would generally be more serious than inadvertent misconduct, inadvertent misconduct is still significant, as "all participants in the capital market are responsible for adhering to the law".

[21] Harm or potential harm to particular investors encompasses both financial and confidence aspects. It may be relatively easy to determine financial harm to a particular investor. Less simple may be assessing the loss of confidence in our capital market suffered by an investor who experienced actual or potential financial harm. Also relevant is a general loss of confidence in our capital market, and accompanying inefficiencies, caused by the misconduct at issue.

(b) Respondent's Characteristics and History

[22] The characteristics and history of the particular respondent may be relevant to the risk of future misconduct and thus to the deterrence required. Characteristics relevant to sanction "may include education, work experience, registration or other participation in the capital market, any disciplinary history and (with particular reference to proportionality) claimed impecuniosity" (*Homerun* at para. 27).

[23] As stated in *Homerun* at para. 33, "it may be appropriate to attribute to a corporate respondent pertinent characteristics of its guiding individuals".

(c) Benefit Sought or Obtained by Respondent

[24] Seeking or obtaining a benefit through capital-market misconduct may "present an obvious incentive for, and therefore a risk of, similar misconduct in future, by the respondent or by others" (*Homerun* at para. 38).

(d) Mitigating or Aggravating Considerations

[25] As noted in *Homerun* at para. 39:

> Any sanctioning decision must take into account all relevant circumstances, even if not fitting squarely within any of the sanctioning factors . . . discussed. We focus here on whether something in the circumstances of a case mitigates or aggravates a conclusion that might otherwise be drawn in light of any of the factors just discussed, or more generally affects the assessment of risk and deterrence required.

[26] Part of the analysis in *Homerun* on mitigating or aggravating circumstances focused on the extent to which the respondents there recognized the seriousness of their misconduct. We adopt that approach, as in our view it is more helpful to consider such recognition as a mitigating factor (as in *Homerun*) rather than as connected to the seriousness of the respondent's misconduct (as set

out in *Hagerty*, cited by Staff). The concern with the latter approach is that it can be misinterpreted to mean that a respondent must acknowledge engaging in the misconduct found, so that presenting a defence and making arguments before an ASC panel could be construed as a lack of recognition of the seriousness of the misconduct. This was discussed in *Walton* at para. 155. We note that *Walton* was issued only a few days before *Hagerty*, so that the *Hagerty* panel would not have had the benefit of receiving submissions regarding the applicability of the reasoning in *Walton* to the analysis in *Hagerty*. In our view, the appropriate consideration is whether a respondent recognizes that the misconduct found is serious misconduct, not whether the respondent acknowledged engaging in that misconduct. Any such recognition would be viewed as a mitigating factor, but a lack of explicit recognition would not be an aggravating factor (*Walton* at para. 155; and *Homerun* at para. 41).

B. Parties' Positions on Sanctions

1. Staff

[27] Staff submitted that the following would be appropriate sanctions:

- against Aitkens:
  - an array of permanent market-access bans (relating to: director or officer positions; trading in and purchasing of securities and derivatives; using exemptions; investor-relations activities; advising; and acting in certain other capacities); and
  - administrative penalties totaling $1.55 million ($350,000 for the Trust-related misrepresentations; $650,000 for the SV Project fraud; and $550,000 for the HV Project fraud);
- against Beyer:
  - an array of market-access bans (relating to: director or officer positions; trading in and purchasing of securities and derivatives; using exemptions; investor-relations activities; advising; and acting in certain other capacities) for the later of 15 years and the date by which he pays any administrative penalty; and
  - an administrative penalty of $200,000; and
- against the Trust, 0865701, HCMI, SV Crossing and HV Landing:
  - an array of permanent market-access bans (relating to: trading in and purchasing of securities and derivatives (their own and those of other entities); using exemptions; investor-relations activities; advising; and acting in certain other capacities).

2. Aitkens

[28] Aitkens stated in written submissions that a permanent ban "from the exempt markets" would be inappropriate because he wants "to try and help issuers and investors fight the many

injustices that have been inflicted upon the industry". However, he also stated that he has no plans to return to the exempt market, which he has already been away from for many years. During oral submissions, Aitkens replied to a panel question regarding permanent market-access bans by stating that he was "not disagreeable to that". We took this to mean that he had decided by the time of oral argument that he was not opposed to Staff's request for various permanent bans.

[29] Aitkens submitted that the administrative penalty sought by Staff would be far too high for several reasons, primarily because he did not receive any personal gain from the misconduct found, he has no ability to pay, any breaches "were definitely not intentional or purposeful", "the best lawyers and accountants" were hired for the Trust Project matters, and Aitkens made business decisions for the SV Project and the HV Project in the best interests of those projects and their investors. In oral submissions, Aitkens again emphasized those points, saying that "every number looks big to me", but allowing that he could try to manage $50,000.

3. Beyer

[30] Much of Beyer's written submissions claimed that the Merits Decision's findings of misrepresentations in Trust OM1 and Trust OM2 were wrong, in part because he said that the panel inappropriately relied on certain evidence. In addition, Beyer criticized the conduct of the investigation, which he had also criticized during the Merits Hearing. Beyer attempted to characterize his evidence and submissions during the Sanction Hearing as providing "added perspective or context" in assessing sanctions, rather than as re-litigating the Merits Decision. He also went to considerable effort to show that an August 2009 "Settlement Agreement and Undertaking" (the **Settlement Agreement**) which he, Aitkens and others entered into should not be considered against them as showing a negative capital-market history. We considered all of Beyer's points insofar as they could be rationally connected to the relevant sanctioning factors. In these circumstances, it would be improper for us to re-consider the findings in the Merits Decision or to engage in a review of the investigation process, and we did neither.

[31] Regarding the specific sanctions sought by Staff, Beyer submitted that he "has already paid a very heavy personal, professional and financial price" following the issuance of the notice of hearing in this matter and the issuance of the Merits Decision. In particular, he noted that many of Staff's allegations against him were not sustained, and he stated that some people in the community received the impression from materials in the public domain that Beyer had been accused of and had participated in a fraud. (He contended that the Merits Decision had also given this impression, despite there being no allegations or findings of fraud against him.) Consequently, he suggested that "no further sanctions" were warranted, and he appeared to maintain that position during oral submissions. We understood his position to be that we should impose no market-access bans and no administrative penalty.

4. Other Respondents

[32] The Trust, 0865701, HCMI, SV Crossing and HV Landing were not represented at the Sanction Hearing and made no submissions on appropriate sanctions.

C. Analysis

1. Sanctioning Factors

[33] In assessing the need for specific and general deterrence, we now apply the sanctioning factors discussed earlier. In this analysis, all references to Beyer relate only to the

misrepresentation findings, as he was not alleged to have been involved in the fraud relating to the SV Project and the HV Project, nor were any fraud findings made against him.

(a) Seriousness of Misconduct

[34] As noted, the three aspects of this factor are: the nature of the misconduct; the degree of intention involved in the misconduct; and the harm to which identifiable investors and the capital market as a whole were exposed.

(i) Nature of Misconduct

[35] Staff correctly stated that fraud and misrepresentations are serious types of capital-market misconduct, with fraud being the more serious.

[36] We address later in this decision Staff's apparent position that a respondent who does not agree with findings in a Merits Decision does not accept that the misconduct found is serious.

(ii) Degree of Intention

[37] Staff characterized the misconduct here as "planned and deliberate", stating that "Aitkens and (to a lesser extent) Beyer set out to deceive investors and were successful in doing so". Staff also called each of Aitkens and Beyer "a financial predator".

[38] In oral submissions, Beyer characterized the findings against him as indicating that he made a "mistake", and he reiterated his reliance on the Trust's lawyers and on disclosure in the Trust OMs via the applicable Deed of Trust. He continued to assert throughout the Sanction Hearing that he had tried to have the best possible OMs for the distribution of Trust securities, and that the failure to be perfect should not lead to serious findings and harsh sanctions.

[39] Aitkens stated that he did not agree with the panel's decision. Regarding the misrepresentation findings, he also asserted reliance on lawyers and emphasized his commitment to quality in the exempt market. He stated that any breaches "were definitely not intentional or purposeful". Regarding the fraud findings, he asserted his "sincere belief that the loans and investments that were made on behalf of [the SV Project and the HV Project] were not based on deceit or falsehood and definitely were not fraudulent". He also continued to contend that the relevant decisions he made for those two projects were based on his understanding of the "Management Services Agreement".

(A) Misrepresentation – Aitkens and Beyer

[40] Regarding the misrepresentation findings, we accept Aitkens' and Beyer's contention that they did not deliberately intend to deceive investors with the misrepresentations found in Trust OM1 and Trust OM2. The Trust had a real business and, through the actions of both Aitkens and Beyer, sought advice from legal and accounting advisers. As stated in the Merits Decision (at para. 230): "At best, we would describe Aitkens' and Beyer's actions as carelessness in discharging their responsibilities as directors and officers of the trustee, 0865701, and, at worst, wilful blindness." We disagree with Staff's characterization of each of these respondents as a deceitful "financial predator" in the context of the misrepresentation findings.

[41] Therefore, the misrepresentation findings against Aitkens and Beyer were serious, although less so than intentionally deceitful conduct with the goal of using investor money for personal purposes. This conclusion also applies to the Trust, 0865701 and HCMI.

(B) Fraud – Aitkens

[42] Regarding the fraud findings against Aitkens, we reiterate our statement of the law in the Merits Decision (at para. 375) that a respondent's intention or motivation is irrelevant in determining whether a fraud was perpetrated in the securities law context. Moreover, a respondent need not receive a personal financial benefit for a fraud allegation to be sustained. However, a respondent's intention may be relevant at the sanction stage. To that end, we note that we believe Aitkens was either careless or unaware as to the scope of securities law fraud provisions when he used proceeds raised for the SV Project and the HV Project for other projects within the informal grouping of companies referred to during the Merits Hearing as the **Harvest group of companies**. He stated often during the Merits Hearing that he thought it was legitimate to use the SV Project and HV Project proceeds for other corporate purposes. Further, there was no evidence that the impugned funds were paid to or used by Aitkens personally. Finally, we are satisfied that the SV Project and the HV Project were legitimate businesses with real business plans (rather than shams to raise money for the personal benefit of a fraudster).

[43] That said, however, Aitkens knew that he told SV Project and HV Project investors that their money would be used for the SV Project and the HV Project, respectively. Even had he not fully understood that using the investors' money for business purposes other than the stated purposes would lead to a fraud finding, he clearly knew or ought to have known that the money was intended for certain purposes only, and that he should not have used that money for other than those stated purposes. He was clearly cavalier with investors' money, treating it too much as his own. Therefore, although this was not the worst type of fraud (where there is no real business and where investor money is used for personal expenses), and we do not consider Aitkens to be a "financial predator", it is still extremely serious misconduct by Aitkens and must be sanctioned as such. We conclude that Aitkens should not ever again be in a position to handle investors' money. This conclusion also applies to SV Crossing and HV Landing.

(iii) Exposure to Harm

[44] Staff contended that the extent of the fundraising for the Trust Project, the SV Project and the HV Project indicated the extent to which investors and the Alberta capital market were exposed to risk.

[45] A large amount of money was raised through Trust OM1 and Trust OM2 and for the SV Project and the HV Project (the amounts raised through Trust OM3 and Trust OM4 are not relevant because we made no findings of misrepresentations in connection with those latter two OMs). Trust OM1 and Trust OM2 raised approximately $33.6 million. Approximately $31.6 million was raised for the SV Project and approximately $16.1 million for the HV Project. Staff stated that the transfers of $3.66 million and $2.9 million, respectively, of those amounts, was fraudulent. In the Merits Decision, we concluded that the transfer of "the majority of the impugned funds" constituted a fraud.

[46] Staff submitted that the investors who testified did not receive their principal investments back and received little, if any, returns on their investments. Staff's position was that investors' money was lost, with any returns highly unlikely, and that this was due to the misrepresentations by Aitkens and Beyer relating to the Trust Project and due to the fraud by Aitkens relating to the SV Project and the HV Project. Staff did not tender evidence of the current status of the Trust Project, the SV Project or the HV Project.

[47] Aitkens and Beyer contended that the money for the three projects was not necessarily all lost, because there was still at least some chance that one or more of the projects could proceed and lead either to gains for investors or at least to smaller losses. Aitkens stated that the projects were all "very much alive and moving forward at their own pace according to the business realities of their particular industry and market in their locations". Eric Everitt (**Everitt**), one of Beyer's witnesses, testified that the SV Project could still proceed at some point, with investors "at least get[ting] our money back". Everitt considered that the HV Project "was a great project", although he was not sure of its current status.

[48] Aitkens and Beyer also presented a different theory as to why investors were exposed to harm and why investors lost some faith in the Alberta capital market. According to Aitkens and Beyer, at least some investors lost faith because they were disappointed with Staff's investigation, with the *Companies' Creditors Arrangement Act* (**CCAA**) process, and with (as Everitt testified) seeing "sharks abuse the little investor and make big money off of us". The latter point was Everitt's perception that the CCAA process allowed outsiders to come in and take over projects for their own benefit, causing the investors to lose a great deal of money.

[49] Aitkens also claimed that the CCAA process was more expensive than he had been led to believe. He continued to maintain that he voluntarily put companies into CCAA to fix bond-timing issues. However, instead of the anticipated $1 million costs, he stated that the CCAA process cost approximately $30 million. In his view, that expense, in combination with "vultures" taking over, led to investor losses.

[50] In other words, Aitkens' and Beyer's position was that investors' money was not necessarily all lost and that any losses were the fault of others – not caused by the misrepresentations in Trust OM1 and Trust OM2 or the fraud connected to the SV Project and the HV Project.

[51] The evidence before us was unclear as to whether investors would ultimately suffer the loss of some or all of their investments in the three projects.

[52] We do know that there was a CCAA process, that one or more of the companies involved may still have active projects, and that investors apparently have generally not received their full principal investments back nor have received much of the promised returns. We, of course, found misrepresentations in Trust OM1 and Trust OM2 (for which Aitkens, Beyer, the Trust, 0865701 and HCMI were responsible) and the perpetration of a fraud in connection with the SV Project and the HV Project (for which Aitkens, SV Crossing and HV Landing (respectively) were responsible).

[53] We are therefore confident in concluding that the misconduct of the Respondents exposed identifiable investors and the Alberta capital market as a whole to considerable harm. We are also satisfied on a balance of probabilities that at least some identifiable investors have suffered or will ultimately suffer at least some financial loss.

[54] This aspect therefore warrants significant sanctions, more so in connection with the fraud than with the misrepresentations, given the greater amount raised from investors and the corresponding greater risk of harm to investors and the Alberta capital market.

(b) Respondent's Characteristics and History

[55] Aitkens was 64 years old at the time of the Sanction Hearing. As set out in the Merits Decision, Aitkens had considerable experience in commercial real estate syndication. He was also the guiding mind of and controlled the non-individual Respondents (the Trust, 0865701, HCMI, SV Crossing and HV Landing).

[56] Beyer was 58 years old at the time of the Sanction Hearing. He did not appear to have any formal education in business, and his experience before joining the Harvest group of companies was largely in the religious, non-profit and consulting fields. His role with the Harvest group of companies was primarily on the marketing side, although he was also a director and officer of some of the Harvest group of companies, including 0865701.

[57] Staff characterized both men as "savvy market participants" who had raised millions of dollars in the capital market through "elaborate and sophisticated marketing".

(i) Capital-market History: Relevance of Settlement Agreement

[58] As part of Aitkens' and Beyer's capital-market history, Staff pointed to the August 2009 Settlement Agreement signed by each of Aikens and Beyer (and by others). This related to a real estate development project known as Spruce Ridge Estates (the **Spruce Ridge Project**). In the Settlement Agreement, Aitkens and Beyer admitted breaching s. 92(4.1) of the Act, although stated that the breaches were not deliberate and that they never intended to mislead investors. Aitkens paid $30,000 as settlement money; Beyer paid $20,000. In addition, Foundation Capital Corporation (of which Aitkens was an officer, director, the majority shareholder and the guiding mind) committed to making payments of $100,000 and $250,000 (the latter described in the Settlement Agreement as voluntary), in part for training market participants. Aitkens submitted that the $350,000 total was his idea "to make a positive impact in the exempt market".

[59] Staff contended that the Settlement Agreement, combined with the findings in the Merits Decision, showed that Aitkens and Beyer have a "proclivity for misleading investors", such that the sanctions imposed here should be "severe". Further, Staff argued that it is important for general deterrence to show others "that further misconduct will be met with more severe sanctions". We agree that previous capital-market misconduct may generally be a factor warranting a higher level of specific deterrence and, to a lesser extent, general deterrence (see *Homerun* at para. 30).

[60] Aitkens and Beyer both essentially submitted that they entered the Settlement Agreement under a level of duress, so that its existence should not be held against them as evidence that they previously contravened Alberta securities laws. For example, they both claimed that they decided to settle so the Spruce Ridge Project would not be held up by the allegations. Beyer argued that the losses on the project were, at least in part, caused by the allegations and the recession. One of Beyer's witnesses supported Beyer's contention that water-related concerns about the Spruce Ridge Project were unfounded.

[61] A settlement agreement does not show that a respondent was "previously sanctioned" by the ASC, as contended by Staff. Settlement agreements are negotiated documents with no independent findings. A panel could use evidence of a previous settlement agreement as indicating at least a level of recognition and awareness by a respondent that the securities industry is highly regulated and that care must be taken to scrupulously follow securities laws' requirements or risk enforcement action leading to a settlement or a contested hearing. Here, Aitkens and Beyer

presented evidence giving context for their entering into the Settlement Agreement. Staff did not provide contrary evidence, although this was not a hearing into the subject matter of the Settlement Agreement.

[62] In all the circumstances, we give some weight to the Settlement Agreement as indicating that Aitkens and Beyer were both aware of the need to be careful when making representations to potential investors. In other words, the existence of the Settlement Agreement convinced us that Aitkens and Beyer had highly relevant capital-market experience, in addition to Beyer's general business experience and Aitkens' extensive business experience. We need not address the merits underlying the Settlement Agreement, as we did not consider the Settlement Agreement here as evidence of previous sanctions.

(ii) Claimed Impecuniosity

[63] Each of Aitkens and Beyer testified that he is effectively bankrupt, therefore claiming to have a very limited ability to pay any administrative penalty imposed.

[64] Aitkens testified that he has not worked since 2013, so is making no income. He also testified that he has very few assets: a joint bank account with his wife with less than $1,000 in it; an RRSP (approximately $22,000); equity in a house (approximately $30,000); and no interests in companies, life insurance or other assets. He testified that he owes approximately $12 million in taxes. Although a tax liability of that magnitude might suggest that Aitkens received a considerable income from the Harvest group of companies, the preponderance of the evidence indicated otherwise. That was also consistent with the August 30, 2013 report discussed below (the **Monitor's Report**) of the court-appointed monitor (the **Monitor**).

[65] Beyer testified that publicity from the allegations and the Merits Decision, including activity by "the Harvest litigation people" affected his ability to work, making it "almost impossible" for him to earn a living, and even leading to his business bank accounts being closed after issuance of the Merits Decision. He stated that he sold everything he had to survive and pay bills.

[66] Staff criticized Aitkens' and Beyer's claims of impecuniosity because neither respondent provided written documentation such as "a sworn statement of assets and liabilities". In particular, Staff challenged Aitkens' claim of owing $12 million in taxes as not being in evidence (despite it being part of Aitkens' testimony). Staff did not impugn Beyer's impecuniosity claim based on Beyer's overall credibility, but strongly suggested that Aitkens' testimony as to his claimed impecuniosity should be rejected because of Aitkens' tarnished credibility.

[67] Staff cross-examined Aitkens about the "lift" money for the SV Project and the HV Project. That money was paid to Aitkens-controlled companies. Staff implied those payments were not in the investors' best interests. Staff also seemed to be using those lifts as a basis for arguing that Aitkens could not be impecunious and that the panel should disbelieve Aitkens' evidence on that point. However, the Monitor's Report indicated that Aitkens did not profit personally from that money, and Staff agreed that the report appeared to show that Aitkens "did not personally benefit from the lifts on the" various projects. The evidence satisfied us that such money was invested in and directed to companies connected to Aitkens.

[68] We accepted the evidence before us that both Aitkens and Beyer are impecunious.

(iii) Conclusion on Respondents' Characteristics and History

[69] On balance, we conclude that Aitkens' characteristics and history, including the Settlement Agreement, were such that he knew he was participating in a highly regulated industry and should have been aware that he was engaging in capital-market misconduct. Therefore, significant sanctions are appropriate for him. This also applies to Beyer, who took on roles as a trustee, director and officer without a full appreciation of the gravity of those positions. However, this factor leads to sanctions for Beyer which are less than those appropriate for Aitkens, given Beyer's more limited experience (and less serious misconduct). We also conclude that each man's impecuniosity is a factor to be considered when addressing the appropriate administrative penalty to be ordered against each as part of a package of sanctions.

[70] We do not find it useful to consider this aspect in connection with the Trust, 0865701, HCMI, SV Crossing and HV Landing, other than to fix them with the characteristics of Aitkens, who was their guiding mind and controlled them.

(c) Benefit Sought or Obtained by Respondent

[71] Staff acknowledged that "[i]t is trite to say the Respondents intended to benefit from their involvement in the capital market." As noted in *Homerun* (at para. 37), seeking to make money in the capital market is not objectionable, but seeking or obtaining a benefit (even non-monetary, such as a reputational benefit) through capital-market misconduct is.

[72] We earlier discussed Staff's initial suggestion that Aitkens would have personally received millions of dollars from various projects, including the three projects at issue here. However, Staff did not tender evidence showing the flow of any money from the corporate entities to benefit Aitkens or Beyer personally. Further, Staff agreed that the Monitor's Report indicated that Aitkens did not benefit personally.

[73] Regarding Beyer, Staff suggested that Beyer received at least 1% in commissions on money raised for the Trust Project, which would have been over $330,000 in commissions between December 10, 2009 and August 17, 2010. Beyer testified that half of his commission was in the form of shares in the Trust, which he later sold. We do not know what became of the money and proceeds from shares that Beyer received, only that we accepted his evidence that he is now impecunious.

[74] Aitkens denied benefiting personally from the various projects (or from the misrepresentations and fraud which we found), claiming all of the money at issue was used for business purposes. His lack of personal benefit was confirmed by the Monitor's Report. Aitkens also claimed he had good intentions, as shown by his actions of signing over his shares in the SV Project and the HV Project to the investors. Beyer confirmed that.

[75] Based on the evidence before us, this is a neutral factor.

(d) Mitigating or Aggravating Considerations

(i) Recognition of Seriousness of Misconduct

[76] Staff addressed Aitkens' and Beyer's recognition of the seriousness of their misconduct under the "Seriousness of Misconduct" category; as noted, we consider it more appropriate to

analyze any such recognition as a mitigating factor (but the absence of such recognition would not be an aggravating factor).

[77] Staff contended that both Aitkens and Beyer blamed their lawyers and accountants for deficiencies in the Trust OMs, which "is a strong indicator that Aitkens and Beyer do not accept responsibility for their deception". We note that Staff appeared to conflate the concepts of recognizing the serious of misconduct found and accepting responsibility for such misconduct. It is important to acknowledge that presenting a defence or maintaining innocence is not an indication that a respondent fails to appreciate that the misconduct found was serious. A respondent is entitled to make full answer and defence to allegations and is entitled to appeal findings of misconduct. Such actions cannot be used as a basis for increased sanctions.

[78] Aitkens stated that he was "mortified" about the findings made against him in the Merits Decision. We took this as some recognition of the seriousness of the findings made against him. Aitkens also expressed his regret for investors who were hurt and wished that he could "re-do" several decisions he made which had "unintended consequences". However, the significance of this regret was diminished by the fact that the decisions Aitkens would like to re-do were not ensuring there were no misrepresentations or fraud, but entering the Settlement Agreement, allowing the wrong people to take leadership positions within the Harvest group of companies, and enabling "vultures" to gain control of various projects.

[79] Beyer testified that he was "very sad, very unhappy" about what happened to the Harvest group of companies and that he "felt terrible [and] guilty" about it. We note that Beyer continued to maintain that he thought all required disclosure had been made in Trust OM1 and Trust OM2, given the wording of the applicable Deed of Trust. Although he characterized his actions as "a mistake", Beyer also stated that he assumed "that a misrepresentation is a really serious offence".

[80] We are satisfied that Aitkens and Beyer (and, through Aitkens, the other Respondents) accepted that the misconduct found against them was serious, despite their disagreement with our findings. This is a mitigating factor.

(ii) "Due Diligence" and Professional Advice

[81] In the Merits Decision, we concluded that a "due diligence" defence is not available for misrepresentation allegations and fraud allegations, although due-diligence-type steps may be relevant to the *mens rea* element of those allegations (at para. 72). We also stated that "due-diligence-type submissions would typically be considered relevant at any sanction phase of a proceeding" (at para. 72, and see para. 97). Consistent with our statements in the Merits Decision, we do not consider Aitkens' and Beyer's references to their claimed reliance on professional advice to show a failure to appreciate the seriousness of the misconduct found. Instead, we consider whether such reliance – or other aspects of "due diligence" – can be considered mitigating factors in these circumstances for sanction purposes.

[82] Aitkens stated that he and his companies spent hundreds of thousands of dollars to provide a high level of training to employees, and also worked with "world-class developers and consultants and project managers".

(A) Misrepresentation Findings

[83] Beyer stated that it was a mitigating factor that he and Aitkens "got it almost right versus exactly right in terms of the wording in the OM[s]". This was again a reference to the reliance on professional advisers, and made the point that only one misrepresentation allegation was sustained. Presumably this also recognized the panel's conclusion that the misrepresentations did not make Trust OM1 and Trust OM2 so defective as to be effectively null.

[84] Regarding the reliance on advisers, both Aitkens and Beyer pointed to the advisers (legal and accounting) that the companies hired to ensure everything was done properly. Beyer stated that they "took extraordinary effort to seek legal advice and did so at great expense". Beyer argued that the lawyers for the Trust OMs were "profoundly competent" and pointed to evidence from Staff's witness Wayne Tinker during the Merits Hearing as "verif[ying] the sincerity and exceptional effort on the part of the Harvest Group executives to change entirely the process by which OMs were produced and to improve upon the competency and experience of the Professionals retained for generating OMs". We note that Tinker did comment positively on some aspects of agent training and OM drafting, including Aitkens' and Beyer's involvement, although not in the same terms used by Beyer. Beyer reiterated that "we weren't perfect, but we intended to be".

[85] In the circumstances, we consider the extensive involvement of professional advisers to be a mitigating factor in determining the appropriate package of sanctions for the misrepresentations. We are also persuaded that Aitkens and Beyer expended a great deal of time, money and effort to produce generally compliant Trust OMs – apart from their carelessness or wilful blindness concerning the need to disclose specifics of the Neo Shares Profit.

(B) Fraud Findings

[86] Although not completely clear, we assume that Aitkens intended these same arguments of due diligence and reliance on professional advisers to be considered mitigating factors for the fraud findings as well. The problem with the OMs for the SV Project and the HV Project was not the OM drafting, but Aitkens' interpretation of the use of proceeds disclosure in those OMs, specifically the "sound business reasons" clause, as discussed in the Merits Decision. We concluded in the Merits Decision (at para. 404) that there was insufficient evidence to "conclude that Aitkens received any legal advice on this topic, let alone assess its scope or reliability".

[87] Given the lack of evidence on this point during both the Merits Hearing and the Sanction Hearing, we are unable to find that due diligence or reliance on legal advice is a mitigating factor in assessing sanctions for the fraud findings.

(iii) Actions Related or Subsequent to CCAA

[88] Aitkens mentioned throughout this proceeding that he volunteered to put the relevant companies into CCAA, thinking it would be a quick and relatively inexpensive process which would ultimately benefit investors. He stated that it instead became an extensive and expensive process which expanded to include other Aitkens-controlled entities, such that a great deal of investor money ended up paying for the CCAA process. As noted, Aitkens also stated that he signed over his shares in the SV Project and the HV Project to investors.

[89] Beyer pointed to the fact that he returned to the Trust to try to ensure investors would receive at least some money back. He also submitted that negative publicity from the allegations

and the Merits Decision have already led to many consequences for him, including his evidence that his bank closed all of his accounts, he had to withdraw from volunteer positions, and he lost certain business prospects. Beyer contended that reform is needed in securities regulation so that businesspeople can understand what the rules are and that if a lawyer makes a mistake in advising someone, "it's not the end of your life, the end of your reputation, and all your business accounts are going to be closed". He seemed to consider this call for reform to be a mitigating factor. Aitkens made a similar point about needed reforms in the insolvency field.

[90] We consider it a mitigating factor that Aitkens and Beyer both tried to salvage parts of the companies and, therefore, some of the investors' money. We were not persuaded that calling for reforms is a mitigating factor here.

(iv) Other Potentially Mitigating Factors

(A) Aitkens

[91] Aitkens emphasized his involvement in charitable endeavours throughout his career, presumably to indicate that he is a person of good character who would not intentionally mislead or defraud investors. He also referred to financial difficulties (as discussed earlier) and to marital troubles.

[92] Apart from the considerations around impecuniosity and Aitkens' efforts to obtain or preserve some money for investors (both discussed earlier in this decision), we do not find mitigation in Aitkens' personal circumstances.

(B) Beyer

[93] One of Beyer's main contentions during the Sanction Hearing was that his reputation and financial prospects have already suffered greatly, from the time the notice of hearing was issued (and even before) and from the time the Merits Decision was issued. He was particularly upset that his name had apparently been linked to allegations and findings of fraud. In his view, the reputational damage should obviate the justification for ordering any sanctions against him. Beyer's evidence on this point was largely his own testimony, as well as testimony from **MH**, a former business associate of his in a company referred to as "Lyoness".

[94] As noted, Beyer testified that his bank accounts were closed after the Merits Decision was released. He also testified that he was not able to pursue a licence to sell insurance because of the allegations in this matter. He referred in his written submissions to instances of negative responses from others, although the documents he attached were in his submissions, not in evidence. These documents were:

- An email dated approximately one month after the Merits Decision was issued. That email indicated that a company was withdrawing from a business agreement due to information "saying that Roy [Beyer] was found in relation to a $75 million fraud deal on real estate".

- A news article apparently from a Medicine Hat news source on June 13, 2015 (approximately three months after issuance of the notice of hearing in this matter). The headline read "Fraud allegations against two men with ties to local churches". The article stated that Aitkens and Beyer "are accused of misleading investors,

> hiding profits on stock sales between companies they controlled and fraudulently swapp[ing] funds between land development projects".

[95] MH testified that she was told that someone at the ASC had made negative comments about Beyer. MH then spoke on the telephone with **DR**, a public information officer at the ASC. MH testified about specific negative comments she recalled DR making during that conversation, such as that Beyer "will be" charged by the ASC, Lyoness was a pyramid scheme, and "if Roy Beyer was a part of this, you shouldn't be involved". DR did not specifically recall the conversation, but denied that he would have made such statements, as his position at the ASC does not allow him to make such comments. He differentiated between relaying to MH information he found on the internet and giving MH his opinion about information he found on the internet – he would have done the former but not the latter. He did acknowledge that he would have conducted an internet search and reported the results of such searches during the conversation.

[96] MH and DR agreed that there was a conversation during which DR searched the internet for information about Lyoness and found some information about Beyer. We are not persuaded that DR gave opinions to MH rather than merely relayed information – however, that is irrelevant here. What is germane is that the evidence before us (from MH, DR and Beyer) clearly showed that there was negative information about Beyer which was available to those conducting an internet search.

[97] We accept Beyer's testimony that the allegations and findings against him have adversely affected his reputation, opportunities and finances. To the extent that some of those effects on Beyer appear to have been based on a mistaken impression that Beyer was accused in the present case of perpetrating a fraud or found to have perpetrated a fraud, we are prepared to accept that as a minor mitigating factor in determining the appropriate package of sanctions for Beyer. Some of the consequences to Beyer were, however, likely caused by reference to the correct allegations and findings. In that, we find no unusual mitigation.

2. Outcomes of Other Proceedings

[98] Staff referred us to several previous ASC decisions on sanction: *Re Platinum Equities Inc.*, 2014 ABASC 376 (affirmed *Alberta (Securities Commission) v. Chandran*, 2015 ABCA 323); *Re Shire International Real Estate Investments Ltd.*, 2012 ABASC 79; *Re Cloutier*, 2014 ABASC 170; and *Re Aurora*, 2012 ABASC 7. Beyer noted that he was not familiar enough with the law to refer to past decisions, but stated that Staff's written submissions seemed to mean that "there's not a lot of situations that are like mine, to provide guidance as to the right thing to do". Aikens referred to *Re Breitkreutz*, 2019 ABASC 8 and *Re Arbour Energy Inc.*, 2012 ABASC 416, stating that those were both Ponzi schemes, in contrast to Aitkens' projects which "were very real projects and continue to be real projects".

[99] We found the *Shire* decision to provide the most useful guideline for Aitkens. In *Shire*, the individual respondent, Jeanette Cleone Couch (**Couch**), was found to have made misrepresentations in OMs and to have perpetrated a fraud. As here, the fraud in *Shire* involved Couch using proceeds from OMs for connected companies rather than for the particular companies and purposes set out in the OMs. As the panel in *Shire* expressed it, there is a difference between directing money raised under an OM towards arguably sound business purposes of the company for which it was raised, and directing it towards arguably sound business purposes for other companies in the same group of companies (*Shire* at para. 42). We also note, however, that the

misrepresentations in the *Shire* OMs were more extensive than the misrepresentations found here. Couch was given an array of permanent market-access bans, as well as a $750,000 administrative penalty.

[100] The main individual respondent in *Platinum* (**Shariff Chandran**) also had some similarities with Aitkens, and the secondary individual respondent in *Platinum* (**Chitra Chandran**) shared some aspects with Beyer. Shariff Chandran was found to have been responsible for misrepresentations (more serious than the ones in the present case), fraud (similar to that in the present case and in *Shire*) and illegal distributions (not found in the present case). Chitra Chandran was found to have been responsible for misrepresentations and illegal distributions, but not to have been involved in the fraud. In all the circumstances of that case, Shariff Chandran was given a $1 million administrative penalty and 25-year market-access bans, while Chitra Chandran was given a $150,000 administrative penalty and 10-year market-access bans. Some relevant factors were that both individual respondents in Platinum recognized the seriousness of their misconduct and had made significant efforts to help investors recover their money.

[101] We did not find useful the *Cloutier* and *Aurora* decisions referred to by Staff. As pointed out by Aitkens, the *Breitkreutz* and *Arbour* decisions were quite dissimilar from the present case, making those also of limited use.

[102] Beyer pointed to what he described as the panel's "observation of a similar case in BC where BC Securities made [the] decision that a due diligence defence is permissible if it can be proved that the Respondents hired competent legal person(s) and provided the information to such legal persons necessary for a [compliant] OM to have been produced". He did not name that decision. We assume that he was referring to the decision of the British Columbia Securities Commission (**BCSC**) in *Re SunCentro*, 2017 BCSECCOM 58, discussed in the Merits Decision at paras. 73-97. The discussion in the Merits Hearing related to the availability of a due diligence defence for the misrepresentation allegations made against Aitkens and Beyer and the fraud allegations made against Aitkens. We concluded there that *SunCentro* was not helpful in the context before us, as its pronouncements on the availability of a due diligence defence related to allegations that securities had been distributed without a prospectus or exemptions from the prospectus requirement (in contrast to the misrepresentation and fraud allegations before us).

[103] Beyer contended that if the allegations against him and Aitkens had been heard by the BCSC, that commission "would have decided in our favour". Therefore, in his view, there would have been no sanctions for his conduct in that province, and Staff here could have suggested no sanctions against him.

[104] We realize that Beyer was not represented by counsel in taking this position before us in the Sanction Hearing. The legal availability of a "due diligence" defence or reliance on professional advice is a complex area, and we believe that Beyer misunderstood the distinction we made in the Merits Decision between the types of allegations made in *SunCentro* and the present case. As we stated in the Merits Decision (at para. 97), we were not able to find a due diligence defence available for the misrepresentation allegations against Aitkens and Beyer or for the fraud allegations against Aitkens. However, we did consider their claimed reliance on professional advice when assessing their level of knowledge in the context of those allegations. We also noted we would consider evidence presented of any such reliance when assessing appropriate sanctions

for the misconduct found in the Merits Decision. We did this earlier in this decision when addressing mitigating factors.

3. Appropriate Sanctions

(a) General

[105] We are satisfied, for the reasons set out above, that it is appropriate to make sanction orders against each of the Respondents. Such sanctions are necessary in the public interest to meet the needs of both specific and general deterrence.

[106] Staff sought sanctions against Aitkens and Beyer comprised of an array of market-access bans and significant administrative penalties. Aitkens and Beyer did not challenge these categories of sanction, although they contended that minimal or no sanctions under each category would be more appropriate, with Aitkens apparently conceding that permanent market-access bans against him would not be inappropriate. We conclude that both types of sanction are appropriate here for Aitkens and Beyer, and discuss below the appropriate scope and duration of market-access bans and the appropriate amount of administrative penalties.

[107] For the Trust, 0865701, HCMI, SV Crossing and HV Landing, Staff sought permanent market-access bans, but no administrative penalties. We heard no submissions from any of those Respondents. We conclude that market-access bans are appropriate here for the non-individual Respondents, and administrative penalties are not. We discuss below the appropriate market-access bans.

[108] We note that there have been some minor changes to s. 198(1) of the Act since Staff made their written submissions on appropriate sanctions in this matter. We assess the appropriate market-access bans based on the new wording in s. 198(1).

(b) Aitkens

[109] For Aitkens, we consider that the appropriate package of sanctions must include an array of permanent market-access bans, as he engaged in fraud (the most serious capital-market misconduct) and misrepresentations (also serious). Further, a significant administrative penalty is warranted as part of the total sanction package, although the amount of that is ameliorated by the permanent bans, by the mitigating factors set out above, and by our finding that Aitkens is impecunious. We emphasize that, although we found some mitigating factors, Aitkens engaged in serious capital-market misconduct yet persists in characterizing his actions and motivations as a whole as enhancing capital-market safety and improving investor protection. In these circumstances, we see a strong need for deterrence, particularly specific deterrence.

[110] Permanent market-access bans will prevent Aitkens from again being in a position to misuse funds from investors. They also send a strong message to others who are careless or wilfully blind in ensuring OMs are accurate or who are cavalier in ensuring that money raised from investors is used for the stated purposes.

[111] Aitkens did not dispute the particular market-access bans sought by Staff – orders that would prohibit Aitkens from: trading in or purchasing securities or derivatives; using exemptions contained in Alberta securities laws; engaging in investor relations activities; acting as a director or officer of certain entities; advising in securities or derivatives; acting as a registrant, investment

fund manager or promoter; and acting in a management or consultative capacity in connection with activities in the securities market.

[112] We agree that all of these are appropriate, except for a ban on advising in securities or derivatives, as none of the findings against him related to advising.

[113] With the strong specific and general deterrence flowing from such permanent bans, as well as the evidence we accepted of Aitkens' impecuniosity, we conclude it is unwarranted to impose an administrative penalty on Aitkens of the amount sought by staff ($1.55 million). The closest comparator in previous decisions was the administrative penalty imposed in *Shire*. That $750,000 was for multiple (and more serious) misrepresentations, as well as for a fraud similar to Aitkens' (the use of proceeds for business purposes not set out in the relevant OM). Further, although Couch possibly had a poor financial situation, that decision was before the Court of Appeal's decision in *Walton*, which emphasized the need for proportionality when determining the appropriate administrative penalty for an impecunious respondent. We do not take the caution in *Walton* as requiring no or only a nominal administrative penalty in such circumstances, but as requiring that general deterrence not be over-emphasized when determining the appropriate amount.

[114] Considering all of the circumstances here, including the need for proportionality, we conclude that an administrative penalty of $600,000 for Aitkens, coupled with the permanent market-access bans already discussed, will provide (as a package) the appropriate level of specific and general deterrence.

(c) Beyer

[115] For Beyer, we consider that the appropriate package of sanctions must include an array of market-access bans and an administrative penalty, The package of sanctions appropriate for Beyer is obviously much less than that for Aitkens, given that we made a fraud finding against Aitkens, but there were no fraud findings (and, of course, no fraud allegations) against Beyer. His misconduct was limited to the materially misleading omissions in Trust OM1 and Trust OM2. Further, Aitkens held a position of control and authority in the Harvest group of companies. Although Beyer was an officer and director of some entities in the Harvest group of companies – including 0865701, the trustee of the Trust – his role was much less significant than Aitkens'. As already discussed, in addition to the effect of Beyer's impecuniosity, several mitigating factors were relevant for him.

[116] As Beyer's position was that no sanctions were appropriate, he did not address the particular market-access bans sought by Staff – orders that would prohibit Beyer from: trading in or purchasing securities or derivatives; using exemptions contained in Alberta securities laws; engaging in investor relations activities; acting as a director or officer of certain entities; advising in securities or derivatives; acting as a registrant, investment fund manager or promoter; and acting in a management or consultative capacity in connection with activities in the securities market.

[117] In all the circumstances, we conclude that Beyer needs to be removed from certain access to the Alberta capital market for a significant period of time, although specific and general deterrence require neither the permanent bans appropriate for Aitkens nor the 15-year bans argued for by Staff. Instead, bans of 10 years are appropriate here. We conclude that all of the types of bans sought by Staff are appropriate, except for a ban on advising in securities or derivatives, as none of the findings against Beyer related to advising.

[118] Given the mitigating factors discussed earlier and Beyer's impecuniosity, we conclude that a $75,000 administrative penalty is warranted as part of the package of sanctions for Beyer.

[119] Staff also asked that any market-access bans ordered against Beyer remain in effect for the later of the length of the bans and the date by which Beyer has paid any administrative penalty ordered against him. Again, Beyer did not state a position on this request from Staff. We consider that such a link is appropriate in these circumstances.

(d) The Trust, 0865701 and HCMI

[120] The Trust, 0865701 and HCMI were each responsible for the misrepresentations found in Trust OM1 and Trust OM2. Staff sought permanent market access bans – orders that would prohibit the trading in or purchasing of securities or derivatives of each of the Trust, 0865701 and HCMI, and would prohibit each of them from: trading in or purchasing securities or derivatives; using exemptions contained in Alberta securities laws; engaging in investor relations activities; advising in securities or derivatives; acting as a registrant, investment fund manager or promoter; and acting in a management or consultative capacity in connection with activities in the securities market.

[121] We agree that all of these types of permanent bans are appropriate, except for a ban on advising in securities or derivatives, as none of the findings against these entities related to advising. Although they were not involved in the fraud which we found, Aitkens was the guiding mind of and controlled each of them. As Aitkens is to be permanently banned from aspects of the Alberta capital market, so too should the Trust, 0865701 and HCMI.

[122] Staff did not seek administrative penalties from any of these three entities. We agree administrative penalties are not needed for any of them in these circumstances.

(e) SV Crossing and HV Landing

[123] SV Crossing and HV Landing were part of Aitkens' perpetration of a fraud on Alberta investors. Staff sought permanent market-access bans against each (the same bans sought for the Trust, 0865701 and HCMI). With the exception of an advising ban, for the reasons previously noted, we conclude that it is appropriate that SV Crossing and HV Landing be subject to permanent market-access bans.

[124] Staff did not seek administrative penalties from either SV Crossing or HV Landing. We agree that administrative penalties are not needed for either in these circumstances.

IV. COST-RECOVERY

A. The Law

[125] Under s. 202 of the Act, a hearing panel may order a respondent to pay "costs of or related to the hearing or the investigation that led to the hearing, or both". Costs which "are reasonable in all the circumstances" may be ordered in accordance with s. 20 of the *Alberta Securities Commission Rules (General)*, which sets out categories based on time spent by Staff, amounts paid to non-Staff personnel for investigation or hearing purposes, witness costs, and "any other costs paid or payable" in connection with the investigation or hearing.

[126] Costs are assessed for a different purpose than that for which sanctions are imposed. As stated in *Re Marcotte*, 2011 ABASC 287 (at para. 20):

> A costs order is . . . a means of recovering, from a respondent found to have engaged in capital-market misconduct, certain investigation and hearing costs that would otherwise be borne indirectly by law-abiding market participants whose fees fund the [ASC's] operations. It is generally appropriate that a respondent pay at least some portion of the relevant costs. Determination of the appropriate portion may involve assessing parties' contributions to the efficient conduct and ultimate resolution of the proceeding.

[127] We again turn to the discussion set out in *Homerun* (at paras. 49-53):

> Accordingly, the relevant costs will be those related to the investigation into the misconduct found, and the hearing in which that misconduct was proved. It would be inappropriate to assess costs attributable to allegations ultimately withdrawn or dismissed. A panel will therefore be mindful of which allegations were proved and which were withdrawn by Staff or dismissed by the panel. Where a cost item can be readily ascribed to a particular respondent and particular allegation, the task is straightforward. More often, however, it would be impractical for Staff's supporting documentation and submissions to make such plain distinctions, given the complexity and evolving nature of the investigation process or the scope of a particular hearing. In those cases the panel faces the task of estimating the proportion of claimed costs fairly attributable to specific respondents and specific allegations.
>
> In assessing the reasonableness of claimed costs, the panel also considers aspects such as time spent by Staff on a matter; indications of duplicated effort for which some reduction might be warranted; the nature and scale of claimed disbursements; and any prior recovery of costs arising from the same matter (for example, through settlement with another respondent). Through that process the panel determines the amount of costs prima facie recoverable.
>
> The panel must also make an allocation of recoverable costs based on its assessment of which respondents should bear responsibility, and in what respective proportions. In this task the panel will focus on the extent to which investigation and hearing resources (as reflected in the recoverable costs) were applied to proving the respective respondents' misconduct. Other considerations may lead the panel to conclude that cost responsibility is properly allocated wholly among one of multiple classes of respondents (for example, wholly among individual respondents for whom corporate respondents were mere vehicles for the misconduct found).
>
> Having made that allocation, the panel then considers the efficiency (or inefficiency) that each party brought to the proceeding as a whole, and the associated contribution to the broader public interest objectives of our regulatory system. This factor may argue for moderation – sometimes substantial – in the extent of cost recovery to be ordered against a particular respondent (and therefore may result in less than full recovery of the prima facie aggregate amount).
>
> Finally, there may be concern that a cost-recovery order could diminish prospects of recovery for investor victims. This, too, may warrant moderating the amounts of cost recovery ordered against certain respondents, or wholly foregoing cost recovery in a particular case.

B. Parties' Positions on Cost-recovery

1. Staff

[128] Staff tendered a bill of costs totaling $448,447.04.

[129] Staff submitted in their written materials (no oral submissions were made regarding costs) that it was appropriate to reduce the amount of costs claimed to $298,980 for several reasons (discussed later). Of that amount, Staff would attribute 80% to Aitkens ($239,184) and 20% to

Beyer ($59,796), "to reflect their respective roles in the breaches found" and because the fraud allegations (which did not involve Beyer) took "a significant portion of time at the hearing".

[130] Staff did not seek any costs from the Trust, 0865701, HCMI, SV Crossing or HV Landing.

2. Aitkens

[131] Aitkens did not refer to costs in his oral submissions. He stated in his written submissions that the Monitor was paid from six different projects "and also charged the various projects hourly rates for doing work for the ASC". He also contended that "it is again my belief that costs have been borne by the various projects and the amounts that staff quotes have already been subsidized". We assume this is connected to his assertion about payments to the Monitor – in other words, the various companies in the CCAA proceedings paid the Monitor for the Monitor's time working on matters for the ASC, so that the ASC did not incur expenses for that work and should not be seeking reimbursement from Aitkens and Beyer. From that, we assume that Aitkens was arguing that no cost-recovery amount should be awarded to Staff or at least that a lower amount should be awarded.

3. Beyer

[132] In written submissions, Beyer asked that no costs be awarded against him. He did not refer to costs in his oral submissions.

[133] Beyer's written submissions mentioned that not all of Staff's allegations against him (or Aitkens) were upheld. He suggested that provided some of the context for lesser sanctions being appropriate for him (having his name linked to allegations that were not proved), and we considered that with his other points on reputational damage. Primarily, however, the number of allegations proved in relation to the number alleged is a factor for a cost-recovery order, not a sanction order.

4. Other Respondents

[134] The Trust, 0865701, HCMI, SV Crossing and HV Landing were not represented at the Sanction Hearing and made no submissions on appropriate cost-recovery orders.

C. Analysis

1. Potentially Recoverable Costs

[135] As noted, Staff submitted costs of $448,447.04, then proposed a one-third reduction, leaving potentially recoverable costs of approximately $298,980. That reduction was to allow for:

- the initial investigation involving other projects beyond the three that were the subject of the allegations and the Merits Hearing;
- some allegations not being upheld (this appeared to be a minor deduction only, as Staff considered that the allegations not upheld "did not take a significant amount of time";
- some duplication of effort (four investigators and two counsel), emphasizing, however, that "this was a large and complex matter"; and

- the hearing time was somewhat reduced because of admissions made by Aitkens.

[136] We agree with Staff that a substantial reduction of the submitted costs is required for the reasons Staff outlined. However, we conclude that a greater reduction is warranted.

[137] In our view, Staff minimized the effect on time and effort (therefore minimizing the effect on costs) of the allegations not upheld. While some of those allegations, such as signing false certificates, would have taken less investigation and hearing time, two of the failed allegations involved significant time at the hearing – misrepresentation allegations relating to the Neo Working Interest and illegal distribution allegations. In addition to the significant hearing time, it is apparent these would have been the subject of significant investigation time as well. Further, the misrepresentation allegations that were upheld – relating to the Neo Shares Profit – were upheld for only two of the four Trust OMs. Staff should not recover costs for any of the failed allegations.

[138] Moreover, Staff withdrew allegations against two former respondents (Stoney View Capital Inc. (**SV Capital**) and Harbour View Capital Inc. (**HV Capital**)) after the panel had already received all of the evidence and submissions in the Merits Hearing. No costs should be recoverable by Staff in connection with SV Capital and HV Capital, including costs Staff incurred opposing an earlier application by those two former respondents to be removed from the Merits Hearing.

[139] Some other amounts claimed by Staff were problematic, including: time recorded as billed after the end of the Sanction Hearing; time billed for applications in which Staff were unsuccessful; time billed to prepare for a witness Staff did not call; and some disbursements (such as the cost of photocopying and transcripts relating to applications in which Staff were unsuccessful).

[140] We conclude that the potentially recoverable costs should be decreased by more than the one-third proposed by Staff. In our view, a cost-recovery of $200,000 is reasonable and justifiable in the circumstances.

2. Cost-recovery Apportionment

[141] As mentioned, Staff sought 80% of the recoverable costs from Aitkens and 20% from Beyer, with none from any of the non-individual Respondents. None of the Respondents made submissions precisely on this point.

[142] We agree that no cost-recovery order should be made against the Trust, 0865701, HCMI, SV Crossing or SV Landing. These entities acted only through their guiding mind, Aitkens, and he should bear their share of the costs. As between Aitkens and Beyer, we conclude that a 90-10 split of the recoverable costs is more appropriate than the 80-20 split suggested by Staff. Therefore, Aitkens is responsible for $180,000 of the recoverable costs, and Beyer is responsible for $20,000.

V. CONCLUSION

[143] For the reasons given, we make the orders set out below.

Aitkens

[144] Against Aitkens, we order that:

- under s. 198(1)(d) of the Act, he must resign all positions he holds as a director or officer (or both) of any issuer, registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository, designated rating organization or designated benchmark administrator;

- with permanent effect:

  - under s. 198(1)(b), he must cease trading in or purchasing any security or derivative;

  - under s. 198(1)(c), all of the exemptions contained in Alberta securities laws do not apply to him;

  - under s. 198(1)(c.1), he is prohibited from engaging in investor relations activities;

  - under s. 198(1)(e), he is prohibited from becoming or acting as a director or officer (or both) of:

    - any issuer or other person or company that is authorized to issue securities; or

    - a registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository, designated rating organization or designated benchmark administrator;

  - under s. 198(1)(e.2), he is prohibited from becoming or acting as a registrant, investment fund manager or promoter; and

  - under s. 198(1)(e.3), he is prohibited from acting in a management or consultative capacity in connection with activities in the securities market;

- under s. 199, he must pay an administrative penalty of $600,000; and

- under s. 202, he must pay costs in the amount of $180,000.

Beyer

[145] Against Beyer, we order that:

- under s. 198(1)(d) of the Act, he must resign all positions he holds as a director or officer (or both) of any issuer, registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository, designated rating organization or designated benchmark administrator;

- for a period of 10 years from the date of this decision or until the administrative penalty set out below is paid in full, whichever is the later:
    - under s. 198(1)(b), he must cease trading in or purchasing any security or derivative;
    - under s. 198(1)(c), all of the exemptions contained in Alberta securities laws do not apply to him;
    - under s. 198(1)(c.1), he is prohibited from engaging in investor relations activities;
    - under s. 198(1)(e), he is prohibited from becoming or acting as a director or officer (or both) of:
        - any issuer or other person or company that is authorized to issue securities; or
        - a registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository, designated rating organization or designated benchmark administrator;
    - under s. 198(1)(e.2), he is prohibited from becoming or acting as a registrant, investment fund manager or promoter; and
    - under s. 198(1)(e.3), he is prohibited from acting in a management or consultative capacity in connection with activities in the securities market;
- under s. 199, he must pay an administrative penalty of $75,000; and
- under s. 202, he must pay costs in the amount of $20,000.

The Trust, 0865701, HCMI, SV Crossing and HV Landing

[146] In respect of the Trust, 0865701, HCMI, SV Crossing and HV Landing, we order, with permanent effect, that:

- under s. 198(1)(a) of the Act, all trading in or purchasing of securities or derivatives of the Trust, 0865701, HCMI, SV Crossing and HV Landing must cease;
- under s. 198(1)(b), each of the Trust, 0865701, HCMI, SV Crossing and HV Landing must cease trading in or purchasing any security or derivative;
- under s. 198(1)(c), all of the exemptions contained in Alberta securities laws do not apply to the Trust, 0865701, HCMI, SV Crossing and HV Landing;

- under s. 198(1)(c.1), each of the Trust, 0865701, HCMI, SV Crossing and HV Landing is prohibited from engaging in investor relations activities;
- under s. 198(1)(e.2), each of the Trust, 0865701, HCMI, SV Crossing and HV Landing is prohibited from becoming or acting as a registrant, investment fund manager or promoter; and
- under s. 198(1)(e.3), each of the Trust, 0865701, HCMI, SV Crossing and HV Landing is prohibited from acting in a management or consultative capacity in connection with activities in the securities market.

[147] This proceeding is concluded.

October 2, 2019

For the Commission:

"original signed by"
Tom Cotter

"original signed by"
Terry Allen, CFA

"original signed by"
Webster Macdonald, QC