ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Magneson, 2021 ABASC 129 **Date: 20210811**

Allan Robert Magneson, 1111108 Alberta Ltd., and New Wave Innovations Ltd.

Panel:	Kari Horn Steven Cohen Tom Cotter
Representation:	Carson Pillar for Commission Staff Shamsher Kothari for Allan Robert Magneson
Submissions Completed:	September 1, 2020
Decision:	August 11, 2021

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I. INTRODUCTION AND OVERVIEW

[1] In a notice of hearing issued May 2, 2018 (**NOH**), Alberta Securities Commission (**ASC**) staff (**Staff**) alleged that Allan Robert Magneson (**Magneson**), 1111108 Alberta Ltd. (**111 Alberta**), and New Wave Innovations Ltd. (**NWI**, and together with Magneson and 111 Alberta, the **Respondents**) contravened s. 93(b) of the *Securities Act* (Alberta) (**Act**) by engaging in a course of conduct that they knew or ought to have known perpetrated a fraud on NWI's investors.

[2] Particulars of the fraud allegation were outlined in the NOH and are discussed in further detail later in these reasons. Stated briefly, Staff alleged that Magneson misled investors about the use that would be made of the funds they invested in NWI. Instead of using those funds for NWI's business as represented, Magneson diverted the majority to his personal benefit, or to the benefit of members of his family. As a result, NWI lost the use of the funds, and its pecuniary interests were put at risk.

[3] A hearing into the merits of the allegations (**Hearing**) was held over six days, during which Staff tendered documentary evidence and called six witnesses: one member and one former member of investigative Staff, plus four NWI investors.

[4] Magneson was represented by legal counsel throughout the evidentiary portion of Staff's case. His counsel cross-examined Staff's witnesses and tendered documentary evidence through those witnesses, but withdrew from the record after Staff's case concluded. As discussed further herein, Magneson was then self-represented, and ultimately did not call any evidence or testify on his own behalf.

[5] Early in these proceedings, Magneson had different legal counsel than that who represented him at the Hearing. 111 Alberta was briefly represented by the same counsel, who received service of the NOH and Staff's disclosure on both parties' behalf. Thereafter, 111 Alberta was not represented and did not participate in the Hearing. NWI was notionally represented by a director, TD, for the purpose of accepting service of the NOH and receiving Staff's disclosure. However, TD (who was also an NWI investor and a Staff Hearing witness) did not represent NWI at the Hearing, and it did not otherwise participate.

[6] We received written submissions on the merits of the allegations from Staff and from Magneson, and heard their oral arguments on September 1, 2020. No submissions were made on behalf of NWI or 111 Alberta.

[7] After considering the evidence and the submissions, we find that the Respondents breached the Act as alleged by Staff. Our reasons for that finding follow.

II. PROCEDURAL HISTORY

[8] A number of applications were heard and decided between the commencement of this matter and the conclusion of argument. Some of these occurred during hearing management sessions that are not public pursuant to s. 11.2 of Rule 15-501 *Rules of Practice and Procedure for Commission Proceedings* (**Rule 15-501**), unless otherwise ordered by a panel. During the Hearing on September 1, 2020, we ordered that the transcripts of all hearing management sessions held in relation to this matter form part of the public record of these proceedings.

[9] On notice to the Respondents – who were represented by counsel – Staff applied for an interim cease trade order (**ICTO**) against the Respondents on November 10, 2017, pursuant to ss. 33 and 198 of the Act. After finding that Staff had established a *prima facie* case of fraud, the ICTO was issued. It is cited as 2017 ABASC 172, and provides that:

> (a) all trading in securities of NWI must cease, except for trades made in reliance on the offering memorandum prospectus exemption under National Instrument 45-106 *Prospectus Exemptions*;
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> (b) Magneson must cease trading in all securities and all exemptions contained in Alberta securities laws do not apply to him, except that he is not precluded from trading in securities through a registrant (who has first been given a copy of this order) in one or more accounts maintained with that registrant; and
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> (c) Magneson is prohibited from becoming or acting as a director or officer (or both) of NWI.

[10] The ICTO was not appealed and no application for variance was brought. It has therefore remained in place since its issuance, although it will cease to have effect once these proceedings are fully and finally determined. At that time, we may issue other orders to replace it.

[11] On July 11, 2018, with the agreement of Magneson's counsel at the time, the Hearing was scheduled to commence on January 7, 2019. Although Magneson was apparently aware in July that that counsel would not be representing him at the Hearing, in November 2018, he was still in the process of retaining new counsel. On November 28, 2018, Magneson applied for an adjournment of the January 2019 Hearing dates until later in 2019 to accommodate his new lawyer's schedule. Despite the objection of Staff, we granted the application. The Hearing ultimately commenced on July 26, 2019.

[12] Staff completed their case on July 31, 2019, with the exception of concluding the cross-examination of one of their witnesses, TD. During cross-examination, Magneson's counsel elicited evidence that TD had copies of certain communications with potential relevance to the matters at issue. Accordingly, Magneson applied for and was granted an order for disclosure of those communications, and the Hearing was adjourned pending their receipt and scheduling a date for continuance. TD re-took the witness stand and Magneson's counsel completed his cross-examination on October 23, 2019.

[13] In the interim, in August 2019 Magneson brought an application for an order compelling Staff to disclose additional documents and compelling certain witnesses to appear at the Hearing to testify about those documents. He argued that that evidence would be relevant to a separate application he had pending alleging breaches of his rights under the Canadian *Charter of Rights and Freedoms* (**Charter**) and the Alberta *Bill of Rights* (**Charter Application**). For the reasons set out in an oral ruling we delivered on October 10, 2019, we dismissed the application, apart from confirming disclosure of several documents Staff had already agreed to disclose prior to the ruling.

[14] Also in October 2019, Magneson filed an amended Notice of Constitutional Question relating to his outstanding Charter Application, which he had filed initially just prior to the commencement of the Hearing in July 2019. He contended that his rights to privacy and a fair hearing as well as his right to be secure from unreasonable search and seizure were violated when the ASC disclosed an affidavit sworn in support of the ICTO application by Staff investigative lawyer, Eric Keller (**Keller**; **Keller Affidavit** or **Affidavit**). Although the Affidavit was already a public document by virtue of s. 11.1 of Rule 15-501, the disclosure had been made to a member of the public in response to a request under the Alberta *Freedom of Information and Protection of Privacy Act*. Written submissions on the Charter Application were provided by both Magneson and Staff, and we issued an oral ruling on December 19, 2019.

[15] For the reasons set out in that ruling, we dismissed the application. However, to address Magneson's concern (repeated in his closing submissions following the Hearing) that the evidence of any Hearing witnesses who read the Keller Affidavit before testifying would be unfairly "tainted" by what they read, we indicated that we were prepared to assume – unless proved otherwise – that all of the investor witnesses had access to it before testifying. We therefore indicated that we would weigh their evidence accordingly in arriving at our decision on the merits of the allegations in the NOH, and we have done so.

[16] Earlier in the Hearing, Magneson's counsel had suggested that Magneson might not enter a defence case, as he and Staff counsel were in discussions concerning a possible Agreed Statement of Facts. Later, counsel indicated that Magneson would not make that decision until after he received our ruling on his Charter Application. After we delivered that ruling, we immediately convened a hearing management session to discuss Magneson's decision, and, if necessary, to schedule additional Hearing dates.

[17] Magneson's counsel indicated he still needed to confirm his instructions in that regard. He also indicated that he had no availability for the continued Hearing until the fall of 2020. We advised that a further hiatus of nine months was not in the public interest, and that if counsel could not find availability earlier in 2020, Magneson should consider finding alternate counsel. A further hearing management session was scheduled for January 6, 2020 to give counsel time to obtain instructions and reconsider scheduling.

[18] On January 6, 2020, Magneson's counsel advised that Magneson had decided to enter a defence case, but counsel's availability in 2020 was still extremely limited. After further discussion, four non-consecutive dates in June and July 2020 were set for Magneson's case to accommodate his counsel's calendar.

[19] However, two events intervened. The first was the emergence of the COVID-19 pandemic and the Alberta government's imposition of certain public health protocols and restrictions. The second was a letter Magneson's counsel sent to the ASC Registrar on April 27, 2020 advising that he wanted to withdraw as counsel of record due to a breakdown in the solicitor-client relationship. We granted his application to withdraw on April 28, 2020 and issued an order to that effect.

[20] Subsequently, we scheduled a hearing management session for the purpose of discussing the continuation of the Hearing by remote technology in light of COVID-19. In email correspondence to Staff that was later copied to this panel, Magneson indicated that he needed

time to retain new counsel, which he had been unable to do because of the pandemic. He also indicated that he opposed proceeding with the Hearing by remote means.

[21] At hearing management on May 6, 2020, we confirmed that the ASC was proceeding with hearings during the pandemic by remote means such as teleconference and video conference. Magneson indicated that he believed he had a constitutional right to a public, in-person hearing with all parties present in the same room together, but declined to discuss the issue further without legal advice. When pressed on his efforts to find new counsel, he indicated he had been unable to pursue it because he would not retain someone unless he could meet them in person first. Therefore, while he indicated that he was not applying for an adjournment, Magneson's position amounted to a refusal to proceed until the pandemic ended so he could meet with counsel in person, then have what he considered to be an in-person hearing with in-person testimony from witnesses that would include at least one resident of the United States (**U.S.**) then facing a closed border due to COVID-19.

[22] Staff objected to any further delays in completing the Hearing, noting that it had already been subject to numerous delays since the original Hearing dates in January 2019, largely to accommodate Magneson's previous counsel. However, in the interest of balancing fairness to Magneson against the public interest in timely resolution of serious allegations, we adjourned the June 2020 Hearing dates and directed that the Hearing would recommence on July 20, 2020. That gave Magneson an additional seven weeks and a total of nearly three months to find a replacement for the counsel who withdrew at the end of April 2020. Given the uncertain timeline for resolution of the COVID-19 pandemic, we rejected as unreasonable Magneson's contention that he could not retain counsel without a face-to-face meeting, and concluded that this did not justify additional delay.

[23] At a further hearing management session on May 22, 2020, Magneson advised that he still had not retained new counsel, and declined to answer the panel's questions regarding his efforts to do so. Staff argued that the continuation of the Hearing should not be conditional on Magneson finding a lawyer, and that at some point it should be assumed he would not be represented. We concluded that if Magneson did not have new counsel by July 20, 2020, we would assume that he intended to represent himself for the balance of the Hearing.

[24] During the same session, we asked Magneson whether he could advise who his witnesses would be and how many he would call. He replied that he still believed he had a right to a hearing his witnesses could attend in person. We explained that while he had a right to be heard, that did not mean an in-person hearing with all parties in the same room together, and that the ASC's Rule 15-501 provides that the hearing panel will determine the format of the hearing. We then inquired whether Magneson had any further pre-Hearing disclosure to make to Staff as required by Rule 15-501, or if he intended to rely on the pre-Hearing disclosure his prior counsel had provided on his behalf. Magneson indicated that he could not respond to that question or the issue of whether he was obliged to participate in a remote or virtual Hearing without first consulting legal counsel.

[25] To avoid further unreasonable delay, we advised Magneson that we would not leave the proceedings in abeyance indefinitely. We set a deadline of June 19, 2020 for him to confirm whether he intended to proceed based on the pre-Hearing disclosure already provided to Staff prior to the commencement of the Hearing almost a year earlier, or if he had additional disclosure to

make. We further advised Magneson that if he did not comply with the June 19, 2020 deadline, we would deem it an election not to enter any evidence and proceed to set a schedule for closing submissions. These directions were confirmed in an email to the parties on May 22, 2020, which included the following (original emphasis):

> - The panel directed Mr. Magneson to deliver to Staff, **no later than noon on June 19, 2020** the following:
>
> - any additional pre-hearing disclosure, including the following:
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> 1. a witness list with the names of any additional witnesses Mr. Magneson intends to have testify at the hearing;
> 2. a summary of what each witness is expected to say that is relevant to the allegations in the notice of hearing; and
> 3. any additional documents Mr. Magneson intends to put before the hearing panel as evidence in the hearing.
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> OR, if there is no additional pre-hearing disclosure,
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> - confirmation that the pre-hearing disclosure previously provided to Staff is accurate; specifically, Mr. Magneson is to specify any witnesses he no longer intends to have testify and any documents he no longer intends to put before the hearing panel.
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> - The panel further directed that Mr. Magneson will be deemed to have elected not to call evidence in the event that he does not comply with the above direction by the specified deadline, in which case the evidentiary portion of the hearing will have concluded and the panel will proceed to set a timetable for the delivery of written submissions by Staff and Mr. Magneson.

[26] On June 18, 2020, Magneson sent a letter to the ASC Registrar via email referencing the above-noted directions. However, instead of providing the information required, he reiterated that he still did not have legal counsel, could not determine whether he had additional pre-Hearing disclosure to make without consulting counsel, and that he "at no time agreed to or consented to the [H]earing being held on July 20, 2020". He also reiterated that he believed he was "entitled to a full public hearing where [he had] the right to be personally present and call [l]ive evidence with witnesses in attendance", and did "not agree with nor consent to a hearing that is conducted remotely or electronically".

[27] In response, Staff sent email correspondence arguing that Magneson had failed to respond to the directions we gave on May 22, 2020, and that Magneson did not have the right to decide "when, if and how the [H]earing happens". They further pointed out:

> Mr. Magneson has consistently been provided with accommodations to ensure he receives a reasonable opportunity to participate in and be heard in this proceeding. This willingness to accommodate Mr. Magneson has resulted in a process that has been eminently fair, but hardly efficient. It has been more than two years since the Notice of Hearing was issued and close to a year since Staff put in its case.
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> In line with the Panel's May 22 direction, Staff's position is that the evidentiary portion of the hearing should conclude and a timetable be set for written submissions. It is simply not in the public interest to further delay a resolution of the allegations in the Notice of Hearing.

[28] We agreed with Staff. Accordingly, on June 22, 2020 we set and communicated the timetable to the parties by email sent through the ASC Registrar. That email read as follows (original emphasis):

> The panel has determined that Mr. Magneson has not complied with its direction of May 22, 2020. Therefore, as previously advised, Mr. Magneson is deemed to have elected not to call evidence and the evidentiary portion of the hearing has concluded. As a result, the previously scheduled hearing dates of July 20, 2020 through to and including July 25, 2020 are released. While the typical timeline for the delivery of written submissions contemplates three weeks for Staff, three weeks for the Respondent, and one week for Staff's reply, the panel has allowed Mr. Magneson an additional two weeks in accordance with the following timeline:
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> - Staff is to provide their written submissions to Mr. Magneson and (through the Registrar) to the panel by **16:00 on Monday, July 13, 2020**;
> - Mr. Magneson is to provide his written submissions to Staff and (through the Registrar) to the panel by **16:00 on Monday, August 17, 2020**; and
> - Staff is to provide any written reply submissions by **16:00 on Monday August 24, 2020**.
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> To the extent either of the parties elects to make oral submissions, or in the event the panel has questions for either of the parties, such oral submissions will be heard at **09:00 on Tuesday, September 1, 2020**. The parties are to notify the Registrar no later than **16:00 on Wednesday, August 26, 2020** if they wish to make oral submissions. If neither party so elects, and the panel has no questions arising from the written submissions, the scheduled hearing date will be released.

[29] Despite the foregoing communications and his position concerning the Hearing, Magneson complied with the timetable for closing submissions and, as mentioned, provided written submissions and appeared by teleconference to provide oral submissions. However, he raised arguments with respect to his purported lack of opportunity to present a defence, as discussed later in these reasons.

III. REASONABLE APPREHENSION OF BIAS

[30] At the outset of the Hearing on July 26, 2019, Magneson's counsel argued that Vice-Chair Cotter should not participate as a member of this panel because it would raise a reasonable apprehension of bias. This was because Vice-Chair Cotter chaired the otherwise differently-constituted panel that heard Staff's ICTO application in November 2017 (**ICTO Panel**). In counsel's submission, Vice-Chair Cotter could be or could appear to be unduly influenced by the fact that he had already heard certain evidence and concluded that the evidence was sufficient to warrant an ICTO.

[31] Magneson's counsel acknowledged that triers of fact are often required to disabuse themselves of certain evidence or information that should not form part of the evidence and information assessed in deciding a case (see, e.g., *Re Northern Securities Inc.*, 2013 LNONOSC 1023 at para. 331). However, he submitted that this situation was different for two reasons.

[32] First, Staff's ICTO application relied primarily on the extensive evidence in the Keller Affidavit and exhibits, which, according to counsel, "contain[ed] basically the sum total" of Staff's case against the Respondents. Further, in his view, the Affidavit included certain assertions that were inaccurate.

[33] Second, to decide the ICTO application, Vice-Chair Cotter was required to weigh Staff's evidence to determine if Staff had met their burden to establish a *prima facie* case of fraud sufficient to lead to the conclusion that it was in the public interest to issue the ICTO. The ICTO Panel then issued what Magneson's counsel described as a very detailed, robust decision finding that the burden had been met.

[34] In response, Staff opposed the application for disqualification and noted its lateness given Vice-Chair Cotter's participation on this panel at the preceding hearing management sessions. They also argued that Vice-Chair Cotter could disabuse himself of the preliminary evidence he saw and the preliminary conclusions he drew previously.

[35] After deliberation, we dismissed Magneson's application to exclude Vice-Chair Cotter from this panel. We did not find that it raised a reasonable apprehension of bias in the circumstances, and indicated that our reasons for that ruling would be included in this decision. Magneson raised the issue and some of the same arguments again in his written closing submissions, but we disregarded those comments because the decision had already been made. In any event, his comments would not have altered our analysis.

[36] To arrive at our decision on the application, we applied the well-known test for reasonable apprehension of bias, which was succinctly set out by the Alberta Court of Appeal (**ABCA**) in *Rainbow Beach Developments Inc. v. Parkland (County)* (2013 ABCA 205 at para. 12; see also, more recently, *Yee v. Chartered Professional Accountants of Alberta*, 2020 ABCA 98 at para. 29(e)):

> The test for reasonable apprehension of bias on the part of a tribunal is whether a reasonable person, viewing the matter realistically and practically, and after having obtained the necessary information and thinking the matter through, would have a reasonable apprehension of bias . . . .

[37] The burden of proof on a balance of probabilities is on the party alleging the reasonable apprehension of bias. It is a high threshold because there is a strong presumption that adjudicators are impartial (*Wewaykum Indian Band v. Canada*, 2003 SCC 45 at paras. 59-60, 76; *Bizon v. Bizon*, 2014 ABCA 174 at para. 62; in the securities commission context, see *Northern Securities* at para. 76, citing *E.A. Manning Ltd. v. Ontario Securities Commission* (1995), 23 O.R. (3d) 257 (CA) at p. 267). As stated in *Boardwalk REIT LLP v. Edmonton (City)* (2008 ABCA 176 at para. 29), "[t]o have any legal effect, an apprehension of bias must be reasonable, and the grounds must be serious, and substantial. Real likelihood or probability is necessary, not a mere suspicion" (see also *R. v Lupyrypa*, 2011 ABCA 324 at para. 6). Moreover, "[t]he test of appearance to a reasonable neutral observer does not include the very sensitive or scrupulous conscience" (*Boardwalk*, *ibid.*).

[38] With these principles in mind, we considered the law applicable to ICTO applications and the ICTO ruling in this case. In *Re York-Rio Resources Inc.* (2009 ABASC 112), the panel observed that orders under s. 33 of the Act (including ICTOs) "are merely interim protective measures; they are not sanctions for misconduct in the same sense as orders that might be made after an investigation is completed, a hearing held, and actual misconduct found on the basis of the evidence and argument presented at the hearing" (at para. 11).

[39] More recently, in *Re Cohodes* (2018 ABASC 161), it was confirmed that, "[t]he threshold Staff must meet on an application under s. 33 is relatively low: they need only establish on a *prima facie* basis that Alberta securities laws have been contravened as alleged" (at para. 33). This is "a lesser burden than would be required at a hearing on the merits" (at para. 56).

[40] In *Re Omega Securities Inc.* (2017 ONSEC 42), the Ontario Securities Commission (**OSC**) also came to the conclusion that Staff's evidentiary burden is lower on an interim application than it is to prove allegations at a merits hearing (at para. 23). They went on to state that in the context of an application for a temporary order, a *prima facie* case is established where (at para. 25):

> a. the available evidence supports the material parts of the allegation(s) made by Staff; and
>
> b. in the opinion of the Commission, the evidence appears to be credible and reliable, having regard to all of the circumstances, including its source, detail, and the presence or absence, at this preliminary stage, of any explanations or evidence that may contradict it. [emphasis added]

[41] Based on the limited evidence led, the ICTO Panel indicated they were "satisfied on a *prima facie* basis that a significant portion of the funds raised by [NWI] were diverted to the personal use of Magneson and members of his family". They were also "satisfied on a *prima facie* basis that [NWI's] investors did not authorize that use of funds, and instead expected their money to be spent directly on the [D]rill project" (as defined and described later in these reasons). In the result, the panel concluded that a *prima facie* case for fraud had been made out in accordance with the test set out by the Supreme Court of Canada (**SCC**) in *R. v. Théroux* ([1993] 2 S.C.R. 5).

[42] In other words, the ICTO Panel reiterated throughout the ruling that all findings had been made "on a *prima facie* basis": while the evidence raised more than a suspicion for the purposes of the ICTO, it was not necessarily conclusive of anything for the purposes of determining the allegations in the NOH on a balance of probabilities. Staff's evidence at the ICTO application was limited, and both untested and unopposed. The evidence adduced on behalf of the Respondents to the application was an affidavit sworn by TD as a director of NWI on November 9, 2017. That affidavit focused solely on the viability of the Drill technology and the need for NWI to be able to continue to raise funds for its development and optimization so that existing investors' interests would not be jeopardized. It did not address the allegations in the NOH this panel is to determine on their merits: whether a fraud was perpetrated by some or all of the Respondents as a result of undisclosed and unauthorized use of funds.

[43] Therefore, we concluded that the ICTO Panel was required to do little in the way of weighing or assessing the evidence or the credibility of anyone who provided that evidence. It made an interim ruling in the absence of opposing evidence and did "not decid[e] on the ultimate merits of Staff's allegations" (*Omega* at para. 13). As the OSC explained in *Omega* (at para. 27):

> Ultimate determinations of credibility or reliability are not to be made on an application for a temporary order. Those are to be made by a hearing panel when the hearing on the merits takes place. Equally, even if the evidence presented is credible or reliable, ultimate determinations as to whether that evidence is sufficient, in fact or in law, to prove Staff's allegations are to be made when the hearing on the merits takes place.

[44] In the result, we were satisfied that Magneson had not met the test to establish a reasonable apprehension of bias. In the case cited in his written submissions, *KCP Innovative Services Inc. v. Alberta (Securities Commission)* (2008 ABQB 8; rev'd. on other grounds 2009 ABCA 102), the Court observed (at para. 12) that even where hearing panels are identical, that does not lead automatically to a finding of bias or apprehension of bias. The SCC in *Wewaykum* (at para. 77) was cited in support, which stated as follows:

> . . . there are no "textbook" instances. Whether the facts, as established, point to financial or personal interest of the decision-maker; present or past link with a party, counsel or judge; earlier participation or knowledge of the litigation; or expression of views or activities, they must be addressed carefully in light of the entire context.

[45] In this context, we found that the ICTO Panel's task was different than the task before this panel, which now has the benefit of all of the evidence, tested by cross-examination, and final argument based on that evidence from both of the parties that participated in the Hearing. It is not likely or probable that Vice-Chair Cotter was tainted by what he heard at the ICTO application, and he remained in a position to determine Staff's allegations fairly based on the full record of the proceedings.

IV. OTHER PRELIMINARY MATTERS

A. Standard of Proof

[46] The standard of proof for ASC enforcement matters is not the criminal standard, beyond a reasonable doubt, it is the civil standard, proof on a balance of probabilities (*Re Arbour Energy Inc.*, 2012 ABASC 131 at para. 36; *Re De Gouveia*, 2013 ABASC 106 at para. 88). A hearing panel "must be satisfied that there is sufficiently clear, convincing and cogent evidence that the existence or occurrence of any alleged fact required to be proved is more likely than its non-existence or non-occurrence" (*Arbour* at para. 38; see also *F.H. v. McDougall*, 2008 SCC 53 at paras. 46, 49). As stated in *De Gouveia* (*ibid.*):

> Staff bear the burden of proof in a Commission enforcement proceeding such as this. The applicable standard of proof is the balance of probabilities, determined on the basis of clear and cogent evidence. Stated differently, to succeed on the merits of their allegations, Staff must demonstrate that it is more likely than not that misconduct occurred as alleged.

[47] A panel may draw inferences from the evidence as a whole (*Arbour* at para. 39), including any circumstantial evidence. However, inferences must be supported by evidence and not based on speculation (*Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 at paras. 26-28).

B. Relevance, Weight, and Use of Hearsay Evidence

[48] Section 29(e) of the Act provides that an ASC hearing panel "shall receive that evidence that is relevant to the matter being heard", and s. 29(f) provides that "the laws of evidence applicable to judicial proceedings do not apply". Accordingly, all relevant evidence – including hearsay evidence – is admissible, subject to a panel's discretion and the rules of natural justice and procedural fairness (*Lavallee v. Alberta (Securities Commission)*, 2010 ABCA 48 at paras. 14-18; *Arbour* at para. 45; see also *Maitland Capital Ltd. v. Alberta (Securities Commission)*, 2009 ABCA 186).

[49] In arriving at our decision, we assessed the weight to be given to the evidence led at the Hearing. In doing so, we considered available indicators of reliability, including whether the

evidence was corroborated by other evidence (*Arbour* at paras. 46, 53-54). Staff are entitled to adduce evidence collected under ss. 40 and 42 of the Act during their investigation, and often seek to enter into evidence transcripts of witness interviews they conducted (*Arbour* at para. 49). Indicators of the reliability of such transcripts include whether the witness was either sworn or affirmed, and whether the witness was represented by legal counsel (*Arbour* at para. 54; see also *Re TransCap Corp.*, 2013 ABASC 201 at para. 65 and *Alberta (Securities Commission) v. Brost*, 2008 ABCA 326 at para. 34 (aff'g. *Re Capital Alternatives Inc.*, 2007 ABASC 79)).

[50] In *Re Kapusta* (2011 ABASC 322), the hearing panel stated as follows (at para. 10):

> The nature of the Investigative Interviews leads us to handle them with caution. Such evidence will generally be given less weight than direct evidence in the form of sworn or affirmed hearing testimony. Unlike testimony, transcripts of interviews conducted outside a hearing do not enable a hearing panel to observe interviewees as they give their interview evidence, or allow for testing or clarification of the interviewees' evidence (such as seemingly inconsistent statements) through cross-examination by other parties or panel questioning. The circumstances of the interviews must also be considered.

[51] The interviewees in that case had each been sworn or affirmed before giving their interview evidence, which the panel described as "an indicator of seriousness that we consider would have been appreciated by the interviewees as they were interviewed" (at para. 11). In addition, each of the interviewees had given testimony at the hearing and were available to be cross-examined on their interview evidence. Where their interview evidence was not tested, the panel said that they gave that evidence "little or no weight", and did "not rely exclusively on any Investigative Interview content in reaching [their] conclusions or making [their] findings" (*ibid.*).

[52] In this case, the only full investigative interview transcript entered into evidence during the Hearing was that of Magneson, who was interviewed by Staff on August 22, 2017 (**Interview**). Magneson gave his Interview evidence under oath, and was accompanied by counsel (albeit different counsel than that who represented him at the Hearing). Magneson did not testify at the Hearing, but could have if he had wanted to augment or explain anything he said during his Interview. He could also have called other evidence, whether through Staff's witnesses or his own. Moreover, Magneson's counsel submitted during the Hearing that the Interview transcript should be accepted for the truth of its contents, although he took issue with the weight the panel should assign to certain exhibits entered at the Interview that Magneson had not personally prepared.

[53] In view of the foregoing, while we remained mindful that Magneson was not cross-examined before us, we treated his Interview evidence similarly to the *vive voce* evidence given at the Hearing, especially where it addressed non-controversial matters or was consistent with other reliable evidence. Unless otherwise indicated, all references in these reasons to statements made by Magneson or to Magneson's evidence are references to the Interview.

[54] As for the short excerpts from the investigative interviews of Staff's investor witnesses that were in evidence as exhibits to the Keller Affidavit, we refer to them in these reasons where relevant. However, since they were only excerpts and therefore did not provide the full context of the discussion, we did not rely on them unless they were corroborated by or consistent with other reliable evidence.

[55] As mentioned, when assessing the weight to ascribe to the evidence given by Staff's investor witnesses, we assumed (unless proved otherwise), that each had access to the Keller Affidavit before they testified. We also took into account that TD had access to all of Staff's pre-hearing disclosure before testifying, having received it as an NWI director.

C. Conflicting Evidence and Credibility

[56] During our deliberations, it was necessary for us to assess the credibility of the witnesses and consider certain conflicting evidence. We were guided by the following statement from the British Columbia Court of Appeal's decision in *Faryna v. Chorny* ([1951] B.C.J. No. 152 at para. 11):

> The credibility of interested witness[es], particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[57] We therefore evaluated the overall consistency of the evidence and considered whether it was logical in the circumstances. We also noted the ABCA's caution in *Walton* (at para. 36) that disbelief of a witness does not necessarily mean that the opposite of that witness's evidence is the truth. If such a conclusion is to be drawn, it must be based on other evidence.

[58] Generally, we found that the witnesses who testified at the Hearing were reliable, especially where their evidence was in harmony with other evidence. Some witnesses could not specifically remember every detail of the relevant events, but we attributed that to the passage of time rather than any intent to deceive.

D. Currency

[59] This matter involved transactions in both Canadian dollars (**CAD**) and U.S. dollars (**USD**). Unless otherwise indicated, all dollar amounts referred to in these reasons are in CAD and are rounded to the nearest dollar.

V. BACKGROUND

A. Parties

[60] Magneson is a resident of Sherwood Park, Alberta. He is married, and has three adult daughters with his spouse (**Mrs. Magneson**, and together with Magneson, the **Magnesons**). Magneson holds two undergraduate degrees, and was a dairy farmer before he founded NWI.

[61] NWI was incorporated in Alberta as a numbered company on July 10, 2003, and changed its name to NWI on October 2, 2003. Magneson was NWI's founder and guiding mind, as well as its president and sole director from incorporation through the time material to this matter, June 1, 2011 to December 31, 2016 (the **Relevant Period**). NWI was struck from the Alberta Corporate Registry on January 2, 2018.

[62] On founding NWI, the Magnesons were each issued six million Class A voting shares (**Shares**), although Magneson said at his Interview that Mrs. Magneson was not involved in NWI's

business. Records indicated that Mrs. Magneson's six million Shares were transferred to Magneson in December 2012.

[63] The Shares are "securities" as defined in the Act (see ss. 1(ggg)(i) and (v)).

[64] NWI was in the business of developing and bringing to market a low-decibel dental hand piece known as the Magna 7 – a dental drill with air-bearing turbine technology that would not emit a high-pitched whine like a standard dental drill (the **Drill**). NWI worked on the development of the Drill with a U.S.-based engineering company called Rotor Bearing Technology and Software, Inc. (**RBTS**). The evidence indicated that Magneson was the primary inventor of the Drill technology, but worked with other specialized manufacturing companies as consultants for its development.

[65] 111 Alberta was incorporated in Alberta on June 2, 2004. Corporate searches indicated that while Mrs. Magneson was originally 111 Alberta's sole director and shareholder, in May 2017 the records were retroactively amended to indicate that Magneson was its sole director and shareholder effective June 4, 2004, and remained so throughout the Relevant Period. Magneson acknowledged during his Interview that he was 111 Alberta's guiding mind from 2004 onward, and authorized all of its activities. He performed his research and development work for NWI through 111 Alberta.

[66] Magneson also founded New Wave Innovations (USA) Inc. (**NWI US**) in November 2003, and was its guiding mind from its inception through the Relevant Period. A document given to some NWI shareholders explained that NWI US had been incorporated as a holding company to separate the intellectual property (presumably, from NWI) for legal reasons. Magneson further explained that while he and RBTS invented the Drill and co-owned the patent, RBTS assigned its ownership interest to him. He in turn licenced the associated rights to NWI US, which then licenced the rights back to NWI under a Technology Licensing Agreement.

[67] Magneson described NWI US as a shell company, and said it did not have any expenses.

B. The Investment

[68] During the Relevant Period, NWI and Magneson raised funds by selling Shares to numerous members of the public, including Alberta residents. However, it was not entirely clear exactly how much money was raised.

[69] According to Magneson's written submissions, approximately $6,500,000 was raised between June 1, 2011 and December 31, 2016. At his Interview, he estimated that a total of approximately $6,900,000 to $7,000,000 had been raised between 2006 and the end of 2016, which correlates roughly to a Share transaction register Magneson provided during the investigation. That document indicated that NWI raised $6,893,467 from the sale of Shares issued from treasury since incorporation: $2,313,244 prior to the Relevant Period, and another $4,580,223 during the Relevant Period. That in turn correlates closely with numbers shown in the NWI financial statements for the years 2011 through 2016 that were reviewed – but not audited – by Deloitte LLP (**Deloitte**) in 2017 (**Unaudited Statements**). According to the Unaudited Statements, as of December 31, 2016, NWI's total Share capital was $6,893,466, net of redemptions. The Unaudited Statements further indicated that $2,133,244 of the total had been raised by the end of 2010, which would mean that $4,760,222 was raised from 2011 through the end of 2016, net of redemptions.

[70] The price paid for the Shares varied. Magneson explained that different investors negotiated different prices at different times, depending on NWI's need for funding and the amount of money the investor was willing to invest. In some instances, those who invested more money got a lower price per Share.

[71] Magneson indicated that NWI's initial investors were his friends and acquaintances, and that he did not advertise for or otherwise solicit investments. He said every investor completed a subscription agreement, and their money was deposited to NWI's bank account. Two blank forms of subscription agreement were in evidence, as provided to investigative Staff by Magneson's counsel. Each version states on its first page that investment funds should be made payable to NWI.

[72] According to Magneson, if prospective investors were not among his friends, family, or business associates, he established that they were accredited. He acknowledged that he did not report any of these transactions to the ASC as required by securities laws, and explained that he had not been aware of that requirement. He did not obtain legal advice before selling the Shares, and said he did not have counsel during the Relevant Period.

[73] Even though all investment funds were paid to NWI, not all Shares sold to NWI's third-party investors were issued from the company's treasury. A record provided by Magneson indicated that between 2011 and 2016, Magneson sold 5,142,865 Shares from his personal holdings to third parties. Magneson explained that he did so to avoid dilution, and said he told investors when he was selling them Shares from his holdings and not from treasury. Despite the fact that he was selling his personal Shares, he said he told the investors their payments should be made to NWI, because their funds would be used by NWI for development of the Drill.

[74] Magneson maintained during his Interview that whenever he met with prospective investors, he gave them a presentation about the Drill technology, but did not provide them with any written information (such as a term sheet) about the investment. He said that he told them there were no guarantees as to the time frame within which the Drill might be completed and investment returns might be realized (if ever), or what returns might be expected. In response to a request during the investigation for copies of any documentation given to NWI investors to provide them with information before investing, Magneson's counsel provided only the two forms of subscription agreement mentioned.

[75] However, since a group of what Magneson described as "dissident" investors pressured him after they invested to give them an idea of what the company might eventually be worth, he said he had NWI's bookkeeper prepare some draft projections. Magneson acknowledged that he provided the projections to a small number of people, but said he did not know what the numbers were based on, and explained to anyone who received them that they should not rely on them because he felt they were unrealistic. He denied that he ever gave anyone the projections before they invested, because he did not want them to think that he was trying to lure them into investing.

[76] Magneson admitted that he did not hold a meeting of NWI shareholders until 2017, as he did not realize such meetings were necessary under the law. Instead, he claimed that he gave investors monthly updates on the progress developing the Drill. He also acknowledged that he did

not provide financial statements to any investors until 2017, after Deloitte completed its review engagement for the statements covering the prior 10 years.

[77] As of the date of Magneson's Interview, the Drill was still under development. However, Magneson stated that he firmly believed it works, and gave a prototype to his lawyer, who apparently took it to a dentist to try out and film its operation. There was no evidence that NWI ever reached the point of manufacturing or selling the Drill.

[78] According to the Unaudited Statements, by the end of 2016, NWI had an accumulated deficit of $7,003,077, and Deloitte added a going concern note.

VI. ADDITIONAL EVIDENCE

A. Staff Investigators

[79] As mentioned, Keller is a Staff investigative lawyer and was the primary investigator involved in this matter. He was assisted by Sean Bonazzo (**Bonazzo**), a former Staff investigative analyst. Bonazzo was responsible for obtaining and analyzing bank records for NWI and 111 Alberta, and sat in on some of the interviews Keller conducted, including Magneson's Interview.

[80] In addition to the Magneson Interview and formal interviews of several NWI investors – including those who testified at the Hearing – Keller testified that he spoke to four other NWI investors by telephone. He took notes of the conversations, and those notes were entered into evidence. Given that these investors were not formally interviewed and did not testify at the Hearing, the notes are of limited utility, especially since Keller acknowledged that they are not a verbatim representation of what was said. The notes indicated the following:

- Each investor was asked how much they invested and when. All four said they paid their investment funds to NWI, with the exception of one investor who said that he wrote one of his two investment cheques to NWI and the other to 111 Alberta.

- None of the four investors was sure whether they purchased Shares from treasury or from Magneson's personal holdings, although one thought it was the latter because Magneson told her that NWI was "out of" Shares to sell.

- All four investors had somewhat different answers when asked what they were told or what they understood about how their investment would be used:

    - One said she did not recall discussing with Magneson how he was going to get paid for his efforts, but assumed he would not get paid until the Drill was sold. She did not recall Magneson saying some of the investment might be paid to him personally.

    - One said he thought his investment would be used to develop the Drill. While he knew Magneson needed to be compensated for his time, he did not think Magneson could use the investment for personal reasons.

- One thought his investment would be used for marketing and making prototypes of the Drill. He and Magneson did not discuss how Magneson would get paid, but he did not think Magneson could use the investment for personal reasons.

- One was not sure what his funds would be used for, but said he thought it would be to take the Drill to the next stage. Again, he and Magneson did not discuss how Magneson would be paid, but he said he assumed all investment funds would go to the "bottom line". Keller acknowledged that he did not ask this investor what he meant by that.

[81] On cross-examination, Keller acknowledged that these investors could have had different ideas about what constituted a personal use of funds by Magneson, but he did not inquire into the specifics.

[82] Keller testified about the freeze orders Staff obtained from the Executive Director of the ASC in the fall of 2017, which affected four properties owned by one or both of the Magnesons. According to the affidavit Keller swore in support of the freeze order application, Magneson was asked during his Interview about certain payments from 111 Alberta's bank account. Magneson identified a number of payees who received funds in relation to the Magnesons' personal real estate holdings. This included a couple from whom the Magnesons once leased their personal residence in Sherwood Park, several mortgage companies that held mortgages on properties owned by one or both Magnesons (including two other Sherwood Park homes occupied by two of their daughters and a recreational property in Long Lake, Alberta), and several lawyers and law firms that appeared to have been involved in the Magnesons' real estate transactions.

[83] Bonazzo testified about his work analyzing the bank records for NWI and 111 Alberta, which he obtained from the companies' bank. Both of the Magnesons were authorized signatories on the accounts, even though Magneson said during his Interview that Mrs. Magneson was not involved with NWI, and that he took over 111 Alberta in 2004.

[84] Bonazzo compiled and categorized the banking information and prepared spreadsheets summarizing the credits to and debits from NWI's CAD and USD accounts during the Relevant Period, as well as the credits to and debits from 111 Alberta's account. Staff referred to this as a source and use of funds analysis (**Source and Use Analysis**).

B. Magneson Interview

[85] When questioned about NWI's use of investor funds and what he told investors about how their funds would be used, Magneson indicated that the answer to both was research and development of the Drill. Funds were either paid to RBTS and other contractors and subcontractors, or to himself (directly or through 111 Alberta) for expenses and compensation for the research and development work he performed. As his counsel explained in correspondence to Keller:

> Overall, the money was paid to RBTS (for their work and to reimburse them for all expenses they incurred to pay third party suppliers and service providers) and to 1111108 Alberta Ltd. and Mr. Magneson (for all of the work that Mr. Magneson performed and to reimburse him and 1111108 Alberta Ltd. for all expenses incurred for hotel, travel, office, meals, fuel, etc). Over 17 different

> sub-contractors were used in the development of the handpiece [i.e., the Drill]. In addition to dozens of trips to Philadelphia to meet with RBTS, Mr. Magneson travelled to almost all of the sub-contractors located in the U.S.A. at various times over the years. Research and development activities assumed by 1111108 Alberta Ltd. also included patenting the technology in the U.S.A., which was successful in obtaining a US patent in 2013.

[86] At his Interview, Magneson provided a similar explanation for his activities. He said that he started taking a salary from NWI in 2006, and was paid from investment funds. From 2011 onward, NWI was his primary source of income other than government pensions. In this regard – and in response to investigative Staff's inquiry about the salary, fees, and commissions NWI paid to Magneson – Magneson provided a copy of his "Personal Services Contract" with NWI dated September 1, 2006, as well as a document entitled, "All Amounts Paid to Magneson and 1111108 Alberta Ltd. January 2011 to December 2016" (**Magneson and 111 Alberta Payment Summary**). This document reflected amounts disclosed in the Unaudited Statements for related party transactions.

[87] The Personal Services Contract (signed by Magneson on behalf of both parties) provided that Magneson was to be paid $180,000 per year for "Development", plus $108,000 per year for "SG&A Expenses" – presumably, sales, general, and administrative expenses. Additional amounts were to be paid yearly upon achievement of certain milestones in the Drill's development and marketing, but none appears to have materialized. NWI was also to pay Magneson $2,800 per month ($33,600 per year) for "incidental travel expenses", "incidental office costs", and "incidental communications costs", and to pay for insurance. Expected insurance included automobile liability insurance for "all vehicles used in connection with the services". "Services" was defined elsewhere as "business development, advisory and other services".

[88] Excluding the insurance, the total yearly compensation payable to Magneson under the Personal Services Contract was therefore $321,600. At his Interview, Magneson testified that the Personal Services Contract allowed him $300,000 per year, comprised of $192,000 per year for research and development plus his salary of $108,000. It was unclear where the $192,000 figure came from, as it is not mentioned in the Personal Services Contract. However, it matched the yearly payments to 111 Alberta for "Research and development" set out in the Unaudited Statements and the Magneson and 111 Alberta Payment Summary.

[89] Magneson acknowledged that he told prospective NWI investors their money would only be used for development of the dental Drill, but did not explain to them how he was going to be compensated or that he considered his compensation part of NWI's research and development expenses. Magneson gave the following answers to Keller's questions at his Interview:

> Q And so what were investors told that their money would be used for? What was the -- you know, if they invest their money, what would that -- what was the money supposed to be used for?
>
> A For the development of the dental drill.
>
> Q And that's what you told everybody it was -- everybody's money was research and development?
>
> A Yes.

Q Did you ever explain to them what you were going to get paid?

A No.

[90] This accords with an audio recording Magneson's counsel entered into evidence at the Hearing, which was apparently made by an investor during a meeting he and some other investors had with Magneson in late 2016. During the meeting, Magneson was asked how investment funds were used by NWI. Magneson replied, "the development of the hand-piece", and said that investor funds went from NWI to RBTS. The investors at the meeting said that they understood Magneson must have been taking some kind of wage, but Magneson did not provide any specifics.

[91] There was confusion during the Interview as to what investors were told about their funds if they bought Shares from Magneson's personal holdings instead of Shares issued from treasury. As mentioned, Magneson's counsel provided a document to Keller indicating that between January 2011 and December 2016, Magneson sold 5,142,865 of his personal Shares to third parties, who paid a total of $2,263,122 (or, during the Relevant Period only, 4,727,865 Shares for $2,043,122). Magneson was shown the document during the Interview and confirmed that he was familiar with it and that the numbers appeared correct. The following exchange took place:

Q Okay. So how did the money work, then? So you would tell somebody I'm going to sell you these shares personally out of my holdings, but the money is going to go to New Wave; is that right?

A Yes.

Q So if an investor bought out of your personal holdings, would they write the cheque to New Wave, or would they write the cheque to you?

A To New Wave.

Q And then you would, then, I guess, just transfer the shares and never get paid?

A That's correct.

Q So of this $2.3 million, none of that made it to your pocket; is that correct?

A The $2.3 million did make it to my pocket. I got reimbursed for those shares.

Q Okay. So you would tell the person that the shares were yours and they would write the cheque to New Wave and then New Wave would pay you?

A Yes.

Q Why?

A Well, the funds went into New Wave, and then they flowed -- the money flowed into New Wave's expenses to --

Q Okay. So that's a different story than what I'm getting. Sorry. I thought you meant they wrote the cheque to New Wave, and then the next day you went to New Wave and, say, they bought $100,000 worth of shares, a hundred grand went to New Wave, a hundred grant went back to your pocket. That's not what happened.

A No.

Q Okay. So the money went to New Wave. And then if you incurred expenses and got a salary out of New Wave, you might have got paid?

A That's right.

Q But it was -- as far as you were concerned when that money was paid for those shares from your personal account, that was New Wave's money?

A Right.

[92] Keller attempted to clarify with a follow-up question, and Magneson answered as follows:

Q And again, just so we're clear. That $2.3 million, that was -- from you selling your own personal shares. That money went to New Wave. You might have earned a salary or might have incurred expenses and got some of that money that way, but you never pocketed money from investors directly that way?

A Correct.

[93] Magneson made it clear several times during the Interview that the only funds paid out of NWI were for research and development of the Drill, including his compensation (whether paid to him directly or through 111 Alberta). For example:

Q MR. KELLER: Other than your salary, were there any other funds expended towards something other than research and development? And I appreciate that the premise of my question might be wrong in that your salary might [be] considered by yourself to be research and development. But other than your salary, were there any other funds paid out of New Wave that didn't go towards research and development of the drill?

A No.

Q So all the money came in. Either went to your salary or to the research and development of the drill?

A Research and development, yes.

Q And from what you said earlier, and correct me if I'm wrong, all the research and development money went to RBTS; is that correct?

A Research and development money flowed two ways. One portion of it went to RBTS. The other portion of it went to [111 Alberta] for research and development for which [sic] I undertook.

[94] Keller attempted to clarify again as follows:

Q Okay. So basically, I think we've done the math here, and we say we've got $7.1 million coming into New Wave from outside investors. Other than -- than your salary and the money to RBTS -- pardon me. Other than your salary, the lion's share, that would have gone to RBTS, then?

A Say that again.

Q Sorry. I didn't say it very clearly. Of the $7.1 million that was raised from outside investors, other than your salary and the $192,000 that went to the numbered company, the rest went to RBTS or the lion's share did?

A Yes.

[95] However, later in the Interview when Magneson was questioned about payments from 111 Alberta's account for personal expenses such as the mortgages on his personal real estate and regular payments to his three daughters, he gave the following answers:

Q [MR. BONAZZO] Do any of these categories, daughters, and Kokanee Mortgage, Caplink Financial, Capital Direct, do these count against funds that are owed to you through your salary or research and development?

A Through my salary.

Q Because these add up to far greater --

A Also --

Q -- numbers than --

A Also to clarify that, I sold personal shares pertaining to my own share structure for personal expenditures of this nature.

Q MR. KELLER: Sorry. That's an important distinction. You said earlier that the personal shares that you sold, that money went to New Wave. Is that incorrect?

A Well, partially. I traded shares for a Long Lake property in 2006 and put that money into New Wave. And I have record of that as well. And in 2007 as well.

. . .

Q Was there any other times that you sold shares from your personal holdings and took the money that you made selling those shares as personal funds?

A Oh, to clarify that, the shares that I sold personally that didn't go out of treasury, I sold my shares. That went to me personally.

Q That's completely opposite than the testimony you provided this morning. This morning you said that that money went to New Wave. Is that -- is your testimony now that money went to yourself personally?

A To myself personally and also I used it as well for New Wave when New Wave was short. And that's why I sold some of my property.

Q Mr. Magneson, we're talking about $2.3 million. I mean, it seems hard to believe that you didn't recall getting $2.3 million.

A Those funds of my personal shares went to me personally.

Q So why did you tell us this morning that they went to New Wave?

A Maybe I didn't understand the question correct. I apologize.

Q Why if the money was to go to you personally would you have people write cheques to New Wave? If you're selling shares -- if you're selling these shares, my cheque to you is going to be Allan Magneson. Why are you having people write shares [sic] to New Wave to pay for your shares?

A I wanted the funds to go right to New Wave, and I told them that I would be selling my shares so these shares didn't have to come out of treasury. I should have possibly directed it right to me personally, but that's how I handled it.

Q Again, I've talked to a number of investors. And this is -- a few of them have told me that they -- they understood they were buying shares from your personal holdings. And they all said what you said this morning that the money was going to go to New Wave for developing the drill even though they were their personal -- your personal shares they were buying. Did you not make those representations?

A I never explained that situation completely in that manner whatsoever. I told them that the funds would be going into New Wave itself, but I would have to sell my personal shares. And then I allotted the expenses out accordingly.

Q And again, we need to be really clear. I don't want -- I'm not -- I don't want the record to be wrong. This is a very important point.

A Yes.

Q You've gone around again a little bit saying that it was going to go for expenses. But two minutes ago you said, no, when you sold personal shares you were supposed to get -- you personally, Mr. Magneson, were to get that money. Is that what you intended?

A Yes.

Q Okay. And again, I got to ask. If you were supposed to get the money, why not just have the investor write the cheque to you?

A Because I wanted it to go through the -- going to New Wave because some of it would be used for New Wave as well.

[96] Magneson acknowledged that he did not explain this to the investors who purchased his personal Shares:

Q And you never told the investors -- and again, correct me if I'm wrong. There's been a little bit of a change here. But you never told the investors that you would be pocketing all or some of the money from the sale of your personal shares; is that correct?

A I didn't explain that to them.

C. Financial Records

[97] There were two primary sources of evidence at the Hearing about the funds that were received and paid out by NWI: Staff's Source and Use Analysis and the banking records on which it was based, and the Unaudited Statements provided by Magneson. Staff's Source and Use Analysis also considered the use of the funds 111 Alberta received from NWI.

1. NWI – Sources

[98] Bank statements indicated that at the beginning of the Relevant Period, NWI's CAD account had a balance of $3360.

[99] According to the Source and Use Analysis, $6,666,012 was deposited to the account during the Relevant Period, $5,228,670 of which came from NWI investors. Bonazzo explained that he categorized the source of these deposits based on Magneson's Interview evidence that NWI's sole source of income was investor funds, and by cross-referencing other evidence Magneson provided listing shareholder names and the dates and amounts of their investments. Staff suggested that another $973,045 also likely came from investors, again based on correlation between certain deposits and the shareholder information provided by Magneson. The remaining funds came from various other sources including transfers from NWI's USD account, depositors characterized as "Unknown", cash deposits, and retail returns.

[100] Bank statements indicated that at the beginning of the Relevant Period, NWI's USD account had an opening balance of $46.72 USD. According to Staff, during the Relevant Period, $428,064 USD was deposited to the account. This included the equivalent of $295,498 USD transferred from NWI's CAD account, $94,720 USD received from investors, and $37,000 USD received from "Unknown" sources. Staff further indicated that based on the shareholder information, another $15,000 USD from the "Unknown" sources category also came from an investor, which would bring the investor total to $109,720 USD.

[101] Therefore, the Source and Use Analysis suggested that during the Relevant Period, NWI received at least $5,228,670 and as much as $6,201,715 from investors, plus $94,720 to $109,720 USD.

[102] As mentioned, the Unaudited Statements disclosed that NWI raised $4,760,222 from investors from the beginning of 2011 through the end of 2016, a slightly longer interval than the Relevant Period. In addition, the Unaudited Statements disclosed that NWI both borrowed from and lent money to unspecified shareholders between 2011 and 2016. Notes to each year's Unaudited Statements stated that NWI used shareholder loans to finance its operations, and that these sums were "unsecured, . . . non-interest bearing and [had] no set terms of repayment". The net amount loaned to NWI by shareholders from 2011 through 2016 was $355,952.

2. NWI – Uses

[103] According to the Source and Use Analysis, a total of $5,094,572 was transferred from NWI's CAD account to 111 Alberta and Magneson during the Relevant Period: $4,866,872 to 111 Alberta, and $227,700 to Magneson. $39,157 was transferred to NWI US, $33,967 of which was apparently designated for RBTS. RBTS was directly paid an additional $444,476 from NWI's CAD account, plus $40,000 USD from NWI's USD account.

[104] Based on the currency conversion rates shown in NWI's bank records, Staff calculated that the total paid directly to RBTS during the Relevant Period was therefore $456,927 USD. This roughly accords with other evidence. At Magneson's request, RBTS provided a summary of all of the invoices it issued to NWI between November 10, 2006 and September 25, 2014 and the amounts it was paid for those invoices. According to that document, RBTS received a total of $1,246,492 USD during that time frame, $426,757 USD of which was paid during the Relevant Period. A wire transfer record showed that NWI paid an additional $20,000 USD to RBTS on November 3, 2014, bringing the total during the Relevant Period to $446,757 USD.

[105] The Source and Use Analysis disclosed that the remaining funds in NWI's CAD account were paid to various parties. $24,199 was paid to NWI's legal counsel. $150,341 was paid to a car leasing company for leases on Magneson's personal vehicles. $169,681 was withdrawn in cash, and $122,909 was spent on miscellaneous retail purchases (including gas stations, hardware and appliance stores, grocery stores, numerous restaurants and fast food outlets, AMA, and other personal services). Another $18,423 was paid to a home builder and to Strathcona County for property taxes. $75,000 was repaid to investors. $315,755 was transferred to NWI's USD account, and $122,805 was paid to NWI's bookkeeper or companies related to him.

[106] According to the Source and Use Analysis, of the funds in NWI's USD account, the aforementioned $40,000 USD was paid to RBTS, and another $15,800 USD was paid to NWI's U.S. legal counsel. $117,543 USD was transferred to 111 Alberta, $100,648 USD was transferred to NWI's CAD account, and $145,175 USD was transferred to NWI US.

[107] The Unaudited Statements also contained information about NWI's expenditures, and set out the total expenses paid each year by category. The categories included "Research and development", "General and administrative", "Travel", "Professional fees", and others. Based on the Unaudited Statements, from 2011 through 2016, NWI spent $1,962,510 on research development and $1,300,656 on all other categories, for a total of $3,263,166. This included $2,011,250 paid to related parties 111 Alberta and Magneson for research and development, management fees and allowances, and travel allowances, as discussed further in the next section of these reasons.

[108] There was some evidence that NWI made payments to third parties during the Relevant Period that related to debts incurred prior to the Relevant Period. For example, when questioned during his Interview about a sum of approximately $122,000 transferred to a company related to NWI's bookkeeper, Magneson explained that it was repayment of a loan advanced to NWI "in earlier years". On cross-examination at the Hearing, Keller acknowledged that there was some indication during the Interview that there were funds received by NWI prior to the Relevant Period that did not relate to the sale of Shares. Keller also acknowledged that he did not investigate NWI's financial status or debt prior to 2011, so he did not know whether there were debts accrued before 2011 that were paid after 2011.

[109] NWI's debts were more clearly evident from the Unaudited Statements. As of the end of 2010, NWI had $22,735 in accounts payable and accrued liabilities, which increased by $156,724 over the Relevant Period to $179,459 at the end of 2016. The notes to the Unaudited Statements explained that this sum included amounts relating to consulting services provided by an unidentified shareholder from 2011 through 2016.

[110] The Unaudited Statements for 2011 disclosed that $1,520,288 was owing to related parties at year-end 2010: $1,337,839 to 111 Alberta and $182,449 to "Director" – i.e., Magneson. The Unaudited Statements then showed that NWI paid the loans down over the course of the Relevant Period. By the end of 2016, its debt to 111 Alberta and Magneson was $1458, a reduction of $1,518,830: $1,336,163 paid to 111 Alberta, and $182,667 paid to Magneson. As was the case concerning the shareholder loans, a note to the Unaudited Statements indicated that the related party loans were unsecured, non-interest bearing, and had no set terms of repayment.

3. 111 Alberta and Magneson – Receipt of NWI Funds

[111] According to its bank records, 111 Alberta's account opening balance at the beginning of the Relevant Period was $5262. According to the Source and Use Analysis, over the course of the Relevant Period, $5,139,256 was deposited to the account. This was comprised of the $4,866,872 transferred from NWI's CAD account, the equivalent of $130,981 transferred from NWI's USD account, $137,473 from depositors characterized as "Unknown", and a small amount (less than $4000) from retail returns. Staff pointed out that the funds deposited to 111 Alberta's account from NWI's CAD account included $302,400 in automatic transfers set up to cover overdrafts in the 111 Alberta account between July 28, 2014 and December 2, 2016.

[112] In the course of the investigation, Staff inquired about the reason funds were paid by NWI to 111 Alberta. Magneson's counsel sent correspondence explaining that NWI originally expected that all of the research and development work for the Drill would be conducted through 111 Alberta so that it could apply for a Canadian federal government grant. However, tax advice was later received that 111 Alberta would not qualify for the grant program because too much of the work was being performed in the U.S.

[113] Despite that, Magneson kept 111 Alberta active, and "[f]or accounting purposes", NWI continued to split amounts payable for research and development expenses between 111 Alberta and Magneson personally. In other words, as Magneson explained during his Interview, because he considered his compensation part of NWI's total research and development expenses, the amounts NWI paid to 111 Alberta for research and development were actually payable to him for the work he performed.

[114] According to the Magneson and 111 Alberta Payment Summary and the Unaudited Statements, NWI paid 111 Alberta $192,000 for research and development each year from 2011 to 2015, plus $72,000 in 2016 for a total of $1,032,000 over the Relevant Period. In addition, NWI paid 111 Alberta a yearly travel allowance from 2011 to 2016. The amounts varied somewhat from year to year, but the Unaudited Statements indicated that they totalled $109,100 by the end of 2016.

[115] Based on these amounts, the total of the research and development and travel allowance payments to 111 Alberta – and therefore to Magneson – was $1,141,100 during the period from 2011 to 2016. The Magneson and 111 Alberta Payment Summary indicated that in addition to travel, some of this covered general and administrative expenses.

[116] The Magneson and 111 Alberta Payment Summary and the Unaudited Statements also disclosed that NWI paid Magneson yearly "Management fees and allowances" (described as including "allowances for travel, phone, telecommunications and provision of office and related expenditures") in the total amount of $870,150 from 2011 through 2016. Again, the amount paid per year varied somewhat, and ranged from $129,900 in 2011 to as much as $168,000 in 2016.

[117] As the Source and Use Analysis showed that only $227,700 was paid directly to Magneson by NWI during the Relevant Period, some of the $870,150 in "Management fees and allowances" must have been paid to Magneson through 111 Alberta. According to the Magneson and 111 Alberta Payment Summary and the Unaudited Statements, a total of $2,011,250 was paid to

111 Alberta and Magneson from 2011 through 2016 for research and development, management fees and allowances, and travel allowances.

[118] Bonazzo testified about a number of instances where shortly after a deposit of investor funds to NWI's CAD account, those funds were transferred to 111 Alberta, Magneson, or payees for Magneson's benefit. For example, on July 30, 2012, $50,000 from investors JG and FG was deposited to NWI's CAD account, bringing the account balance to $53,467. Within the following two weeks, $8423 was paid to Strathcona County for property taxes on the Magnesons' home, $3000 was wired to Magneson, $6600 was paid on the leases for Magneson's vehicles, and $24,000 was transferred to 111 Alberta. Similarly, between February 12, 2013 and October 22, 2013, the only significant deposits to NWI's CAD account amounted to $1,435,000 from investors who testified at the Hearing. During the same period, a total of $955,200 was transferred to 111 Alberta, and $21,539 was paid on the leases for Magneson's vehicles. $135,694 was paid to RBTS.

[119] Staff also provided evidence concerning the use of the funds that 111 Alberta received from NWI. Bonazzo testified that the uses were "[l]argely personal in nature". For example, according to the Source and Use Analysis, of the $5,144,120 paid out of 111 Alberta's account during the Relevant Period, $2,147,609 was used for the Magnesons' real estate, including lease payments, mortgage payments, payments to a builder, property taxes, and payments to real estate lawyers involved in the Magnesons' real estate transactions. $1,274,934 was paid to the Magnesons' three daughters for their personal expenses, and $105,300 and $38,500 were paid to Magneson and Mrs. Magneson respectively. $116,510 was paid toward vehicles, and $101,424 toward utilities.

[120] 111 Alberta transferred some comparatively small amounts back to NWI ($16,935) and NWI US ($118,428) over the Relevant Period, but the reasons it did so were not apparent.

[121] We are of the view that in light of Magneson's admission that 111 Alberta was his personal holding company that he used to receive funds he considered payable to him, his specific use of the money after it was paid to 111 Alberta is not strictly relevant to the allegations. Staff's analysis confirms that 111 Alberta did not use the money it received to pay NWI business expenses, and Magneson did not argue that it did.

D. Investors

1. TD

[122] TD is a dentist practising in Calgary and one of NWI's major investors. At the time of the Hearing, he was also NWI's sole director, having been appointed to that position at an NWI shareholders' meeting held on May 31, 2017 (**May 2017 Meeting**).

[123] TD said he first heard about NWI through other shareholders, and met Magneson in 2011 to discuss the concept for the Drill. Following that meeting, TD made an initial investment of $500,000 and received two million Shares. After subsequent investments during the Relevant Period, TD acquired a total of either 5,748,000 or 5,748,001 Shares (amounting to 11% of the Shares outstanding as of May 2017), but it was unclear exactly how much he paid for them. An investment summary Magneson prepared for TD in May 2017 indicated that TD paid $1,437,000, but an NWI list of shareholders and a Share transaction register suggested it was $1,477,570. NWI's bank records showed deposits from TD during the Relevant Period in the amounts of $1,406,500 and $79,000 USD.

[124] TD testified that when he first invested in NWI, Magneson led him to believe the Drill project was almost finished. Magneson said he did not want to dilute Share value so close to "the finish line" by either issuing any more new Shares or by taking on any more new shareholders. This had two consequences from TD's perspective. First, while he always made his bank drafts and wire transfers payable to NWI during the Relevant Period, he understood that his Shares either came from Magneson's personal holdings or from another investor. Second, TD offered to provide all of the remaining financing necessary to bring the Drill to completion. Whenever NWI required more money (which TD understood was typically after RBTS issued an invoice), Magneson was to go to him. TD therefore believed that he was NWI's sole investor at that time, and that he and Magneson were NWI's "main investors", holding 98% of the Shares.

[125] As discussed further below, however, other evidence made it clear that this was not the case. Others invested even more than TD during the Relevant Period. In addition, shareholder records showed that all of TD's Shares had in fact been issued from NWI's treasury.

[126] When asked about NWI's use of investment funds, TD testified that he understood his money would be used for Drill research and development, including payments to RBTS. In the course of doing his due diligence before investing the first time, TD said he asked Magneson several specific questions, one of which was whether Magneson had invested personally. Magneson assured him that "he had . . . a lot of money in this project". TD also asked whether Magneson was taking a monthly management fee. Magneson told him that he was not, as it would be unfair to the other shareholders if he got paid before everyone else did. TD did not see information to the contrary until he saw the Unaudited Statements around the time of the May 2017 Meeting.

[127] TD was challenged on this evidence in cross-examination. Based on TD's investigative interview (only short excerpts of which were in evidence at the Hearing), Magneson's counsel suggested that TD knew Magneson was facing personal financial difficulties, and also knew the money he was paying for Shares from Magneson's holdings was keeping Magneson solvent. TD denied that his funds were intended for Magneson to live on, and denied that Magneson ever said he was taking money for that purpose. He reiterated that Magneson would present the need for more money as "just . . . that last little bit" required to get the Drill "over the hurdle", and to pay RBTS, since Magneson would always refer to an RBTS invoice that needed to be paid when he asked for additional funding. TD acknowledged that for his last few investments in 2017 Magneson asked him to make his cheques payable to 111 Alberta, but he denied that he knew Magneson would use the money for personal purposes. TD still intended the funds to be dedicated to research and development of the Drill. On re-direct examination, TD testified that when Magneson mentioned having personal financial difficulties, he understood that Magneson needed TD to cover NWI's bills.

[128] After becoming an NWI director, TD said he took a number of trips to the U.S. on business relating to the Drill's final development. The affidavit he swore in opposition to Staff's ICTO application included copies of RBTS progress reports from March 4, 2009 through June 24, 2014, as well as a letter from RBTS dated October 12, 2017 that outlined further work to be done and the funding that was required. TD testified that he still believes in the Drill, but has come to the conclusion that the investment has failed. NWI is unable to raise further funds to complete the

project because Magneson still owns the Drill patent, and shareholders do not wish to benefit him further.

[129] Two final points concerning TD's evidence were made during cross-examination. The first was the extent to which TD's testimony was influenced by materials he read or communications he had with other NWI shareholders before the Hearing. He acknowledged that he received information about this matter after he invested, and could not always be clear about what he learned later and what he knew at the time. In addition, as NWI's sole remaining director, TD confirmed that he received a copy of all of Staff's pre-Hearing disclosure on the company's behalf. However, he denied reviewing it because it was provided on USB sticks that he had been unable to open. TD was also included on an email chain in evidence that appeared to circulate a copy of the Keller Affidavit among several NWI investors, but denied he received any of its attachments. Instead, he said that he learned about Staff's case by reading the NOH.

[130] The second point was TD's involvement in other legal proceedings against Magneson. He admitted that he tried to encourage Magneson to both settle the civil lawsuit against him brought by other NWI investors and to admit his guilt in this proceeding – failing which TD and others would report Magneson to law enforcement authorities for fraud and sue his family. TD candidly admitted that he was hoping we will find Magneson guilty of securities fraud and outline what happened to the investment money so that Crown prosecutors will take action.

2. MD

[131] MD is a resident of Edmonton, and co-owns a transportation company with his brother, DD. He first learned of NWI and the Drill from his friend, ME, who had already invested.

[132] MD testified that at their first meeting, Magneson told him NWI did not need any more investment money because the Drill was so near completion. He told MD he would let him know within a week or so if MD could invest, but came back after less than a week to say that he could. After that, Magneson periodically approached him for additional investments, usually indicating that some issue had arisen and he required more money to complete the project, but did not want to bring in any new investors. MD said that he did not want the project to fail, so he invested more money when Magneson requested it.

[133] Between February 2013 and September 2014, MD and his brother purchased 8.2 million Shares for $1,625,000 through their numbered company. At the Hearing, MD testified that he was not sure whether they acquired Shares from treasury or from Magneson's personal holdings each time they invested, but thought they received both at different times. Shareholder records provided by Magneson indicated that only the first million Shares (for which MD and DD paid $500,000) came from Magneson's holdings, while the remaining 7.2 million Shares (for which MD and DD paid the remaining $1,125,000) were issued from treasury. Their total of 8.2 million Shares made them the largest NWI shareholders, with 15.68% of the Shares outstanding as of May 2017.

[134] MD also testified that Magneson asked him and his brother to pay for their investments by bank draft or certified cheque so that the funds would not be held by the bank and Magneson could pay RBTS for its work as soon as possible. All of the bank drafts in evidence for MD's and DD's investments were made payable to NWI. At their investigative interview, MD and DD said that

they understood their money would go to NWI whether they purchased Shares from treasury or from Magneson's holdings.

[135] According to MD, he understood that he was investing in the Drill research and development, and was always told his money was going to pay RBTS. On cross-examination, he acknowledged that Magneson also told him initially that while NWI had enough money to finish developing the Drill, Magneson was not sure it had enough to cover expenses relating to the sale of the technology, such as legal and accounting advice.

[136] MD stated that he asked Magneson on several occasions how he (Magneson) was being paid for his time. Magneson never gave him any details, but said he was not taking much out of NWI as a salary because he had a supportive family that was carrying him through. On cross-examination, MD agreed with Magneson's counsel that if he had known NWI was in debt and a significant amount of money was supposed to be paid to Magneson such that the company was always in debt, he would not have invested.

[137] MD denied that he received and read Magneson's Interview transcript before testifying at the Hearing. He said he did not recall receiving the email chain that appeared to circulate a copy of the Keller Affidavit among several NWI investors, including MD and his brother.

3. ME

[138] ME is a retired Alberta farmer. He testified that he initially heard of NWI in February 2010 from a friend who had in turn heard about it from DL. ME first met Magneson shortly thereafter, and made his first investment of $100,000 for 100,000 Shares in early March 2010.

[139] There was inconsistent documentary evidence about the total amount ME and his spouse invested in NWI and the number of Shares they received, but ME testified that they invested $502,500 in NWI and NWI US between March 2010 and January 2013. This was comprised of $480,000 in cash, plus snowmobiles and a trailer worth $22,500. He and his spouse received 4 million Shares and 1,050,000 shares in NWI US. Based on cancelled cheques and other documents, at least $80,000 of that total was invested during the Relevant Period: $50,000 for 500,000 Shares in June 2011, and $30,000 for 1 million shares in NWI US in January 2013.

[140] ME introduced a number of other people who made investments in NWI, including his parents and both MD and MD's brother, DD. He was compensated for the referrals in Shares, and thought he received approximately 1.5 million of his Shares for that reason. He was also given some Shares by his mother after his father died.

[141] Although ME said he and his spouse always wrote their investment cheques to NWI, Magneson told him they were buying Shares from Magneson's personal holdings so that Magneson could give him a good price per Share. However, shareholder records suggested that ME and his spouse actually received Shares from both treasury and Magneson.

[142] ME testified that Magneson always told him his investment funds would be used for the Drill project, and specifically for research and development. According to an excerpt from ME's investigative interview transcript, he told Staff investigators that even though he thought he was buying Shares from Magneson's personal holdings, he told Magneson he would only get involved

if his money went to the Drill project, and not to Magneson personally. When asked at the Hearing why he made further investments after his initial Share purchase, ME replied that he was prompted by Magneson's requests for more money. He said that on at least one occasion, Magneson approached him in tears because NWI needed money urgently to prevent a cheque from bouncing.

[143] On cross-examination, ME reiterated that he understood he was investing in the research, development, and ownership of the Drill. He acknowledged that he assumed Magneson would be paid for his efforts and that corporate and administrative expenses would also be paid. He agreed that when he and some other shareholders met with Magneson in the fall of 2016, they told him they understood he needed to take a wage and needed money to move the product. However, he did not think Magneson's salary and expenses would amount to "a hundred percent of what comes in" or close thereto.

[144] Like MD, ME agreed with Magneson's counsel that if he had known NWI was heavily in debt before he invested or knew the amounts Magneson was going to take for himself as compensation, he would not have invested. He did not see any of NWI's financial information until he received the Unaudited Statements at the May 2017 Meeting. He and other shareholders had requested meetings and financial statements before that, but Magneson told them his counsel's advice was that he was not required to hold shareholder meetings or provide financial statements.

[145] ME testified about several documents he had that he described as "ROI"s, which gave projections as to what NWI investors might expect as an eventual return on investment. He recalled receiving one such document from Magneson after he made his first investment, and received others at the time of subsequent investments. Magneson also gave him periodic updates about the Drill's development and efforts to bring it to market. This included a copy of a letter dated February 3, 2015 from a professor at Marquette University in the U.S., who was involved in assessing the Drill. The report was positive in many respects, but also pointed out certain concerns with the Drill design. ME said that at that point, he and other shareholders understood that the Drill was complete, but at the May 2017 Meeting over two years later, they were informed that some of the design concerns had yet to be resolved. As of the date of his testimony, ME considered the project a failure and his money lost.

[146] ME acknowledged that he received information about this case from his shareholder group's legal counsel before testifying at the Hearing. This included Magneson's Interview transcript and some financial information, which seemed to have come from the Keller Affidavit.

4. DL

[147] DL is a resident of Alberta and a retired RCMP officer. He was introduced to Magneson and NWI by his brother-in-law in February 2010, when Magneson gave him a document outlining projected returns on investment. DL and his spouse initially invested $30,000 and received 10,000 Shares. Soon after, Magneson contacted him for more money, and DL agreed to invest another $20,000. For his total investment of $50,000, he received 50,000 Shares.

[148] DL testified that in the fall of 2010, Magneson told him that NWI was running out of money, and more funding was required to continue developing the Drill. For another $50,000, Magneson offered 200,000 Shares, so DL invested again in October 2010.

[149] DL and his spouse invested for the final time in March 2011, after Magneson told them that NWI was out of money and the Drill project would "die" without more funding. Magneson offered him 150,000 Shares for $25,000, and said that if DL could find two other people to invest $25,000 for 150,000 Shares, Magneson would issue him an additional 30,000 Shares as compensation. This brought the total invested by DL and his spouse to $125,000 for 400,000 Shares, all prior to the Relevant Period.

[150] All of DL's investment cheques were made payable to NWI, and DL testified that he understood he was purchasing Shares from treasury, not Shares from Magneson's personal holdings. He said he later learned that all of the Shares he and his spouse received came from Magneson. He considered the distinction important, and stated that he would not have purchased Shares directly from Magneson if he had known. On cross-examination, he denied that Magneson told him he was getting Shares at a reduced price because they were coming from Magneson's personal holdings, but agreed that dilution was of concern.

[151] DL testified that Magneson told him investment funds would be used for the research and development of the Drill. During his investigative interview, he told Staff that he would not have invested in NWI if he had known that his money would go to Magneson personally. At the Hearing, he recalled being told that RBTS and other contractors in the U.S. were involved in the work, and acknowledged on cross-examination that Magneson incurred expenses travelling to the U.S. on a number of occasions. DL agreed that those expenses would fall within the category of research and development to a certain extent, but pointed out that even if the original idea for the Drill was Magneson's, Magneson was not personally performing the work done in the U.S.

[152] Further, like MD and ME, DL agreed with Magneson's counsel that if he had known NWI had a large debt and would incur more debt, he likely would not have invested. However, he testified that that was not the picture Magneson presented. To the contrary, Magneson continually led him to believe that the Drill was very near completion.

[153] As for Magneson's compensation, DL testified that initially, he did not realize Magneson would being paying himself a wage from the funds raised for NWI. He later came to understand that Magneson was taking a wage and admitted that he thought that made sense, but he did not know the amount. When he asked Magneson about it at a meeting in the fall of 2016, Magneson told him it would be disclosed in NWI's financial statements, which shareholders would see at the May 2017 Meeting. Like ME, DL testified that when he previously asked Magneson about having shareholders meetings and receiving financial statements, Magneson said his legal counsel told him it was not required and they would see financial statements once NWI was sold.

[154] According to DL, his first indication of what Magneson was being paid came from the Management Information Circular and Proxy Statement he received before the May 2017 Meeting. That document disclosed that either directly or through 111 Alberta, NWI paid Magneson total compensation of $356,400 in 2015 and $254,400 in 2016.

[155] On cross-examination, DL admitted that he saw the Keller Affidavit and Magneson's Interview transcript at some point prior to the Hearing. He did not recall whether he saw the other exhibits to the Affidavit.

VII. ARGUMENTS OF THE PARTIES

A. Staff

[156] In their written submissions, Staff stated that during the Relevant Period $6,161,715 and $109,720 USD were deposited to NWI's accounts by investors, including $3,111,500 and $79,000 USD invested by TD, ME, and MD. 111 Alberta received $4,866,872 and $117,543 USD from those accounts, and $689,054 was paid directly to Magneson, withdrawn in cash, or paid to third parties on Magneson's behalf (including payments toward his personal vehicles, real estate, and retail purchases). Only $444,476 and $40,000 USD were paid to RBTS. As a result, Staff concluded that while some investor funds were spent on Drill development, Magneson misappropriated at least 80% of the total raised, either directly or through 111 Alberta.

[157] Once NWI transferred funds to 111 Alberta, Staff argued that Magneson treated them as his and used them as he saw fit. They pointed out that Magneson acknowledged during his Interview that any amounts paid to 111 Alberta went to him personally, and that at the Hearing, Magneson's counsel referred to the 111 Alberta account as Magneson's "personal numbered company account". They detailed all of the personal uses of funds deposited to 111 Alberta's account, and argued that there was no evidence any of those funds were used to pay NWI's business expenses.

[158] Citing the law governing civil and securities fraud (discussed later in these reasons), Staff argued that they had proved on a balance of probabilities that the Respondents breached s. 93(b) of the Act by engaging in a course of conduct the Respondents knew or ought to have known perpetrated a fraud on NWI's investors. As he acknowledged during his Interview, Magneson told investors their investment funds would only be used to pay for research and development of the Drill, whether they bought Shares from treasury or from his personal holdings. In reality, Staff argued, he treated all proceeds from the sale of Shares as his own, as there was no evidence he made any effort to track which funds were paid for treasury Shares and which were paid for his Shares.

[159] Staff further contended that Magneson deceived NWI investors by either deliberately failing to disclose or actively concealing how much he was taking as personal compensation. If asked, he either denied that he took anything or denied that he took anything significant. Staff acknowledged that some of the investor witnesses indicated they assumed or understood that Magneson was entitled to some form of compensation. However, the investors did not expect and Magneson did not tell them that he was going to take more than 80% of what was raised. If they had known, it is unlikely they would have invested at all. Magneson compounded this deception by later representing to some investors that more funding was urgently needed or the project would collapse. Staff described these as desperate pleas for money that were lies, although the lies had a grain of truth: there was an urgent need for money, but it was Magneson who needed it to support his lifestyle.

[160] Staff also acknowledged that the Unaudited Statements disclosed certain payments to 111 Alberta and Magneson for research and development, travel, and management fees and allowances. This did not diminish the deception, because investors did not have that disclosure until the May 2017 Meeting. Moreover, it only accounted for approximately $2,000,000 of the total amount 111 Alberta and Magneson took from NWI. Even if Magneson had told investors that he was going to take approximately $2,000,000 as compensation and another $2,000,000 from the

sale of his personal Shares, Staff calculated that he still misappropriated at least $1,500,000. The Unaudited Statements disclosed repayment of loans Magneson and 111 Alberta purportedly gave to NWI, but there was no evidence Magneson ever told anyone their investment money would be used to repay those loans.

[161] Staff rejected Magneson's reliance on the Unaudited Statements "as a panacea that is dispositive of the allegations in the NOH". They argued that the Source and Use Analysis was a more accurate reflection of the funds received and how they were spent, since the Unaudited Statements only represented Deloitte's review of financial information provided by NWI and did not provide the assurance of an audit. Further, the Unaudited Statements were not supported by any other evidence, while the Source and Use Analysis was supported by reliable bank documents. In any event, Staff argued, the Unaudited Statements did not answer the NOH allegations because they did not address what Magneson told investors about how their money would be used.

[162] Finally, Staff argued that in diverting such a large proportion of the investment funds for his personal use, Magneson not only deceived investors and adversely affected their financial interests, he also undermined NWI by depriving it of the use of funds intended for development of the Drill. Magneson was aware of his deception and misappropriation of funds, and given his urgent pleas to certain investors for more money, he knew his misconduct prejudiced both NWI's and its investors' economic interests. Staff argued that this – and not his purported reliance on unsubstantiated legal advice – was the real reason Magneson did not disclose what he was taking from the company and refused to hold shareholder meetings or provide financial information. Even after the Relevant Period, he continued the deception by providing inaccurate unaudited financial statements, and by attempting to ostracize investors like ME and MD as "dissidents" when they started to ask questions and demand transparency.

[163] Staff concluded that all of the Respondents were liable for the fraud because corporations can only act through their directing minds. Magneson's conduct and knowledge should therefore be attributed to NWI and 111 Alberta, as they were the conduits through which Magneson obtained funds by deceiving investors about the intended use of their money.

B. Magneson

[164] Initially, it was unclear whether Magneson's written submissions were made solely on his behalf or on behalf of all of the Respondents, but during oral submissions, he clarified that he was only making arguments on his own behalf. We have therefore treated Magneson's arguments as relating solely to the allegations made against him.

[165] In his submissions, Magneson referred to a number of purported facts and documents that were not in evidence at the Hearing, and attached two new documents as appendices. He also seemed to believe that certain material disclosed to Staff was before this panel when it was not – for example, full transcripts of the investigative interviews given by the investors who testified at the Hearing (his counsel had taken the position that there was no need to admit these transcripts into evidence), NWI's financial statements prior to 2011, and will-say statements from witnesses that Magneson's prior counsel had apparently indicated may testify in Magneson's defence. Some of this information is referenced in these reasons for context, but if it was not in evidence, we gave it no weight and did not consider it in our analysis of the allegations in the NOH.

[166] Magneson's overall position was that Staff failed to establish "beyond a reasonable doubt" that he breached s. 93(b) of the Act, and that the allegations should therefore be dismissed. As mentioned, the correct standard of proof for ASC proceedings is a balance of probabilities. We have also already noted that the ICTO in this matter was not appealed and no application for variance was made, either of which would have been the appropriate forum for Magneson's arguments about the ICTO application and the ICTO Panel's decision. Accordingly, we did not consider those arguments in these reasons.

[167] The rest of Magneson's arguments can be grouped into four general categories.

(i) Entitlement to the funds received from NWI

[168] Magneson argued that any funds he received from NWI – whether directly or indirectly through 111 Alberta – were not misappropriated. They properly belonged to him and were properly accounted for in the Unaudited Statements, which he contended had been ignored by Staff.

[169] First, Magneson argued that the Personal Services Contract provided for compensation for his work in developing and marketing the Drill. This included communicating with shareholders and manufacturers, performing administrative tasks such as banking and record-keeping, attending prototype testing, and meeting with prospective buyers. In addition, he was entitled to reimbursement for any expenses incurred in performing that work, such as travel and office supplies. This work resulted in the creation of an operating model of the Drill, and Magneson said he had entered negotiations to sell it to a large dental equipment manufacturing company. As reflected in the Unaudited Statements, between 2011 and 2016, he was paid $2,011,250 for his work and expenses under the Personal Services Contract.

[170] Second, Magneson argued that between 2011 and 2016, he sold Shares from his personal holdings for $2,263,122 (or $2,043,122 during the Relevant Period). Those funds were all deposited to NWI's bank account – i.e., loaned to NWI for its operations – but Magneson remained their legitimate recipient. Although no evidence admitted at the Hearing was cited in support, he contended that he only withdrew those funds when NWI did not need them, and that RBTS's work was never delayed or interrupted due to a lack of funding.

[171] Third, Magneson cited the related party loans disclosed in the Unaudited Statements. He and 111 Alberta were owed $1,520,288 as of the beginning of 2011, and, as mentioned, that debt was paid down by $1,518,830 between 2011 and 2016. According to Magneson, the loans accrued because he was owed money under the Personal Services Contract that had not been paid in earlier years, as well as $1,828,500 from the sale of his personal Shares prior to 2011, $778,000 from the second mortgages he placed on his personal properties in May 2007 and December 2010, and other amounts he was owed for expenses he paid using his personal credit cards. No evidence was cited in support of these debts apart from the Unaudited Statements, Keller's testimony that funds appeared to have been deposited to NWI's bank accounts prior to the Relevant Period that were not from Share issuances, and Keller's testimony confirming DL's interview evidence that Magneson claimed he had personally invested $1,800,000 in NWI.

[172] Magneson therefore acknowledged that he and 111 Alberta received at least $5,793,202 from NWI between the beginning of 2011 and the end of 2016. Once the funds owing were paid, he argued, their subsequent use was not relevant to the allegations in the NOH. Magneson pointed

out that there was no evidence the Unaudited Statements contained any errors, and suggested that Deloitte had certified "there was no potential or actual fraud, non-trivial errors or illegal acts" in the Unaudited Statements. This, he argued, proved that the allegations against him were totally unfounded.

[173] In contrast to his reliance on the Unaudited Statements, Magneson criticized Staff for instead relying on the Source and Use Analysis. He described the latter as a collection of "list totals that [did] not adequately categorize or explain the accounting of the [NWI] business" and did not indicate how the totals would be treated for financial statement purposes. Further, Magneson questioned how Staff could have come up with accurate figures when they did not obtain NWI's general ledger or account for any activity or amounts owing to him prior to June 2011, and how Staff's financial analysis could be considered complete when it included items that were labelled as "unknown". In his view, Staff also failed to disclose what, if any, Generally Accepting Accounting Principles they applied. Accordingly, he submitted, Staff's analysis and submissions ought to be disregarded by this panel.

(ii) NWI investors were not deceived

[174] Magneson argued that NWI's investors were not deceived about the use of their investment funds. They were told the funds would be used to develop and market the Drill, and that included paying NWI's corporate and administrative expenses. He pointed to testimony from Staff's investor witnesses that they understood they were buying his personal Shares and knew investment funds would be used for marketing and administration, although he referred in part to the investigative interviews of some of these individuals, the transcripts of which were not in evidence other than a few pages appended as exhibits to the Keller Affidavit. Magneson maintained that he did not withhold information from NWI investors with the intent to deceive them about how their money was spent, as he provided "continuous and timely updates" concerning the Drill's progress, including RBTS's technical reports.

[175] Magneson denied that he hid his compensation from NWI's shareholders. He argued that both ME and DL acknowledged at a meeting in the fall of 2016 (the audio recording of which was in evidence) that he was taking a wage and that he needed cash to market the Drill and pay expenses. Magneson also referred to TD's investigative interview evidence that he understood his investment funds would be used for research and development of the Drill and associated expenses, including travel.

[176] Magneson contested the testimony given by MD, ME, and DL that they were unaware of any debts owed by NWI at the time they invested. Again, he pointed to the audio-recorded meeting, and said there was a discussion about expenses and debts. In addition, he claimed that DL knew there was a shareholder's loan of over $1.5 million owing to Magneson.

(iii) Motives of Staff's investor witnesses

[177] According to Magneson, NWI had 238 investors. Only five of those investors complained and lied about him: the four investor witnesses who testified at the Hearing, plus DL's brother-in-law. Magneson referred to these individuals as the "Dissenters" or the "Dissident Group". He pointed out that during the ASC's investigation, Keller contacted several investors who "believed in and trusted Magneson and had no issues with management". This appeared to be a reference to

the investors for whom Keller's telephone interview notes were in evidence, although we observe that the notes do not indicate that the interviewees endorsed Magneson in those terms.

[178] Magneson recounted various attempts by the "Dissenters" to threaten him and take over the company, including by filing complaints with the ASC and RCMP. He argued that this conduct raised issues about their motivation in testifying against him.

(iv) Fairness of the proceedings

[179] Magneson alleged that the ASC proceedings against him were unfair in a number of respects, from the investigation through to the Hearing. While we have considered all of his arguments in this regard, we summarize only the more significant points here.

[180] Magneson described his Interview by Keller and Bonazzo as an "interrogation", and alleged that during the Interview Keller unfairly referred to documents and numbers prepared by the ASC that were unfamiliar to him. He noted that he gave two undertakings at his Interview to provide further information concerning NWI's expenditures between 2011 and 2016, but implied he was unable to answer them because Keller refused to provide his counsel with a copy of the Interview transcript at that stage of the proceedings, citing the confidentiality provisions in the Act that govern investigations. Later in his submissions, Magneson claimed that his prior legal counsel sent receipts to the ASC, but Staff returned them unopened. There was no evidence of this led at the Hearing.

[181] Magneson further alleged that Staff did not make full disclosure in this matter despite his understanding that they had been directed to do so by this panel. There was no indication what material Magneson felt had not been disclosed.

[182] As to the Hearing itself, Magneson argued there were numerous breaches of procedural fairness and natural justice, and that the panel acted in bad faith and made biased rulings against him. No particular ruling was mentioned, or how or why he considered it biased or in bad faith. He asserted that he had been denied the right to testify or call evidence, and complained that the panel refused to convene a hearing at which he could call evidence and appear in person. Instead, the panel attempted to force him to agree to forego what he perceived to be his right to an in-person, public hearing with all parties present in the same room together. He recounted the exchange of correspondence described earlier in these reasons and maintained that despite submitting his response of June 18, 2020, the panel determined he had not complied with its directions and therefore considered the evidentiary portion of the Hearing concluded. In Magneson's view, he was not given any reason or explanation for this ruling, which denied him the opportunity to present a full answer and defence to Staff's case.

[183] As a result, Magneson contended that the ASC exceeded its jurisdiction, breached his Charter rights, and improperly delegated its jurisdiction to the ASC Registrar. No law was cited in support of these assertions.

[184] In conclusion, Magneson submitted that the evidence showed he did not perpetrate a fraud on NWI's investors. He regularly met with them and provided them updates, and was only compensated under the Personal Services Contract or for the sale of his personal Shares and the financing he had provided to NWI since its inception in 2003. He denied that NWI lost use of any

of its funds or that its pecuniary interests were ever put at risk: the Drill was developed and still has value, as demonstrated by what he described as TD's "extortion attempts" to get the company away from him.

VIII. ANALYSIS

A. Fairness

[185] In our ruling on the Charter Application, we observed that Magneson was entitled to due process of law under the Charter and the Alberta *Bill of Rights*, including the right to a fair hearing. We also observed that in a proceeding such as this – with potentially significant consequences for a respondent – a reasonably high level of procedural fairness is required. However, we dismissed the application in part because Magneson failed to adduce evidence that his rights to due process and a fair hearing were breached. We arrive at the same conclusion with respect to the fairness arguments raised in his closing submissions.

1. Investor Witnesses

[186] Although Magneson voiced a concern about the motives of Staff's investor witnesses given their complaints and litigation against him, he did not point to anything in their testimony that was demonstrably false or that would suggest they were not telling the truth because they wished to do him harm. It is not unusual in ASC matters for a complainant to appear as a witness for Staff, or for a complaining witness to be involved in other legal proceedings against a respondent. Such witnesses have usually been negatively affected by the conduct of the respondent and may well harbour ill will. However, that does not inevitably mean that that witness's testimony is false, or that the witness must be so overcome by personal *animus* that he or she is prepared to lie under oath during a formal hearing. Something more than a mere suspicion about the witness must be raised to call into question the veracity of the testimony.

[187] In this case, all of Staff's investor witnesses were subject to thorough cross-examination by Magneson's counsel. He had and took the opportunity to put to them any contradictory past statements they may have made, and to question their motives and their involvement in other proceedings against Magneson. In our view, the substance of their evidence was unshaken. Even TD's candid admission that he was hoping Magneson will be found liable for fraud by the ASC so that he and the other investors can gain an advantage in other litigation did not lead us to assume that the rest of his evidence must be false. We considered all of the Hearing evidence as a whole in arriving at our conclusions, and its overall consistency.

[188] That there may also have been NWI investors who did not complain about Magneson and who were content with everything he did is not determinative of the question of whether the complaints of different NWI investors have merit. We also note that the five investors Magneson identified as the "Dissident Group" held nearly 40% of NWI's Shares, while the four telephone interviewees he relied on held less than 2%.

[189] For the same reasons given in our ruling on the Charter Application, we were similarly unpersuaded by Magneson's closing arguments that the evidence given by Staff's investor witnesses was suspect because they had access to the Keller Affidavit and TD had access to Staff's disclosure before testifying. We did not find that the Keller Affidavit contained Staff's entire case as Magneson contended. While Staff's theory of the case was evident from the Affidavit, it was also evident from the NOH publicly available on the ASC's website. Further, the evidence led at

the Hearing was far more extensive, including the *vive voce* testimony and over 100 exhibits that were not part of the Affidavit.

[190] Further, despite cross-examination on the point, it was unclear what each witness actually had read and remembered prior to the Hearing. More importantly, there was no indication that any of this material led them to change their evidence about their investments and their communications with Magneson. Each was interviewed before the Keller Affidavit was sworn, and the short excerpts of their interview transcripts that were in evidence were consistent with what the witnesses said at the Hearing. TD acknowledged that he was not entirely sure what he knew at the time he invested in NWI and what he learned later, but his testimony on the issues central to Staff's allegations did not lead us to conclude that he had altered or embellished his account of his experience based on information received after the fact. Again, mere suspicion is not enough.

2. Staff Conduct

[191] We were also unpersuaded that Magneson's complaints about Staff's conduct resulted in any unfairness. It is an adversarial process, and investigative interviews are designed to elicit information relevant to a suspected breach of Alberta securities laws as Staff attempt to determine what happened. If a document was presented to Magneson that he was unfamiliar with, it was open to him to say so and indicate that he could not answer questions about it. Magneson was accompanied by legal counsel at his Interview who could and did raise objections to such questions.

[192] In any event, the transcript of Magneson's Interview and other Hearing evidence also showed that of the 10 documents marked as exhibits during the Interview, nine had either been provided to Staff by Magneson's counsel or had been obtained from NWI investors who said they got them from Magneson or from NWI's minute book. When asked at the Interview about the documents in the latter category, Magneson said he was familiar with them.

[193] As for Magneson's complaint that he did not have a proper opportunity to respond to his Interview undertakings, an investigative interview and any undertakings requested by Staff are for the benefit of Staff, not the interviewee. If Staff elected not to pursue responses to the undertakings, that was their choice, and it did not prevent Magneson from adducing evidence in his favour later in the proceedings. We were not directed to any evidence that Magneson's counsel sent receipts for expenses to Staff and Staff returned them unopened. Magneson's counsel could have asked Staff's witnesses about those receipts and tendered them into evidence himself.

[194] Finally, as mentioned, Magneson did not identify the material he asserted Staff failed to disclose despite our order to do so. The portions of the Hearing he referenced in support of his contention that we made orders that were ignored by Staff did not include any such orders or directions. As described earlier in these reasons, all of Magneson's applications were heard and decided, including his application for disclosure of documents and compulsion of witnesses relating to his Charter Application.

3. Hearing Format

[195] Apart from his arguments concerning his purported lack of opportunity to enter a defence case – to which we will turn next – Magneson did not specify how he believed this panel acted in

bad faith and made biased rulings against him. Some rulings were made in his favour while others were not. That some did not go in his favour does not mean that they or the Hearing as a whole were biased or conducted in bad faith. We have already addressed his allegation that Vice-Chair Cotter's participation on this panel and the ICTO Panel gave rise to a reasonable apprehension of bias.

[196] Concerning Magneson's assertion that he was denied the right to testify or call evidence, we refer to the lengthy procedural history of this matter set out in detail at the beginning of this decision. From that history, it is apparent that:

- there were several delays in scheduling and concluding the Hearing, many of which occurred to accommodate the calendar of Magneson's counsel. In July 2018, his original counsel agreed to the original January 2019 Hearing dates. At that time, Magneson was already aware that he needed to retain new counsel for the Hearing, but he was still in the process of doing so in November 2018. As a result, the Hearing was adjourned to late July 2019;

- it was unclear for some time whether Magneson would enter a defence case at all. As was his right, he declined to decide until he received the ruling on his Charter Application, but even after that ruling was delivered, his counsel indicated he was not available to continue the Hearing until late the following year;

- not long after settling on earlier dates in 2020 that would accommodate his calendar, Magneson's counsel withdrew from the record;

- once it became apparent that it was likely to be many months before public health measures would allow the resumption of hearings with all parties physically present in the same room, the ASC – like courts and tribunals across the country – began conducting its proceedings by remote means, including teleconference and video conference;

- while Magneson refused to enter his case by remote means or to retain new counsel without meeting that person face-to-face, he also indicated he was not applying for an adjournment. Regardless, we adjourned the June 2020 Hearing dates to give him more time to find counsel or to prepare his case;

- having concluded that it was not in the public interest to delay the conclusion of the Hearing indefinitely, on May 22, 2020 we issued and confirmed in writing very specific directions for its continuation, and set out the consequences that would ensue if those directions were not followed; and

- in response to our directions, Magneson simply reiterated his previous position.

[197] We reject Magneson's contention that he was given no reasons for this panel's decision to consider the evidentiary portion of the Hearing concluded in the face of his refusal to proceed by remote means. When he first raised his objections in that regard, we explained that his right to be heard did not equate to a right to a hearing at which all participants could be in the same room. We

also explained that as we control our own procedures (see, e.g., *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 S.C.R. 560 at para. 16), decisions about the hearing format are for the panel to make, not the respondent. Section 10.2 of Rule 15-501 provides that, "[t]he panel will determine the location of and manner in which all or part of a hearing will be held", and two of the considerations that may be taken into account in making that determination are "the effect on the cost, efficiency and timely completion of the proceeding" and "the avoidance of unnecessary delay".

[198] After Magneson refused to follow our directions of May 22, 2020, we sent an email communication through the ASC Registrar confirming that refusal. The same email explained that as a result, we considered the evidentiary portion of the hearing complete, just as we had indicated would be the consequence in our May 22, 2020 directions. Those communications were written by this panel, and we requested that the ASC Registrar send them to the parties. We did not delegate the decision-making or our jurisdiction to the Registrar.

[199] We understand that Magneson's preference was for a hearing at which everyone involved and any interested members of the public could appear in the hearing room at the same time, including any witnesses from outside of Canada. However, his preference does not constitute an inviolable right to a hearing of that nature, especially when there was no prospect of it being possible in the near term. Video conferencing is a proven technology that allows all participants to see and hear each other, and allows members of the public to attend. Any minor inconveniences are not so significant that using video conferencing amounts to a denial of natural justice or procedural fairness, which is flexible and variable depending on the context (see *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 20-22). As mentioned, Magneson had no difficulty making oral closing submissions by teleconference on September 1, 2020, and that session was open to and attended by several members of the public.

[200] The Act provides that a respondent is entitled to a hearing of allegations brought by Staff. Section 1.1(e) of Rule 15-501 defines a "hearing" as "an opportunity for all parties to present evidence, argument or a position to a panel during a proceeding". We are satisfied that Magneson had that opportunity, including the opportunity to testify on his own behalf.

[201] We are also satisfied that our conclusions in this regard are consistent with those of several other courts and tribunals that have faced similar arguments during the pandemic.

[202] In *Re Miller* (2020 ONSEC 16), the respondent sought an extension of a deadline to provide a witness list and will-say statements and to indicate whether an expert witness would be called on the basis that he had not been able to meet with his counsel in person due to the pandemic. The OSC denied the extension, observing that there were other ways lawyers and their clients could communicate effectively, even in person if physical distancing guidelines were respected (at paras. 16, 19).

[203] In *Re Forum National* (2020 BCSECCOM 285), two of the respondents applied for an adjournment of a British Columbia Securities Commission (**BCSC**) merits hearing because of the pandemic. Like Magneson, they argued that they were entitled to a physically in-person merits hearing given the seriousness of the allegations against them, and cited concerns including U.S.-

resident witnesses who could not travel to British Columbia to testify, and the fact that one respondent had underlying medical conditions that put him in a high-risk category.

[204] BCSC staff opposed the application in part on the basis that the parties and witnesses could attend the hearing by video conference, and that the merits hearing had already been subject to numerous delays and adjournments. They disputed the respondents' contention that the BCSC panel would not be able to assess the credibility of the witnesses properly if the witnesses testified by video technology, citing a criminal assault case in which a superior court justice held that, "the use of the video and voice technology in this case will not, in any way, jeopardize or prejudice the right of the accused to a fair trial and to make full answer and defence to the charges" (*R. v. Jeanes*, 2014 BCSC 944 at para. 43, cited in *Forum National* at para. 18). They also pointed out that, like Magneson, the *Forum National* respondents had not provided any authority to support their claim that they were "entitled" to a hearing with all parties physically present in the same place.

[205] The BCSC panel agreed with staff and the court in *Jeanes* (at para. 39). They noted that the issue came down to balancing hearing fairness against the public interest in having the merits hearing proceed (at para. 28). They remarked, "[i]nvestor confidence in the integrity of the capital markets and the [BCSC]'s ability to protect the public diminishes as the merits of this matter continue to be unheard" (at para. 30; see also *Re Frank*, 2015 LNCMFDA 75 at para. 21 as to the impact of undue delay on the justice system). The panel concluded that as "the master of [their] own procedures", they could direct the use of video technology, and that this would be "procedurally fair while at the same time satisfying the public interest in not further delaying the hearing on the merits of this matter for an uncertain period of time" (at paras. 36, 44).

[206] In *Re First Global Data Ltd.* (2020 ONSEC 23), a matter that included allegations of fraud, the respondents objected to proceeding by video or telephone conference on the basis of fairness. The OSC panel found that the respondents had failed to establish that a videoconference would deprive them of their right to a fair hearing or cause them any appreciable prejudice (at para. 73). The panel cited their jurisdiction to determine their own procedures – including holding hearings by videoconference (at para. 14) – and agreed with the Ontario Superior Court of Justice that, "[t]here is nothing about a remote procedure, whether large, complex, and potentially final, or small, straightforward, and interim, that is inherently unfair to either side" (at para. 42, citing *Miller v. FSD Pharma, Inc.*, 2020 ONSC 3291 at para. 10).

[207] *Re Ziaian* (2020 IIROC 34) is an Investment Industry Regulatory Organization of Canada (**IIROC**) decision concerning a respondent's submission that if he could not have a physically in-person hearing, the proceedings against him should be stayed. The IIROC panel characterized this as an argument that the respondent "has an absolute right to an in-person oral hearing before the [p]anel, and the [p]anel's control over its process, once an oral hearing is scheduled and a [r]espondent withholds his consent to another form of hearing, is limited to holding an oral hearing or delaying the proceeding indefinitely until such a time as it is possible to do so safely" (at para. 21). They rejected the notion that ultimate control of the hearing process lay with the respondent (at para. 24), and concluded as follows (at para. 34):

> It is the conclusion of the [p]anel that an electronic hearing by way of videoconference offers the [r]espondent all of the entitlements enumerated in [IIROC] Rule 8423(2) [i.e., to attend and be heard, to call and examine/cross-examine witnesses, and to present evidence]. The sole difference between it and an in-person hearing is the physicality of attending. The [r]espondent and his counsel will be

> in attendance every day at the hearing, and they will see and hear, and be seen and heard, by the [p]anel, as will their witnesses. Their right to call and examine witnesses and present documentary and other evidence remains, and their right to cross-examine witnesses as reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding may be fully exercised in an electronic hearing.

[208] Like the OSC in *First Global*, the IIROC panel also found that the respondent had failed to establish that an electronic proceeding would cause him prejudice sufficient to justify an indefinite delay in concluding the hearing (at paras. 70, 86). While the respondent may have preferred an in-person hearing where all parties could be present together, a hearing by videoconference was "a viable and fair alternative" (at para. 45).

[209] The IIROC decision was upheld on appeal to the OSC (2021 ONSEC 9). The appeal panel framed the issue as a question of "whether a requirement of physical co-location would protect an essential entitlement of a respondent who faces an IIROC proceeding" and concluded that it would not (at paras. 62-63). The panel was not persuaded that a videoconference hearing would deprive the respondent of due process or fairness, and cited both OSC and judicial authority to the contrary (at para. 63; see also paras. 65-66, and *Arconti v. Smith*, 2020 ONSC 2782 at paras. 32, 34).

[210] We therefore conclude that there would have been no denial of fairness to Magneson by continuing the Hearing by remote means, and that it was not reasonable for him to refuse to proceed as directed by this panel.

B. Fraud

1. Applicable Law

[211] The Respondents were alleged to have contravened s. 93(b) of the Act. The language of that section changed somewhat during the Relevant Period. Until October 31, 2014, it read:

> No person or company shall, directly or indirectly, engage or participate 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.

[212] As of October 31, 2014, the section was amended to add the underlined words as follows:

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

[213] The section was broadened in October 2014 to capture additional misconduct, but the amendment does not change the analysis required in this case (see also *Re Breitkreutz*, 2018 ABASC 37 at para. 111).

[214] The ASC has adopted the legal test for civil fraud enunciated by the SCC in *Théroux* (see, e.g., *Capital Alternatives* at paras. 308-309, or more recently, *Re Bluforest Inc.*, 2020 ABASC 138 at para. 381). The test requires Staff to prove the *actus reus* and *mens rea* of fraud on a balance of probabilities (*Théroux* at para. 27).

[215] According to the SCC, the *actus reus* is proved if: (i) a "prohibited act" was perpetrated, and (ii) the prohibited act caused the victim to suffer "deprivation" – i.e., economic loss – whether or not the victim faced merely the risk of loss, or incurred actual loss (*Théroux* at para. 27). A "prohibited act" may be an "act of deceit, a falsehood or some other fraudulent means" (*ibid.*). Acts of deceit or falsehood include representing that "a situation was of a certain character, when, in reality, it was not" (at para. 18). "[O]ther fraudulent means" include dishonest acts that are not necessarily acts of deceit or falsehood. In *Théroux*, the SCC cited as an example "the use of corporate funds for personal purposes, non-disclosure of important facts, . . . unauthorized diversion of funds, and unauthorized arrogation of funds or property" (*ibid.*).

[216] The *mens rea* of civil fraud is proved if the respondents had "subjective knowledge" or "subjective awareness" of both their prohibited act and of the possibility that the prohibited act could cause a victim to suffer deprivation (*Théroux* at paras. 24, 27). Staff is not required to prove that the respondents knew they were doing something wrong or that they intended to cause economic loss. Staff need only prove that they intentionally committed the prohibited acts while aware that they could cause deprivation, including the risk of deprivation (*ibid.* at para. 24; see also para. 28). The SCC explained this as follows (at para. 36):

> A person who deprives another person of what the latter has should not escape criminal responsibility merely because, according to his moral or her personal code, he or she was doing nothing wrong or because of a sanguine belief that all will come out right in the end. Many frauds are perpetrated by people who think there is nothing wrong in what they are doing or who sincerely believe that their act of placing other people's property at risk will not ultimately result in actual loss to those persons.

[217] *Théroux* sets out that in some cases, "subjective awareness of the consequences can be inferred from the act itself, barring some explanation casting doubt on such inference" (at para. 23). The SCC concluded, "[t]he fact that such an inference is made does not detract from the subjectivity of the test" (*ibid.*). As the panel explained in *Arbour*, "subjective knowledge can be inferred from the prohibited act and surrounding circumstances" (at para. 983; see also *Brost* at para. 48).

[218] In this case, the Respondents include the two corporate entities Magneson controlled at all times material to the allegations. In *Re Mandyland Inc.* (2012 ABASC 436), the respondents likewise included both individuals and the corporations they controlled. The hearing panel observed that, "[c]orporations carry on their activities through their guiding minds; therefore, what their guiding minds knew or reasonably ought to have known can equally be attributed to them" (at paras. 197, 318). In *Arbour*, the panel similarly noted that to find a corporation liable for fraud, "it need only be proved that the corporation's directing minds knew or reasonably ought to have known that the acts of the corporation perpetrated a fraud" (at para. 985). In *Re Zeiben*, the panel found "that the acts of Zeiben as officer, director and controlling mind of the two companies are the acts of the two companies and that Zeiben's knowledge and intention as a directing mind of the

two companies constitute the intention and knowledge of the companies" (2014 ABASC 167 at para. 124).

2. *Actus Reus*

[219] The evidence at the Hearing clearly demonstrated that Magneson perpetrated acts of deceit, falsehood, and other fraudulent means within the meaning of *Théroux*. Specifically, he made representations concerning the use of investor funds that were inconsistent with the true use of funds, and failed to disclose how the funds were actually spent. This was apparent from the documentary evidence, as well as from the investor testimony. That testimony was consistent among the witnesses, and it was confirmed by Magneson's evidence in his Interview.

[220] Magneson admitted that he told investors all funds invested in NWI would be spent on research and development of the Drill, whether investors purchased Shares from treasury or Shares from Magneson's personal holdings. This would have been confirmed in the investors' minds by the fact that they were directed to make their payments to NWI in either case. However, these representations were false. Magneson did not disclose that the majority of the funds invested would be paid to him, whether directly or through 111 Alberta, as compensation and reimbursement for expenses, repayment of loans purportedly advanced prior to 2011 (whether or not the loans were advanced for the ostensible purpose of Drill research and development), and payment for his personal Shares.

[221] Although Magneson may have considered his compensation and expenses part of the total cost of research and development of the Drill, by his own admission he did not explain that to the investors. He had a Personal Services Contract with NWI – essentially, a contract with himself – that provided he and 111 Alberta would be paid cash compensation of $321,600 per annum, or a total of $1,929,600 from 2011 through 2016. However, not only did he pay himself in excess of that amount ($2,011,250 from 2011 through 2016, according to the Unaudited Statements), there was no evidence that he disclosed the contract or the amount of his compensation to any of the investors until after the Relevant Period. Prior to 2017, the investor witnesses who said they asked Magneson about his compensation reported that they were either told he was taking nothing, or that he was taking nothing significant. If they asked for financial disclosure, Magneson told them he was not required to provide it. Therefore, even if some investors assumed he was receiving some recompense, there was no evidence they had any sense of the amount or its proportion of the total funds raised.

[222] Similarly, although there was some evidence that Magneson told at least one investor that he had personally invested in NWI, there was no evidence that any investors were aware of Magneson's claim that NWI owed him and 111 Alberta for shareholder and related party loans. In fact, Magneson's counsel elicited evidence from MD, ME, and DL on cross-examination that if they had known NWI carried such a large debt, they would not have invested. It is true that the Unaudited Statements indicated that Magneson and 111 Alberta were owed $1,520,288 as of the end of 2010, but there was no evidence that this was conveyed to the investors. More importantly, even if he had disclosed the debt, there was no evidence Magneson ever told investors that he intended to use investment funds to pay himself back. The Unaudited Statements disclosed that $1,518,830 of the amount owing was repaid from 2011 through 2016, but again, despite repeated requests, Magneson did not give the investors that information until 2017.

[223] By Magneson's own admission, it is also patently clear that investors were not told he intended to take all of the proceeds from the sale of his personal Shares. Instead, he concealed his intention to do so by having them make their payments to NWI and telling them all of their money would go toward advancing the Drill project.

[224] According to the Unaudited Statements, $4,760,222 (net of redemptions) was raised from Share issuances between 2011 and 2016. This corresponded with the total paid for treasury Shares shown on the NWI Share transaction register provided to Staff by Magneson's counsel. However, the Share transaction register showed $0 paid for every Share transaction that was categorized as a "Transfer from Magneson". The $2,263,122 paid for Magneson's Shares during the same period was accounted for on a separate record provided by Magneson's counsel that showed what was paid for each purchase from his personal holdings. Together, the two amounts totalled $7,023,344, which roughly approximated the deposits to NWI's accounts that Staff calculated based on NWI's bank records. Therefore, even if investors had a copy of the Unaudited Statements, they would not see the full picture of the Share sales amounts and the total amount paid to Magneson.

[225] Based on Magneson's own numbers, of the $7,023,344 raised from Share sales from 2011 through 2016, he received $5,793,202 – approximately 82% of the total. If only the numbers shown in the Unaudited Statements are considered (i.e., if Share sales from Magneson's holdings are excluded entirely), Magneson received $3,530,080 of $4,760,222 raised, or approximately 74% of the total. If, for the sake of simplicity, the lowest and most conservative numbers from Staff's Source and Use Analysis of NWI's CAD account are used and the comparatively small transactions in the USD account are ignored, NWI received $5,228,670 from investors, and paid $5,094,572 or 97% of the total to 111 Alberta and Magneson. If the higher numbers from Staff's Source and Use Analysis of NWI's CAD account are used, NWI received $6,201,715 from investors, and paid $5,555,925 or 90% of the total to or for the benefit of 111 Alberta and Magneson.

[226] In his submissions, Magneson maintained that he was entitled to all of the amounts he was paid, all of the amounts were properly disclosed in the Unaudited Statements, and Deloitte certified "there was no potential or actual fraud, non-trivial errors or illegal acts" reflected in those statements. The Unaudited Statements in evidence contained no such assertion by Deloitte: they only contained a standard review engagement cover letter that described the limits of a review engagement. Moreover, even if Deloitte had made that assertion, its accounting opinion would not be dispositive of an allegation of securities fraud under the Act.

[227] Magneson's purported entitlement to the funds is not dispositive of the allegations in this case, either. Even if we were to accept it as true, it does not justify his deception: by his own admission, Magneson did not inform the investors about these purported entitlements when they invested. Instead, he led them to believe that the "situation was of a certain character, when, in reality, it was not" (*Théroux* at para. 18), failed to disclose important facts, and diverted funds the investors intended for corporate use to his personal use. It is one thing for investors to assume that Magneson was being paid something for his work and expenses during the Drill's development; it is another thing entirely for them to be advised that Magneson would be paid three-quarters or more of the total funds invested.

[228] As a result, we agree with Staff: for the purposes of s. 93(b) of the Act, it does not matter what justification Magneson had for taking investor funds if he did not provide that information to

the investors. Keeping them informed on the progress of work on the Drill is not the same as providing accurate financial disclosure. As the ASC has often commented in previous decisions, an issuer's proposed use of the funds it raises is one of the most important pieces of information an investor considers in deciding whether to proceed with an investment (see, e.g., *Arbour* at para. 776). In this case, more than one investor witness indicated he would not have invested if he had known how Magneson intended to use the money.

[229] We are also satisfied that Magneson's prohibited acts caused NWI and its investors to suffer "deprivation" within the meaning of *Théroux* (at para. 27). Given NWI's current status, it is likely that the investors' money has been lost entirely. Even if that is not the case, NWI's pecuniary interests – and, consequently, the pecuniary interests of its investors – were put at risk when such a large proportion of the funds invested was diverted from advancing the Drill project to paying Magneson for his remuneration, expenses, loans, and Share sales. Although TD said that Magneson told him he was not taking any compensation because it would not be fair to the other investors if he got paid before they did, that was exactly what happened: Magneson ensured that he was paid first, in full – apart from the $1458 that remained owing at the end of the Relevant Period. This occurred even though the Unaudited Statements disclosed that the related party loans to NWI were not accruing interest and were not required to be repaid within any specific time.

[230] Indeed, based on the evidence before us, apart from the few investors who received relatively small amounts from redemptions or secondary transfers, Magneson appeared to be the only one who received a benefit from the Drill project. At the very least, he was paid well from 2011 to 2016, and received cash consideration for 5,142,865 of his Shares.

[231] Although Magneson argued that he did not take funds out of NWI's accounts if NWI needed them and that RBTS's work was never compromised or delayed for lack of funds, it was not in dispute that the Drill project was not completed. The evidence was that further work is required, and NWI needs additional investment funds to do it.

[232] Moreover, if NWI had all the money it needed throughout, it is difficult to understand why Magneson approached investors like TD and ME to ask for further investments because more money was urgently needed to pay NWI's bills and keep the Drill project alive. As Staff put it, "Magneson would have the Panel conclude that it was not deceptive for him to approach investors and beg for funds to pay urgent expenses to keep the Drill alive, only to immediately transfer those funds to pay a debt allegedly owing to him."

3. *Mens Rea*

[233] By Magneson's admission, he was the sole directing mind of both NWI and 111 Alberta, and was the only person who dealt with NWI's investors. He was aware of what he told each person about the intended use of the funds raised, and was aware of how the funds were actually spent. In short, he knew that he intentionally failed to provide NWI investors with accurate and complete disclosure, and in fact refused to provide it when asked. Accordingly, Magneson had subjective knowledge of his deceit and therefore of his prohibited acts as defined in *Théroux*.

[234] It may be that Magneson did not think there was anything wrong with raising funds on false pretences because he was entitled to the money and expected that the Drill would be such a success that everyone would soon make their money back plus a return. However, his efforts to

conceal his compensation, the repayment of purported debts, and whether he or NWI would receive the proceeds from the sale of his personal Shares could also be interpreted as full consciousness of guilt. Either way, proof of awareness that the conduct was wrong is not a requirement of the legal test.

[235] We are satisfied that Magneson knew what he was doing, and also that he was aware of the possibility that his prohibited acts could cause deprivation: obviously, if he took the money, it would not be available to NWI. As a result, the Drill project – and thus the investors' economic interests – would be jeopardized. Indeed, this possibility appeared to manifest itself on several occasions, when Magneson pleaded with certain investors for more money because NWI was without funds to pay a bill or to take the next step with the project.

[236] We are therefore satisfied that Staff have also proved the *mens rea* elements of the test in *Théroux,* and we find that Magneson breached s. 93(b) of the Act as alleged.

4. Corporate Liability

[237] Finally, we are satisfied that the corporate Respondents, NWI and 111 Alberta, are also liable for breaching s. 93(b) of the Act. Magneson perpetrated his fraud through them by using NWI to raise funds from investors, and 111 Alberta as the conduit through which most of that money was diverted to his personal use. As the guiding mind and sole decision-maker of both corporate Respondents, Magneson's knowledge and activities are attributable to them.

IX. CONCLUSION

[238] For the reasons given, we find that Staff have proved the allegations in the NOH.

[239] This proceeding now moves into a second phase to determine what, if any, sanction or cost-recovery orders should be made against the Respondents in view of our findings. By its terms, the ICTO remains in effect.

[240] To that end, a hearing management session is scheduled to take place at 09:00 on Wednesday, August 25, 2021. The purpose of this session will be to set a timetable for the delivery and hearing of evidence (if any) and submissions on the issue of appropriate orders.

August 11, 2021

For the Commission:

"original signed by"
Kari Horn

"original signed by"
Steven Cohen

"original signed by"
Tom Cotter