ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Ward, 2022 ABASC 139 **Date: 20221019**

Shane Courtney Ward

Panel:	Kari Horn Karen Kim Maryse Saint-Laurent, KC
Representation:	Tom McCartney Adam Karbani for Commission Staff Robert Stack for the Respondent
Submissions Completed:	June 1, 2021
Decision:	October 19, 2022

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I. INTRODUCTION AND OVERVIEW

[1] On May 29, 2020, enforcement staff (**Staff**) of the Alberta Securities Commission (the **ASC**) issued a Notice of Hearing (the **NOH**) alleging that Shane Courtney Ward (**Ward**) breached the *Securities Act* (Alberta) (the **Act**) by illegally distributing securities, making misrepresentations, and perpetrating a fraud on investors.

[2] A hearing of the allegations in the NOH (the **Hearing**) was held over 12 days in February, March, and June 2021. Staff called 11 witnesses, including three Staff investigators and eight investors. Ward testified on his own behalf, but did not call any other witnesses.

[3] Following the Hearing, we received written submissions from Staff (the **Staff Submissions**) and from Ward (the **Ward Submissions**). Staff also provided reply submissions in response to the Ward Submissions (the **Staff Reply Submissions**). We heard oral closing arguments from both parties on the last day of the Hearing, June 1, 2021.

[4] Following oral arguments, we indicated that we would issue a decision and reasons for the decision in due course. We have determined that Staff proved that Ward engaged in illegal distributions of securities, made misrepresentations to investors, and perpetrated a fraud.

[5] Our reasons for those determinations and our specific findings follow.

II. BACKGROUND

[6] At the material time, Ward was a resident of Edmonton and the founder, sole proprietor, sole employee, and guiding mind of an investment business known by its registered trade name, Engineered Wealth or **E-Wealth**. Documents in evidence described Ward as E-Wealth's "Managing Director and Executive Strategist".

[7] Ward testified that he did all of E-Wealth's banking, and made all of E-Wealth's strategic and investment decisions.

[8] Prior to establishing E-Wealth, Ward was a professional engineer. Search results in evidence at the Hearing showed that at the material time, neither Ward nor E-Wealth was registered with the ASC in any capacity. Ward acknowledged during his testimony that he was never licensed to sell securities.

[9] According to Ward, he quit working as an engineer once he started to earn enough money from his investing through the **Qtrade** platform to make a living. Eventually, he said, people he knew began asking if he could make some investments on their behalf, and he came up with the idea to start a business. Once he had had some success trading for others, he consulted a securities lawyer in Edmonton (to whom we will refer as **AC**) for advice on how to formalize the arrangements.

[10] Ward testified that AC assisted him to set up an investment fund in which he could pool money from investors and trade under a business account to generate profits that Ward and his investors would share. Ward said that AC prepared a draft subscription agreement for him to use, and assisted him with preparing other informational materials. He understood from AC that he

could operate a non-registered, non-reporting private fund and offer exempt securities to certain qualified investors without having to register under securities laws, as long as he kept the number of investors under 50.

[11] In approximately February 2011, Ward began selling units in E-Wealth (the **Units**) for $5000 each. In 2011 and 2012, the subscription agreements for the Units described them as units in an E-Wealth "Fund" with a given calendar year – for example, the "Engineered Wealth 2011 Fund".

[12] Some time around 2013, Ward said that AC told him there had been changes to the applicable securities rules and regulations, and that if he wanted to continue operating a fund, he would have to become a registered fund manager or portfolio manager. To avoid those formal requirements, Ward changed to a promissory note structure, in which he offered a flat rate of return instead of continuing with the fund structure. Since he would no longer be running a fund, Ward said that he and AC worked together to amend the form of subscription agreement. Under the new structure, the agreements indicated that each Unit was comprised of a promissory note in the amount of $5000.

[13] An investor list that Ward prepared and produced during Staff's investigation indicated that he raised $555,909.68 between 2013 and 2017.

[14] Ward was unsuccessful with his investing activities, and by late 2017, E-Wealth failed. Nearly all of its investors lost their funds and received no returns on their investments.

III. OVERVIEW OF STAFF'S ALLEGATIONS

[15] In the NOH, Staff alleged that between February 2011 and April 2018 (defined in the NOH as the **Relevant Period**), Ward solicited investments in E-Wealth from 22 investors, including 21 Alberta residents, raising approximately $819,000. Staff further alleged that during the Relevant Period, Ward distributed E-Wealth securities without a prospectus and without ensuring that all investors qualified for prospectus exemptions, contrary to s. 110(1) of the Act. Specifically, the NOH states that Ward breached s. 110(1) "by distributing securities of E-Wealth without having filed and received a receipt for a preliminary prospectus or a prospectus, and without an exemption from that requirement for some or all of the relevant distributions of securities".

[16] Staff also alleged that in soliciting investments and communicating with investors and potential investors during the Relevant Period, Ward made a number of misrepresentations. The individual misrepresentations alleged were that:

(i) investors' principal would be protected;

(ii) investors would, and did, earn specified high rates of return. In this regard, Staff contended that Ward provided investors with account statements that purported to confirm that they had earned the returns promised in order to encourage them to re-invest their principal and invest additional funds. In reality, Staff alleged, the investments did not earn the purported returns and the account statements were fictitious; and

(iii) investment funds would be used for investing and trading in securities using E-Wealth's proprietary trading strategy. Instead, Ward improperly diverted investment funds for personal use and other unauthorized purposes.

[17] Based on these representations, Staff alleged that Ward breached s. 92(4.1) of the Act "by making statements that he knew or reasonably ought to have known were, in a material respect, misleading or untrue, did not state facts that were required to be stated or necessary to make the statements not misleading, and would reasonably be expected to have a significant effect on the market price or value of a security".

[18] Finally, Staff alleged that because Ward converted investor funds to his own use contrary to his representations that investors' principal would be protected and invested to generate returns, he breached s. 93(1)(b) of the Act "by directly or indirectly engaging or participating in an act, practice or course of conduct relating to securities that he knew or ought to have known may perpetrate a fraud on investors". In their opening statement at the Hearing, Staff suggested that during the Relevant Period, Ward raised approximately $680,000 from investors, but paid at least $436,000 of that sum to himself.

IV. PROCEDURAL HISTORY

[19] Prior to the Hearing, Ward was represented by different legal counsel than the counsel who represented him at the Hearing. His previous counsel applied for and was given leave to withdraw from the record pursuant to an order issued on January 11, 2021.

[20] In February 2021, Ward's new counsel brought an application for an order directing Staff to produce further and better will-say statements for the three investigator witnesses Staff anticipated calling to testify at the Hearing, especially with respect to the financial analysis (the **Source and Use Analysis**) that was created. He also sought an adjournment of the Hearing to provide time for the preparation, delivery, and review of the revised will-say statements and any related materials.

[21] Staff opposed Ward's application on the basis that there was no further material to disclose, because everything relevant to the investigators' anticipated testimony had already been disclosed or was self-evident from that disclosure. They submitted that disclosure concerns should have been raised much earlier than on the eve of the Hearing, and pointed out that while Ward's new counsel may have wanted additional time to prepare for the Hearing, the lack of time was attributable to Ward because he retained new counsel so late.

[22] The panel that heard Ward's application issued an oral ruling on February 16, 2021. The panel concluded that Rule 15-501 *Rules of Practice and Procedure for Commission Proceedings* does not require parties to provide full details of all aspects of a witness's anticipated hearing testimony, and that the content of a will-say statement will vary depending on the nature of the witness's involvement in the matter and the nature of the expected evidence. Given that the witnesses whose will-say statements were of concern to Ward were all Staff investigators who would essentially testify about their collection of evidence and the creation of certain Staff work

product summarizing that evidence, the panel concluded that nothing meaningful could be added to what had already been disclosed.

[23] The panel further concluded that Ward had not met his burden to establish either that further disclosure was required, or that an adjournment was warranted. Accordingly, the application was dismissed.

[24] In the Ward Submissions, Ward raised the same issue again, essentially arguing that it was unfair that he was not given a detailed will-say statement concerning the Source and Use Analysis prior to the Hearing. He contended that without one, he had not been able to sort through the spreadsheets to understand the case that he had to meet in advance of the Hearing.

[25] In response, Staff pointed out that the same issue had already been determined on February 16, 2021. They also noted that in order to give Ward's late-retained counsel more time to prepare for the Source and Use Analysis evidence, Staff voluntarily called two of the investigator witnesses to testify later in the Hearing than originally planned. When they testified, Ward's counsel did not seek additional time to prepare before conducting his cross-examinations. Staff therefore argued that there was no unfairness concerning will-say statements or the investigators' evidence and that Ward was provided a fair opportunity to make full answer and defence to Staff's allegations.

[26] In *410675 Alberta Ltd. v. Trail South Developments Inc.*, 2001 ABCA 274, the Alberta Court of Appeal (**ABCA**) indicated that, "[a] finding of *res judicata* requires that the first order or judgment be a final order, and that the question to be decided in the second matter be the same as the one which was decided in the first decision" (at para. 12, citation omitted; see also *Calgary (City) v. Alberta (Human Rights and Citizenship Commission)*, 2011 ABCA 65 at para. 30). We agree with Staff that this issue was fully and finally determined in February 2021. Accordingly, it is *res judicata* and we decline to revisit it in these reasons.

V. PRELIMINARY ISSUES

A. Standard of Proof

[27] The standard of proof in ASC enforcement proceedings is the balance of probabilities (*F.H. v. McDougall*, 2008 SCC 53 at paras. 40 and 49).

[28] We must therefore decide if it is more likely than not that Ward breached Alberta securities laws as alleged, based on "clear, convincing and cogent" evidence that is sufficient to satisfy the balance of probabilities test (*ibid.* at paras. 44, 46, and 49).

B. Applicable Evidentiary Principles

[29] Section 29(f) of the Act provides that "the laws of evidence applicable to judicial proceedings do not apply" to hearings before the ASC. Therefore, all relevant evidence – including hearsay evidence – is admissible, subject to the rules of natural justice and procedural fairness (*Re Aitkens*, 2018 ABASC 27 at para. 50).

[30] To determine the weight we will ascribe to the evidence, we consider the "indicators of its reliability, such as corroboration by other evidence" (*ibid.* at para. 51).

[31] To assess the credibility of witnesses and to choose between or reconcile conflicting evidence, we adopt the approach typically taken by ASC panels and described in *Aitkens* (at para. 52):

> . . . we consider the source of the evidence and whether or not the evidence is consistent with other reliable evidence, such as documents or the testimony of neutral parties with no motivation not to tell the truth. We also consider whether the evidence makes logical sense in the circumstances. A useful statement of the law is from *Faryna v. Chorny*, [1951] B.C.J. No. 152 (BCCA) (at para. 11, also cited in *R. v. Boyle*, 2001 ABPC 152 at para. 107):
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> > 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.

[32] Unless there is credible evidence to the contrary, disbelief of a witness does not necessarily mean that the opposite is true (*ibid.* at para. 53).

[33] As Staff pointed out, this panel is permitted to draw inferences from facts established by the evidence (see *Re Arbour Energy Inc.*, 2012 ABASC 131 at para. 39). While inferences can be drawn "using common sense, human experience and logic after considering the totality of [the] evidence and any competing inferences that could be drawn from the facts", inferences "must be grounded on proven facts and must be reasonable" (see *Re De Gouveia*, 2013 ABASC 106 at para. 95).

C. Hearing Witness Credibility

[34] Apart from that given by Ward, we generally found the Hearing witness testimony consistent and reliable. It accorded with and was supported by the documentary evidence, and the investor witnesses generally described a consistent experience with Ward and E-Wealth, as well as a common understanding of the features of the investment. In *Re Chmelyk*, 2017 ABASC 13, the panel stated, "[w]e generally considered the witness testimony to be truthful and attributed any gaps in memory, minor inconsistencies or lack of clarity to the passage of time and, in some instances, to the witnesses' relative inexperience with the capital market" (at para. 7). We would say the same in this case.

[35] Our conclusion is different with respect to Ward. Staff argued that he was not a credible witness, and that his evidence should not be accepted unless it concerned non-controversial matters or was supported by other reliable evidence. They described him as "conveniently forgetful" during his testimony, and noted that his evidence was inconsistent with both the investor witnesses' evidence and the documentary evidence. Where his evidence conflicted with other evidence, Staff argued that we should prefer the latter.

[36] Generally, we agree. As discussed in more detail later in these reasons, Ward's testimony on key points often conflicted with other testimony and the documentary evidence. In cross-

examination, he tended to be evasive, and claimed not to remember details we consider him unlikely to have forgotten. For example, when asked about a large number of regular payments he made to a collection agency or agencies over a period of more than four years, he claimed not to remember what his financial situation was at the time or why he was making those payments. We doubt that a person subject to formal debt collection efforts pursuant to which he made regular payments over at least a four-year period would forget the experience or what precipitated it.

[37] At other times, Ward professed to remember details with perfect clarity and suggested that it was those who contradicted him who did not remember correctly, even where their evidence was consistent with each other. Although most of the investor witnesses told a consistent story as to how they came to fill out their subscription agreements in a remarkably similar way, for example, Ward denied their version and explained that because they were new to completing such forms and may have only done so once in their lives, they did not remember it as clearly as he did.

[38] In the result, while we accepted Ward's testimony concerning non-controversial matters, where it conflicted with other reliable evidence on the issues in dispute, we tended to accept the latter.

D. Application of the Rule in *Browne v. Dunn*

[39] Staff argued that the rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.), applies in this case, as Ward gave testimony that contradicted or undermined the evidence given by Staff investigator Dale Fisher (**Fisher**) and two of Staff's investor witnesses, JL and LX, but neglected to put his version to those witnesses during cross-examination. Staff therefore contended that Ward breached the rule, and, as a consequence, his testimony on those points should be disregarded.

[40] The ABCA explained the rule in *Browne v. Dunn* in *R. v. Sawatzky*, 2017 ABCA 179 (at para. 23):

> Where a party intends to impeach a witness who was called by his or her opponent, or present evidence contradicting that witness, the party should direct the witness's attention to the contradictory evidence. The contradictory evidence should be put to the witness during cross-examination, so that the witness has an opportunity to address or explain the contradictory evidence. If the witness is not cross-examined on any such matters of significance, the trier of fact may consider the failure to cross-examine the witness when assessing the witness's credibility or the credibility of any contradictory evidence. [citations omitted]

[41] In *R. v. SCDY*, 2020 ABCA 134, the ABCA further explained (at para. 70):

> The purpose of the rule is to increase the likelihood that parties and witnesses are treated fairly and that the fact-finding process produces as much relevant and helpful evidence as may be within the knowledge of witnesses, particularly the witness [who is] the target of the impeachment attempt. If a court determines that there has been a breach of the *Browne v. Dunn* rule, it must consider what remedial measure is necessary to restore trial fairness. [footnotes omitted]

[42] However, in *Sawatzky*, the ABCA also noted that, "[t]he 'rule in *Browne v Dunn*' is not absolute", and that it is up to the trial judge "to determine whether a party has failed to comply with the rule and whether the failure to cross-examine a witness on a certain point was unfair to the other side" (at para. 21). While the trier of fact may place less weight on evidence given in

breach of the rule (see *SCDY* at para. 69) or take the breach into account when assessing credibility (see *R. v. Abdulle*, 2016 ABCA 5 at para. 11), there is no obligation to do so. The trier of fact has the discretion to determine the extent of the rule's application in the case, whether a remedy for a breach is necessary, and if so, what the remedy should be (*Sawatzky* at paras. 21 and 26).

[43] In *SCDY*, the ABCA found that the accused did not breach the rule by failing to put an aspect of his version of events to the complainant during cross-examination because she had already been questioned about that issue in her direct evidence and "had ample opportunity to state her position" (see para. 16). As long as a witness is given the chance to address a particular subject or issue of significance to the case – whether on direct examination or cross-examination – fairness may be preserved even if the opposing party does not specifically put the contradictory evidence to that witness. To use a simple example, if Witness A has said on direct examination that it was raining on the date in question, the cross-examiner anticipating evidence to the contrary from Witness B is not obliged to put it to Witness A that it was not raining on that date. Witness A's position on the point is already known.

[44] We have carefully reviewed the specific issues with respect to which Ward testified and that Staff alleged were not put to Fisher, JL, and LX on cross-examination. We have also carefully reviewed the evidence given by those witnesses on both direct and cross-examination.

[45] Concerning Fisher, Ward explained during his testimony that he did not contact any E-Wealth investors once he was made aware of the ASC investigation because Fisher had told him the investigation was confidential and he could not discuss it with anyone. Staff correctly pointed out that Ward's counsel did not ask Fisher what he said to Ward in that regard, and Fisher did not address the subject in his direct evidence. However, we are satisfied that none of the issues we must decide during this phase of the proceedings turn on the point. Since we therefore do not consider it a matter of significance that would bear on the outcome of the case or our assessment of witness credibility, the failure to cross-examine on it did not impact hearing fairness and no remedy is required.

[46] Concerning JL and LX, the assessment is somewhat more complex. We are satisfied that some of the issues identified in the Staff Submissions as issues that Ward addressed in his testimony but that Ward's counsel did not put to JL or LX on cross-examination were addressed by those witnesses during their respective direct examinations. Because their positions on those issues were known, the failure to cross-examine on them did not impact hearing fairness, and again, no remedy is required. With respect to the issues that Ward testified to but JL and LX did not have an opportunity to address, we either considered them insignificant or, for the reasons discussed previously, we did not find Ward credible and gave his evidence little to no weight. No further remedy is required.

[47] We describe the details of the evidence later in these reasons.

E. Evidence Collected Outside the Scope of the Investigation Order

[48] The investigation order in this matter was issued on March 14, 2018 (the **Investigation Order**), and appointed certain members of investigative Staff – including Fisher and investigative analyst Sean Bonazzo (**Bonazzo**) – to investigate:

> . . . any and all matters related to Engineered Wealth and each of their [sic] predecessors, related entities and affiliates, and Shane Courtney Ward subsequent to January 01, 2013 related to potential contraventions of section 75(1), 92(3)(b), 92(4.1) and 110(1) of the *Act* and National Instruments 31-103 and 45-106 in respect of registration, prohibitions respecting representations, prohibited transactions, prospectus and registration exemptions.

[49] During his cross-examination of Bonazzo, Ward's counsel focused on the date range for certain financial records that were collected during Staff's investigation. Bonazzo explained that he requested the records in April 2018, and financial institutions only retain their records for seven years. Accordingly, he went back seven years and requested all records for the period from April 2011 through April 2018. Bonazzo acknowledged that the "cutoff point" under the Investigation Order was January 1, 2013.

[50] With specific reference to the compelled personal bank records in evidence, Ward argued that any documents pre-dating January 1, 2013 had been gathered illegally, and should be disregarded to discourage Staff from conducting "illegal searches" in the future. He observed that the NOH makes allegations that include conduct pre-dating January 1, 2013, which is outside the period Staff was authorized to investigate.

[51] Despite the parameters set out in the Investigation Order, Staff pointed out that s. 41 of the Act gives investigators broad powers to investigate matters that occurred or conditions that existed at any time. The relevant parts of that section state:

> 41(1) The Executive Director [of the ASC] may, by order, appoint a person to make any investigation that the Executive Director considers necessary
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> (a) for the administration of Alberta securities laws;
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> (b) to assist in the administration of the securities . . . laws of another jurisdiction,
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> (c) in respect of matters relating to trading in securities . . . in Alberta, or
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> (d) in respect of matters in Alberta relating to trading in securities . . . in another jurisdiction.
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> (3) In an order made under subsection (1) or (2), the Executive Director shall prescribe the scope of the investigation that is to be carried out under the order.
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> (4) For the purposes of an investigation ordered under this section, the person appointed to make the investigation may with respect to the person or company that is the subject of the investigation, investigate, inquire into and examine
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> (a) the affairs of that person or company,
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> (b) documents, records, correspondence, communications, negotiations, trades, transactions, investigations, loans, borrowings and payments to, by, on behalf of or in relation to or connected with that person or company,

> (c) the property, assets or things owned, acquired or alienated in whole or in part by that person or company or by any person or company acting on behalf of or as agent for that person or company,
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> (d) the assets at any time held by, the liabilities, undertakings and obligations at any time existing and the financial or other conditions at any time prevailing in respect of that person or company, and
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> (e) the relationship that may at any time exist or have existed between that person or company and any other person or company by reason of
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> (i) investments,
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> (ii) commissions promised, secured or paid,
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> (iii) interests held or acquired,
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> (iv) the loaning or borrowing of money, securities or other property,
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> (v) the transfer, negotiation or holding of securities . . . ,
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> (vi) interlocking directorates,
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> (vii) common control,
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> (viii) undue influence or control, or
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> (ix) any other matter not referred to in clauses (i) to (viii).

[52] Section 42(1) of the Act further states:

> 42(1) The person appointed to make an investigation under section 41 has the same power as is vested in the Court of [King's] Bench for the trial of civil actions
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> (a) to summon and enforce the attendance of witnesses,
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> (b) to compel witnesses to give evidence on oath or otherwise, and
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> (c) to compel witnesses to produce documents, records, securities, . . . , contracts and things.

[53] While s. 41(3) provides that an investigation order must prescribe the scope of the investigation, Staff argued that investigation orders should be interpreted broadly so as not to impede investigations or the protective public interest mandate of the ASC's Enforcement Division. They cited the following from the British Columbia (**B.C.**) Supreme Court's decision in *British Columbia (Securities Commission) v. Stallwood*, 1995 CanLII 1515 (at para. 32):

> The [B.C. Securities] Commission has a duty to specify the scope of an investigation pursuant to s. 126(2) of the *Securities Act* [(B.C.)]. The very purpose of the investigation is to provide facts to the Commission for it to decide if there is sufficient information to proceed with a [h]earing. The effect of the [i]nvestigating [o]rder setting out the scope of the investigation is, in effect, defining what is relevant. It would be unrealistic to restrict the area of investigation further when many of the facts are solely with the witnesses and not known to the Commission. To this extent the procedure differs

> from that involving the state in a matter involving criminal law offences against an individual. In a regulatory proceeding what has taken place is the predominant issue at the investigation stage.

[54] Staff also argued that while it is possible to amend an investigation order so that new avenues of inquiry can be pursued when uncovered, it is not necessary to do so if the scope of the investigation does not change. They submitted that the investigation here was carried out in good faith; the records were legally discoverable under s. 41(4) of the Act and are relevant, credible, reliable, and "highly probative"; and there was nothing improper about investigators seeking records predating January 2013 – especially since they would not have known before receiving them whether those records were exculpatory or inculpatory. Moreover, Staff contended, the Investigation Order could have been "cured" with a simple amendment, and there is no authority to suggest that the records obtained could not be relied upon at the Hearing.

[55] Although we agree that s. 41 of the Act gives Staff broad powers to investigate things that occurred and conditions that existed at any time, we do not agree that this – or the relative ease of obtaining an amended investigation order – means that the parameters set out in an investigation order are tantamount to loose guidelines that Staff are at liberty to disregard. If that were the case, there would be little point to requiring investigation orders at all. However, the Legislature chose to require them, and chose to require ("the Executive Director *shall* prescribe"; emphasis added) that they delineate the scope of the investigation to be carried out. In our view, "the scope of the investigation" includes the relevant period of time. The limits of the order may be very wide given the investigative powers set out in ss. 41(4) and 42(1), but there are still limits.

[56] To deal with the possibility that Staff will uncover evidence during the course of an investigation that suggests an investigation order's limits are too narrow, they have the ability to seek an amendment. Staff cited *Re Merendon Mining Corporation Ltd.*, 2009 ABASC 232, in which an ASC panel acknowledged that the scope of an investigation may change over time as Staff learn from the information they gather. However, the panel also noted that, "[a]s the scope of an investigation evolves, it may be appropriate to amend an investigation order already issued, or to issue a new investigation order, enabling those investigating to pursue new avenues of inquiry" (at para. 7). The panel did not say that if the scope of an investigation evolves, Staff can simply proceed under the existing order no matter what it says. In fact, in that case – as in this case – Staff had issued a summons for documents from a third party organization that did not correspond with the time period described in the investigation order. Accordingly – but unlike this case – Staff had sought an amended investigation order as a result.

[57] If Staff here had wished to compel the production of records from financial institutions for dates preceding the date range set out in the Investigation Order, they likewise should have sought an amendment. They were put on notice fairly early in the investigation that Ward took issue with Staff's inquiries that sought information prior to January 1, 2013: in responding to undertakings Ward gave during an interview with Staff on January 17, 2019, Ward's previous counsel sent an email on May 2, 2019 declining to provide any requested information that preceded 2013.

[58] Accordingly, we ascribed no weight to records in evidence pre-dating January 1, 2013 that were clearly compelled by Staff from third parties pursuant to s. 42(1). This was generally comprised of financial records relating to Ward and E-Wealth for the years 2011 and 2012 produced by certain financial institutions in response to s. 42 production orders.

[59] There were also a few records in evidence relating to a handful of E-Wealth investors who invested prior to January 1, 2013. However, we were not directed to any evidence as to whether the records had been compelled by Staff or were produced voluntarily. At least two of the investors (MB and LH) testified at the Hearing, but Ward did not cross-examine them on the point. Records produced voluntarily by a cooperative witness (even if produced at Staff's "request") are not dependent on the authority of an investigation order. In the absence of evidence to the contrary, we therefore assumed that the records in question were provided willingly by the relevant witnesses. As such, we assessed that evidence in the same manner as all other evidence before us, in accordance with the principles already discussed.

F. Documents Relating to Investors Who Did Not Testify

[60] Ward objected to the documents Staff entered into evidence at the Hearing that related to investors who were not called to testify. He characterized this evidence as "prejudicial hearsay" that would be of limited utility in determining the allegations in the NOH, and suggested that the inability to cross-examine those investors on that evidence "would violate rules of natural justice and could lead to a miscarriage of justice".

[61] In response, Staff argued that the documents in question are relevant, reliable, credible, and admissible. They pointed out that the investment documents for those investors were similar to the documents for the investors who testified (as will be discussed in more detail later in these reasons), and that the investor list Ward prepared and produced during the investigation confirmed that those individuals made the investments indicated. Staff further argued that oral evidence concerning any emails in evidence between Ward and the individuals who did not testify is not necessary because the emails speak for themselves.

[62] Staff also contended that the investors who did testify were consistent in their evidence about their understanding of Ward's intended use of their investment funds. Since the investors who did not testify received similar documentation from Ward, Staff argued that it is reasonable to infer that those individuals had a similar understanding.

[63] In Staff's view, Ward's argument in this regard is tantamount to suggesting that for Staff to prove their case, they must call every investor involved – a proposition for which Ward did not cite any authority. Since that would be untenable in matters involving hundreds of investors, Staff argued that a hearing panel can make its determinations based on a reasonable sample of investors who give reliable and consistent testimony that is consistent with the documentary evidence. They relied on *Re Breitkreutz*, 2018 ABASC 37, as an example of a case in which an ASC hearing panel found that a fraud had occurred based on the testimony of six investors, and did not require all 260 investors to give evidence.

[64] As noted previously, relevant hearsay evidence is permitted in ASC proceedings. We agree with Staff that in the interest of hearing efficiency, it is commonplace for only a representative sample of investors to testify and for hearing panels to draw broader conclusions and inferences based on that evidence and other evidence they consider reliable. Moreover, the right to cross-examine is not absolute in administrative law matters. We adopt the following discussion from *Arbour* (at paras. 49-52):

> Staff are entitled to adduce in [an ASC] enforcement hearing evidence obtained by them pursuant to sections 40 to 42 of the Act, including transcripts of compelled investigative interviews. Natural justice and procedural fairness require that a respondent be given a reasonable opportunity to comment on and challenge such evidence. However, hearsay evidence can be challenged by means other than cross-examination, means that are in accord with natural justice and procedural fairness.
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> In the recent [decision in *Lavallee v. Alberta (Securities Commission)*, 2009 ABQB 17], Wittmann A.C.J. (as he then was) stated (at para. 205):
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> > . . . Contrary to what the Applicants . . . argue, the case law is clear that, in a regulatory context, the admission of hearsay or compelled testimony or the lack of opportunity to cross-examine will not necessarily breach procedural fairness . . .
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> In determining that [an ASC] panel did not err in admitting and relying on transcripts of investigative interviews, the [ABCA] in *Alberta (Securities Commission) v. Brost*, 2008 ABCA 326 observed that the panel did not deny the respondents "an opportunity to test the impugned hearsay evidence". Noting that the respondents did not testify or apply to the [ASC] for subpoenas to have the interviewees testify, the court said (at paras. 32, 36):
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> > . . . It was up to [ASC] staff to decide what case they would present. As L'Heureux-Dubé said in *R. v. Cook*, [1997] 1 S.C.R. 1113 . . . at para. 39, we "fail to see why the defence should not have to call witnesses which are beneficial to its own case." Brost had the opportunity to testify at the hearing to explain the circumstantial case against him. He chose not to do so. The other appellants could have sought to call Brost if they believed his evidence would help them. They chose not to do so.
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> > . . .
> >
> > . . . The proceedings before the [ASC] were regulatory not prosecutorial or penal in nature and the [ASC] did not deny the appellants an opportunity to test the impugned hearsay evidence. Any of the appellants could have applied to the [ASC] for a subpoena to have any of the other appellants testify: ss. 29(c) and 215 of the *Act*. No such applications were made and all of the appellants elected not to testify. In other words, the appellants chose not to challenge the reliability and content of the impugned hearsay evidence. To exclude that evidence in these circumstances would effectively exempt the appellants from the authority under the *Act* to acquire the evidence and from the evidential provisions of the *Act*. . . .
>
> The court in *Brost* recognized that [an ASC] panel can appropriately admit and rely on transcripts of investigative interviews provided that a respondent is afforded an opportunity to challenge the reliability and content of such hearsay evidence, through (for example) testifying himself or herself or compelling other respondents to testify. . . .

[65] Although this discussion focusses on transcripts of investigative interviews, we consider it applicable to other types of hearsay evidence as well. Ward had the opportunity to challenge the evidence during his testimony at the Hearing, and could also have requested subpoenas compelling the individuals in question to testify.

[66] That said, in determining the allegations in the NOH, we are mindful of the frailties of hearsay evidence, including the fact that the individuals involved in the transactions or communications reflected in the subject documents were not before us. We have weighed the

evidence accordingly. We did not rely on it exclusively in reaching any of our conclusions, but considered it corroborative of certain points made by the investors who testified and the documents they produced.

[67] A related issue Ward raised during the course of the Hearing concerned the evidence given by JL. Her parents provided funds to Ward, and his counsel objected to the fact that instead of calling her parents to testify, Staff called JL to testify on their behalf because they are elderly and do not speak English. While Ward argued that Staff should have called them anyway and used the services of an official translator, Staff argued that JL had direct personal knowledge of her parents' interactions with Ward because she served as intermediary and translator at the time. Considering it relevant, we permitted JL to give her evidence and indicated that we would determine the weight we would ascribe to it during our deliberations on the merits of the allegations.

[68] While we will comment further on the details of JL's evidence and their import later in these reasons, generally, we found her testimony credible and reliable. As Staff pointed out, she was personally involved in the events that led to her parents providing Ward with $100,000 and what occurred thereafter, and had knowledge of their understanding of the transaction based on her discussions with them. She was also close to Ward for a number of years, and was subject to cross-examination. In addition, in his own testimony, he could and did challenge what she said.

[69] However, it is also true that JL was not the investor and could not speak directly to what her parents' actual thoughts were at the relevant times. We therefore treated her evidence with more caution than the evidence of Staff's other investor witnesses, and again did not rely on it alone in reaching our conclusions. This is consistent with the reasoning in *Re Fauth*, 2018 ABASC 175, in which the panel permitted the interview transcripts of two investors who could not appear at the hearing to be entered into evidence, and permitted relatives who had direct knowledge of the two investors' dealings with the respondent to address that evidence in the investors' stead (see paras. 10-17).

VI. ILLEGAL DISTRIBUTION

[70] As mentioned, Staff alleged in the NOH that during the Relevant Period, Ward raised approximately $819,000 from E-Wealth investors. As trades in securities of an issuer that had not been previously issued, Staff alleged that the trades were "distributions" as defined in the Act, and that E-Wealth did not file with or receive a receipt from the Executive Director for a preliminary prospectus or prospectus concerning those distributions as required by Alberta securities laws. Since no exemption from that requirement was available for some or all of the distributions, Staff alleged that Ward breached s. 110(1) of the Act.

A. Law

[71] Throughout the Relevant Period and continuing to the date of this decision, s. 110(1) of the Act has stated:

> No person or company shall trade in a security on the person's or company's own account or on behalf of any other person or company if the trade would be a distribution of the security unless
>
> (a) a preliminary prospectus has been filed and the Executive Director has issued a receipt for it, and

(b) a prospectus has been filed and the Executive Director has issued a receipt for it.

[72] This may be described as the **Prospectus Requirement**, which is intended to ensure that investors are given appropriate disclosure – by way of a prospectus – on which to base their investment decisions (see *Aitkens* at para. 146). In certain circumstances where investment risks are thought to be reduced, there may be an exemption from the Prospectus Requirement available, including as provided for under National Instrument 45-106 *Prospectus Exemptions* (formerly *Prospectus and Registration Exemptions*) (**NI 45-106**) (*ibid.* at para. 147). The exemption AC appeared to have had in mind for Ward and E-Wealth is the **Private Issuer** exemption, described in part as follows in s. 2.4 of NI 45-106:

2.4(1) In this section, "**private issuer**" means an issuer

(a) that is not a reporting issuer or an investment fund,

(b) the securities of which, other than non-convertible debt securities,

(i) are subject to restrictions on transfer that are contained in the issuer's constating documents or security holders' agreements, and

(ii) are beneficially owned by not more than 50 persons, not including employees and former employees of the issuer or its affiliates, provided that each person is counted as one beneficial owner unless the person is created or used solely to purchase or hold securities of the issuer in which case each beneficial owner or each beneficiary of the person, as the case may be, must be counted as a separate beneficial owner, and

(c) that

(i) has distributed its securities only to persons described in subsection (2) . . .

(2) The prospectus requirement does not apply to a distribution of a security of a private issuer to a person who purchases the security as principal and is

. . .

(c) a spouse, parent, grandparent, brother, sister, child or grandchild of a director, executive officer, founder or control person of the issuer,

. . .

(e) a close personal friend of a director, executive officer, founder or control person of the issuer,

(f) a close business associate of a director, executive officer, founder or control person of the issuer,

. . .

(i) an accredited investor . . .

[73] Related exemptions relevant to this matter and subsumed within the requirements for the Private Issuer exemption are:

- the **Accredited Investor** exemption, which is based on either the sophistication or the financial means of the investor and is "available when an individual investor meets specified financial-asset, net-income or net-asset thresholds" (*Chmelyk* at para. 78); and

- the **Family, Friends, and Business Associates** exemptions, which are based on the relationship between the investor and the issuer and are "available when an individual investor is in a certain close relationship with a director, executive officer or control person of an issuer, such that the investor can assess the official's capabilities and trustworthiness" (*ibid.*).

[74] Section 1(p) of the Act indicates that a "distribution" includes "a trade in securities of an issuer that have not been previously issued". Section 1(cc) indicates that an "issuer" includes a person or company that "has outstanding securities" or "is issuing securities". Section 1(jjj) indicates that a "trade" includes "any sale or disposition of a security for valuable consideration" and "any act, advertisement, solicitation, conduct or negotiation made directly or indirectly in furtherance of" a sale or disposition of a security for valuable consideration.

[75] To prove that s. 110 was breached, Staff must establish that: (i) the conduct involved a "security", a "trade", and a "distribution" as defined in the Act; (ii) no prospectuses for the distribution were filed with or receipted by the Executive Director; and (iii) no exemptions from the Prospectus Requirement were available (see also *Aitkens* at para. 148). The party seeking to rely on an exemption may not "assume an exemption's availability" (*Arbour* at para. 894), and bears the burden of showing that an exemption was available for every investor. That party must also show that they made "a reasonable, serious effort – by taking whatever steps were reasonably necessary" to satisfy themselves of that fact (*Chmelyk* at paras. 69 and 77; see also *Re Robinson*, 2013 ABASC 203 at para. 153).

[76] Companion policies are commonly issued to explain how staff of the Canadian securities commissions will interpret a National Instrument. Section 1.9 of the Companion Policy to NI 45-106 (**NI 45-106CP**) provides guidance about the seller's responsibility to ensure compliance with the requirements of any exemptions claimed. The substance of that guidance remained the same throughout the Relevant Period, although it was expanded in May 2015. It currently states in part:

> The prospectus exemptions in NI 45-106 set out specific terms and conditions that must be satisfied in order for the person relying on the exemption to distribute securities. The person relying on a prospectus exemption is responsible for determining whether the terms and conditions of the prospectus exemption are met. That person should retain all necessary documents to demonstrate that they properly relied on the exemption.

[77] Concerning the Accredited Investor and Family, Friends, and Business Associates exemptions, the section goes on to state:

> When distributing securities under these exemptions, the seller will have to obtain information from the purchaser in order to determine whether the purchaser has the requisite income, assets or relationship to meet the terms of the exemption.
>
> It will not be sufficient for the seller to accept standard representations in a subscription agreement or an initial beside a category on Form 45-106F9 *Form for Individual Accredited Investors* unless the seller has taken reasonable steps to verify the representations made by the purchaser.
>
> . . .
>
> Whether the types of steps are reasonable will depend on the particular facts and circumstances of the purchaser, the offering and the exemption being relied on, including:
>
> - how the seller identified or located the potential purchaser
> - what category of accredited investor or eligible investor the purchaser claims to meet
> - what type of relationship the purchaser claims to have and with which director, executive officer, founder or control person of the issuer
> - how much and what type of background information is known about the purchaser
> - whether the person who meets with, or provides information to, the purchaser is registered[.]
>
> We expect a seller to be in a position to explain why certain steps were not taken or to be able to explain how alternative steps were reasonable in the circumstances. It is the seller that is relying on the prospectus exemption and it is the seller that is responsible to ensure the terms of the exemption are met. If the seller has any reservations about whether the purchaser qualifies under the exemption, the seller should not sell securities to the purchaser in reliance on that exemption.

[78] The "reasonable steps" a seller might take to confirm that a purchaser meets the conditions for a particular exemption include (NI 45-106CP at pp. 5-7):

- ensuring the purchaser understands the terms and conditions of the exemption;
- verifying that the purchaser meets the criteria set out in the exemption, including by verifying that the purchaser understands what is being signed or initialled and ensuring the purchaser was truthful in selecting that category; and
- keeping relevant and detailed documentation evidencing the steps followed.

B. Securities

[79] First, we must determine whether the E-Wealth Units, underlying promissory notes, and loan agreements were "securities" as defined in s. 1(ggg) of the Act.

[80] Section 1(ggg) provides an expansive definition of "security" that includes, *inter alia*:

> (i) any document, instrument or writing commonly known as a security;
>
> . . .
>
> (v) any bond, debenture, note or other evidence of indebtedness, share, stock, unit, unit certificate, participation certificate, certificate of share or interest, preorganization certificate or subscription . . . ;
>
> [and]

(xiv) any investment contract[.]

[81] The term "investment contract" is not defined in the Act, but as noted in *Chmelyk* (at para. 120), "the case law has construed it as meaning an investment of money in a common enterprise with an expectation of profits derived primarily from the effort of others (*Pacific Coast Coin Exchange v. Ontario Securities Commission*, [1978] 2 S.C.R. 112)". We adopt this definition concerning some of the investments in this matter.

1. E-Wealth Subscription Agreements

[82] Most E-Wealth investors appear to have entered into subscription agreements, which took two similar forms. The first version described E-Wealth as "A Trade Name of Shane Ward" and the "Issuer". The preamble indicated that the investor or "Subscriber" was purchasing "Units . . . of the Engineered Wealth 2011 [or 2012] Fund". The second page noted that, "[t]he Units will be subject to an indefinite hold period during which they may not be traded unless permitted under securities legislation". The attached Schedule "B" included the terms and conditions of the fund, and stated that, "[t]he Fund represents an investment contract entered into between Shane Ward" and the purchaser.

[83] The second version also described E-Wealth as "A trade name of Shane Ward" and the "Issuer". The preamble indicated that the "Subscriber" was purchasing Units "of the Issuer" and that each Unit "consist[ed] of a Promissory Note". Like the first version, the second page of the second version indicated that, "[t]he Units will be subject to an indefinite hold period during which they may not be traded unless permitted under securities legislation". Most of the E-Wealth subscription agreements in evidence were this version.

[84] Of the eight investor witnesses who testified at the Hearing, six executed one or more subscription agreements for E-Wealth Units. Where these investors re-subscribed under subsequent subscription agreements, they generally left their original principal and the purported returns that had been accrued with Ward instead of receiving any payment of those amounts, re-invested them, and, in some cases, added a "top-up" amount to bring the re-investment up to a round number. The amounts shown on the relevant subscription agreements and their approximate dates are as follows:

- LH: $10,000 in February 2011; $12,345.72 in July 2013; $15,000 in March 2014;
- MB, under his company's name: $20,000 in August 2012; $25,000 in January 2014; $40,000 in April 2014; MB also testified that he made an initial investment of $15,000 in 2011, but could not locate a copy of the subscription agreement;
- BJ: $20,000 in July 2013 (although the associated subscription agreement was not fully executed until February 2014); $30,000 in March 2014;
- RC: $10,000 in September 2015;
- EN: $25,000 in June 2016; and

- JA: $15,000 in August 2016.

[85] Staff also entered into evidence investment documentation collected during the investigation concerning investors who did not testify at the Hearing, but some of whom investigators interviewed or communicated with by email, text message, or telephone. The following is a list of the amounts shown on the subscription agreements and the approximate dates for these investments (some of which were – like those of the investor witnesses – re-investments of principal and the purported returns left with Ward):

- GB, in his company's name: $27,303.56 in March 2013;
- DS, in both his own name and his company's name: $11,125.61 and $13,963.41 respectively in February 2014; $15,000 and $20,000 respectively in June 2014;
- DL: $15,000 in March 2014;
- WS, in his company's name: $20,000 in March 2014; $40,000 in August 2017;
- GO: $10,000 in November 2014;
- TY: $15,000 in January 2015;
- BS: $112,602.11 in February 2014; $130,000 in June 2014;
- TS: $10,000 in February 2015; and
- MT: $10,000 in February 2015.

[86] We are satisfied that all of the investments under the E-Wealth subscription agreements in either form are clearly "securities" as defined in the Act, whether they are considered "note[s] or other evidence of indebtedness" or "unit[s]" under s. 1(ggg)(v), or "investment contract[s]" under s. 1(ggg)(xiv). This is bolstered by the fact that each agreement referred to securities legislation and contemplated its applicability. We also note that in an email Ward sent to investors and prospective investors on February 8, 2014, he described E-Wealth as an "exempt securities business" that specialized in "high-end, sophisticated investments".

[87] That the agreements fall within s. 1(ggg)(v) is apparent from their terms. We agree with Staff that they also fall within s. 1(ggg)(xiv) because – as will be discussed in more detail later in these reasons – all of the investors advanced funds toward a common enterprise (E-Wealth) with the expectation of profit to be earned from Ward's efforts in making investments to generate returns. The investors were not required to participate in those efforts, and needed only to supply the capital. Ward confirmed this arrangement in his February 8, 2014 email, in which he represented that, "[w]e do all the work, and grow your capital for you".

2. E-Wealth Investment Loan Agreements and Loan Agreement

[88] Two investors engaged in transactions with E-Wealth that were represented by instruments other than E-Wealth subscription agreements.

[89] Hearing witness LX testified that she dated Ward for approximately a year and a half beginning in January 2016. In the spring of 2016, she withdrew $100,000 from her professional corporation and gave it to Ward to invest in the stock market on her behalf. She advanced an additional $50,000 to Ward that summer, and also convinced her ex-husband, LL, to invest $100,000. She said that initially, Ward did not provide her with any documentation evidencing these transactions. It was not until much later, near the end of LX's relationship with Ward, that he provided her with three agreements.

[90] The first of the three agreements is dated April 1, 2016, and titled, "Investment Loan Agreement". It is between LX as the "Lender" and E-Wealth as the "Borrower". The opening clause states, "[t]he Lender promises to loan $100,000.00 CAD to the Borrower and the Borrower promises to repay this principal amount to the Lender, with interest payable on the unpaid principal at the rate of 1.00 percent per month, calculated monthly not in advance, beginning on April 1, 2016". The document includes an "Entire Agreement" clause, and was executed by Ward on behalf of E-Wealth.

[91] The second, dated July 1, 2016, is also titled "Investment Loan Agreement". It is the same as the first, except that it is between LL as the "Lender" and E-Wealth as the "Borrower", and the opening clause indicates that the monthly interest payments were to commence July 1, 2016. Again, it was executed by Ward on behalf of E-Wealth.

[92] The third is also dated July 1, 2016. It is between LX as the "Lender" and E-Wealth as the "Borrower", and although titled "Loan Agreement" (not "Investment Loan Agreement"), it is in almost all other respects the exact same as the other two agreements. The exceptions are the lower loan amount ($50,000) and a lower interest rate: "1.00 percent per year, calculated yearly not in advance".

[93] Ward was asked who drafted these forms of agreement. He testified that he could not recall, but he was certain it was not him. He also said that while he had his form of subscription agreement available, LX wanted to use "a different document". We note that at the end of each of the three agreements the following mark appears: "©2002-2017 LawDepot.ca". LawDepot.ca is a commonly-known website that offers free legal documents, forms, and contracts for various purposes that can be filled in and printed by any user.

[94] Ward suggested that the reason LX's two loan agreements had different titles and different interest rates was that the $50,000 loan was not for investment purposes, but was actually a personal loan to Ward that LX knew he planned to use to pay back another investor. He testified that the interest rate was low because LX was aware that he would not be able to use the money to generate the investment returns required to fund higher interest rates.

[95] LX disagreed. In cross-examination at the Hearing, she acknowledged that the cheques relating to all three investments were made payable to Ward personally, but testified that that was

done at his request. She also said that when she advanced the $50,000, Ward told her she would be paid the same rate of return that was provided for with respect to her first investment. Because Ward did not give her any documentation concerning any of these investments until she asked for it near the end of their relationship, she said she did not even notice the small differences between her two agreements. Ward argued that this was improbable, and that the more likely explanation for the differences is that LX knew the Loan Agreement was for a different purpose – to repay another investor.

[96] We are satisfied that regardless of Ward's intended use of the funds, the two Investment Loan Agreements and the Loan Agreement are "evidence of indebtedness" under s. 1(ggg)(v) of the Act. Therefore, they are securities. All three documents evidence loans with terms for repayment, and are substantively the same despite their titles. Moreover, we note that on the E-Wealth investor list Ward prepared and provided to Staff during their investigation, LX and LL were included for the total amount of $250,000. This is further confirmation that Ward considered LX and LL to be among E-Wealth's investors, in the full amount represented by the three agreements.

3. Undocumented Investment

[97] One advance of funds to Ward and E-Wealth was not documented at all.

[98] JL testified that she dated Ward for approximately six years from 2009 to 2015 – the period during which Ward created E-Wealth – and that she and her children lived with him at his home from approximately 2010 to 2015. Her parents, the Js, invested $100,000 in E-Wealth by way of a bank draft dated August 15, 2013 and made payable to "Engineered Wealth". As mentioned, because the Js do not speak English, JL acted as translator when they dealt with Ward and when her mother was interviewed by Staff investigators. JL also testified about their investment on their behalf at the Hearing.

[99] JL indicated that her parents were retired and on a fixed income, but at Ward's suggestion, they came up with the investment funds by using a home equity line of credit (**HELOC**) that Ward helped them obtain through a contact he had at a bank. Ward did not provide any documentation confirming the Js' investment, although JL said she repeatedly asked him for it and he repeatedly promised to provide it.

[100] According to Ward, however, the Js did not execute a subscription agreement because JL told him that it would be pointless to do so given that they could not read English. He also said that there was no subscription agreement because the Js' funds were not strictly an investment in E-Wealth, but were instead a gift or a loan – an "early inheritance" – intended to assist JL with living expenses for herself and her children, most of which he had been paying because JL did not have much income at the time. Since JL had to file for bankruptcy and was receiving child support from her ex-spouse, Ward said that it was agreed the Js would provide the funds through him to avoid complicating JL's financial situation. He acknowledged that when the business started to fail, JL asked him for a contract, but said that he did not provide one based on the purported advice of "a bunch of different advisors, lawyers, accountants, trustees".

[101] JL denied Ward's characterization of her parents' $100,000. She denied that Ward was paying most of the bills at that time, or that her parents advanced the funds through Ward for her and her children's living expenses. To the contrary, she and her parents understood that Ward would invest the money for the Js and generate profits that would cover their bills and possibly pay for a final trip to China they could take before they died.

[102] Staff argued that the Js' funds were an investment in E-Wealth that was a "security" under the Act despite the fact that it was not documented. They pointed out that the Js' bank draft in August 2013 was made payable to "Engineered Wealth", not to Shane Ward, and that their names were included on the list of E-Wealth investors Ward provided during Staff's investigation, showing that he received $100,000 from them on August 16, 2013. In addition, Ward sent the same email to JL and her parents concerning E-Wealth's failure that he sent to all of his other investors. Staff argued that this was more evidence that JL's parents made an investment in E-Wealth, and did not simply provide money for living expenses.

[103] Staff submitted that Ward's explanation for not having the Js execute a subscription agreement was nonsensical, given that they signed documents for their HELOC that were also in English. In Staff's view, the only reason there is no investment documentation for the Js is that Ward "refused to provide any". They further submitted that the preponderance of the evidence established that the money was advanced for investment purposes, and not for living expenses.

[104] We agree. For the reasons discussed previously, where JL's version of events differed from Ward's, we preferred JL's evidence. Although it is true that she was not the investor, we considered her credible and knowledgeable about what transpired given her position as the direct intermediary between Ward and her parents. Her evidence was also consistent with the documentary evidence – including the bank draft, Ward's investor list, and Ward's email announcing the failure of E-Wealth to his investors.

[105] As in *Re 1205676 Alberta Ltd.*, 2010 ABASC 237 (at paras. 143-148), we find on a balance of probabilities that although it was undocumented, the Js had an oral agreement with Ward that constituted a "note or other evidence of indebtedness" under s. 1(ggg)(v) of the Act and an "investment contract" under s. 1(ggg)(xiv). Like the subscription agreement investors, they advanced funds expecting that Ward would use his skills to make investments and generate a monthly return. The lack of documentation is not determinative, as it is the substance of a transaction that is significant, and not its form (see *Pacific Coast*). Issuers cannot escape the operation of securities laws merely by refusing to provide confirming paperwork to an investor.

C. Trades and Distributions

[106] We are also satisfied that the E-Wealth subscription agreements, Investment Loan Agreements, Loan Agreement, and the Js' undocumented investment agreement (collectively, the **E-Wealth Securities**) were traded within the meaning of the term "trade" in s. 1(jjj) of the Act: each was issued in exchange for valuable consideration, i.e., cash. As securities of an issuer – Ward operating as E-Wealth – that had not been previously issued, these trades were also "distributions" within the meaning of that term as set out in s. 1(p) of the Act.

D. No Prospectus

[107] Staff led evidence proving that since 1997, neither a preliminary prospectus nor a prospectus was filed relating to any distribution of E-Wealth Securities, and that the Executive Director of the ASC has never issued a receipt for such a preliminary prospectus or prospectus.

[108] Ward did not contest this evidence.

[109] We are therefore satisfied that no prospectus relating to E-Wealth Securities was ever filed or receipted.

E. No Available Exemptions

[110] Staff cited *Re Homerun International Inc.*, 2015 ABASC 990 (at para. 83), for the proposition that once they proved on a balance of probabilities that Ward distributed securities without a prospectus, the onus then shifted to Ward to demonstrate valid reliance on available exemptions. Each trade within the distribution had to qualify for an exemption – even if some qualified, that does not cure the fact that others did not (*ibid.*). We note that the evidence indicated that no offering memorandum or reports of exempt distribution were filed with the ASC during the material time.

[111] Ward acknowledged that when he set up E-Wealth, his legal counsel, AC, told him that investors would have to complete documentation to indicate how they qualified for an exemption from the Prospectus Requirement, and that it was up to him whether to accept a subscription agreement and a potential investor's representations in that regard. According to Ward, he asked AC if he would have to see proof as to how investors claimed to qualify (for example, documentary proof of assets or income), and AC told him that he did not.

[112] Most of the E-Wealth investors indicated their purported qualification for an exemption on their subscription agreements. On the second page of both the earlier and the later forms of agreement, investors were required to initial a clause representing that they were one of the following:

> (a) a director, executive officer, founder or control person of Shane Ward,
>
> (b) a spouse, parent, grandparent, brother, sister or child of a director, executive officer, founder or control person of Shane Ward,
>
> (c) a parent, grandparent, brother, sister or child of the spouse of a director, executive officer, founder or control person of Shane Ward,
>
> (d) a close personal friend of a director, executive officer, founder or control person of Shane Ward,
>
> (e) a close business associate of a director, executive officer, founder or control person of Shane Ward,
>
> (f) a person or company of which a majority of the voting securities are beneficially owned by, or a majority of the directors are, persons or companies described in paragraphs (a) to (e) above;

> (g) a trust or estate of which all of the beneficiaries or a majority of the trustees are persons or companies described in paragraphs (a) to (e);
>
> (h) an **"accredited investor"**, as such term is defined in Section 1.1 of National Instrument 45-106, a copy of which definition is attached as Schedule "A" hereto and the Subscriber has **initialed** the portion of that definition applicable to him/her; or
>
> (i) . . . purchasing Units at an aggregate acquisition cost of not less than $150,000. [original emphasis]

[113] The fifth and sixth pages of the agreements comprised the Schedule "A" referenced in clause (h) above. The schedule listed the various definitions of the term "Accredited Investor", and required the investor to initial the definition that applied. The definitions included:

> . . .
>
> (j) an individual who, either alone or jointly with a spouse, beneficially owns, directly or indirectly, financial assets having an aggregate realizable value that before taxes, but net of any related liabilities, exceeds $1,000,000 ("financial assets" being cash, securities or a contract of insurance, a deposit or an evidence of a deposit that is not a security for the purposes of securities legislation),
>
> (k) an individual whose net income before taxes exceeded $200,000 in each of the two most recent calendar years or whose net income before taxes combined with that of a spouse exceeded $300,000 in each of the two most recent calendar years and who, in either case, reasonably expects to exceed that net income level in the current calendar year,
>
> (l) an individual who, either alone or with a spouse, has net assets of at least $5,000,000,
>
> . . .
>
> (t) a person or company in respect of which all of the owners of interests, direct or indirect, legal or beneficial, except the voting securities required by law to be owned by directors, are persons or companies that are accredited investors . . .

[114] Concerning clause (t), it is important to note the expansive definition of the word "person" in the Act at s. 1(mm): "an individual, partnership, unincorporated association, unincorporated syndicate, unincorporated organization, trust, trustee, executor, administrator or other legal representative". Clearly there can be no ownership interest in an "individual", which is defined at s. 1(z) as "a natural person" not including "a partnership, unincorporated association, unincorporated syndicate, unincorporated organization or a trust" or "a natural person in the person's capacity as trustee, executor, administrator or other legal representative".

[115] Most of the investors for whom E-Wealth subscription agreements were in evidence selected clause (h) on page 2 representing that they were Accredited Investors, and clause (t) of Schedule "A" on page 6. Of those who appeared at the Hearing, most testified that they made those selections or thought that they had done so at Ward's direction or representation that those were the clauses they needed to initial if they wanted to qualify and participate in the investment. Most also said that they did not really understand the meaning of the term "Accredited Investor" and did not recall Ward explaining it to them, or asking them questions about their financial circumstances (in fact, Ward admitted that he did not understand the Accredited Investor exemption himself until

he was interviewed by investigative Staff). The same witnesses indicated that they would not have met any of the tests to qualify as an Accredited Investor.

[116] LH recalled Ward talking about what it meant to be an Accredited Investor, and said he told Ward he did not have sufficient assets or income to meet the test. He said Ward told him that "he would take care of it" with his lawyer and would "make sure" that LH qualified.

[117] MB was the only investor witness whose subscription agreements were completed differently. While he marked clause (h) on the second page of each agreement, he selected clause (k) of Schedule "A", representing that he met the income test for the Accredited Investor exemption. MB did not suggest that Ward told him to initial there, but instead testified that he selected clause (k) because it was the category that applied to him.

[118] Among the investors who did not testify but for whom subscription agreements were in evidence, GB was the only one whose agreement was completed differently. On behalf of his company, he chose clause (f) on page 2, representing that it was a company controlled by an individual or individuals who met one of the Family, Friends, and Business Associates exemptions. Fisher testified that GB told him he was also an Accredited Investor.

[119] Despite the remarkable consistency with which the E-Wealth subscription agreements were completed, Ward denied that he ever told investors which exemption to choose. He disputed the investor evidence to the contrary, and suggested that they simply did not recall correctly. In argument, he contended that some investors had testified that he told them he could not tell them where to sign, and that those who testified that he did tell them where to sign "did not stand up on cross-examination".

[120] Ward attempted to explain the process he would go through with investors as they filled out their subscription agreements. As we understood his evidence, he would generally advise them that he could not tell them which items to initial, but there were certain ones he could accept and others he could not. He did not identify which was which at the outset, but would sit with investors, sometimes over the telephone, while they went through each item and asked if they could choose that one. If he said no, he could not accept that, they would move to the next item – and so on until they got to one he could accept. Ward said that he understood clause (t) of Schedule "A" to the subscription agreements to be a "generic clause", and that he could accept it if that was how the person claimed to qualify for the investment.

[121] Staff argued that it is difficult to believe that virtually all of the investors for whom a subscription agreement was in evidence would simply have checked the same clauses by mistake. In their submission, all instances where either no clause was marked on Schedule "A" to the subscription agreements, or clause (t) was marked by an individual and not a company, should be considered an illegal distribution because no exemptions from the Prospectus Requirement were available. This would include investments made by individuals who did not testify at the Hearing.

[122] On this basis, Staff calculated that Ward illegally distributed $260,268.53 in E-Wealth Securities from February 2011 to April 2018. Staff indicated that this sum includes the principal amounts invested, plus any amounts investors added later to "top up" the reinvestment of their

principal and the purported returns. Staff further argued that the $100,000 invested by the Js in August 2013 should be considered part of the illegal distribution and added to the total even though Ward did not have them execute a subscription agreement because they were not close family members or friends of Ward, and there was no evidence they met the Accredited Investor criteria (to the contrary, JL testified that her parents had limited financial means). That would bring Staff's total for the illegal distribution to $360,268.53.

[123] We assume that Staff did not include LX's $150,000 in their total because she gave evidence that she was an Accredited Investor at the time. It is unclear why LL's $100,000 was not included, as we were not directed to any evidence that would suggest he was also an Accredited Investor or otherwise qualified for an exemption from the Prospectus Requirement.

[124] On cross-examining certain investor witnesses, Ward's counsel obtained some admissions that they did not specifically remember Ward directing them to fill out their subscription agreements in a particular way. Apart from this, however, Ward did not suggest that the E-Wealth investors were properly qualified for exemptions or lead any evidence in that regard.

[125] We are satisfied that other than with respect to MB, LX, and GB, there is no reliable evidence that any of the E-Wealth investors mentioned in these reasons qualified for exemptions from the Prospectus Requirement. To the contrary, the bulk of the evidence suggests that they did not qualify.

[126] We agree with Staff it is unlikely to be a coincidence that virtually all of the E-Wealth subscription agreements were completed in the same way, and conclude on a balance of probabilities that investors were led to choose item (t) in Schedule "A" by their discussions with Ward. Given that item (t) is nonsensical when applied to an individual and Ward acknowledged that he misunderstood the clause, we consider it unlikely that without his influence almost all of the investors would have erroneously concluded it applied to them.

[127] However, the critical point is not whether Ward specifically directed investors to that item, they arrived at it as a result of the iterative process he described in his testimony, or they chose it for another reason entirely. It is that there is no evidence that these investors met the requirements for an exemption and Ward, as the issuer, bore the responsibility to ensure and prove that he took reasonable steps to establish that they did (*Homerun* at para. 83). Staff met their burden to show that he distributed securities without a prospectus, but he did not meet his burden to show that exemptions applied. It is no excuse that he did not understand this, or the terms of the exemptions themselves.

[128] Although Ward complained that there was no evidence from the investors who did not testify as to whether they may have qualified for exemptions, we reiterate that it was his responsibility to lead evidence in that regard. He was at liberty to call any of those individuals to testify as part of his case, or to submit other evidence demonstrating his reasonable and serious efforts to confirm that exemptions applied. Since he did not, we are left only with subscription agreements on which the named individuals indicated that they qualified pursuant to a clause that could not possibly apply to them, plus LL's Investment Loan Agreement and the Js' undocumented

agreement. With respect to the latter two investors, there was no evidence to suggest that the question of qualification was even considered.

[129] As the panel stated in *Re Cloutier*, 2014 ABASC 2 (at para. 308): "It is insufficient to assume or hope that an exemption was available at the time of the trade or distribution of the security. Nor is it sufficient that some, but not others, of the trades within a distribution qualify for a claimed exemption."

F. Conclusion on Illegal Distribution Allegation

[130] We find that during the Relevant Period, Ward distributed E-Wealth Securities for which no prospectuses were filed with the ASC or receipted by the Executive Director, and for which there is no evidence that exemptions from the Prospectus Requirement were available. He therefore breached s. 110(1) of the Act as alleged in the NOH.

[131] In this case, calculating the amount of money raised in contravention of the Act is complicated somewhat by the fact that in some instances, the investment amounts shown on the E-Wealth subscription agreements included re-investments of original principal amounts plus returns ostensibly earned but not actually paid out to the investors. As such, it is not simply a matter of adding up the total amounts shown on the subscription agreements in evidence, plus the Js' $100,000 and LL's $100,000.

[132] Instead, we relied on the evidence – including Ward's investor list – of the cash payments Ward and E-Wealth received from investors during the Relevant Period for whom there is either evidence that they did not qualify for an exemption, or there is no evidence that they qualified for an exemption. Those amounts are:

Investor	**Date (approx.)**	**Amount**	**Means of Payment**
LH	February 9, 2011	$10,000	bank draft payable to "Engineered Wealth"
	April 4, 2014	$802.42	e-transfer to Ward
BS	May 13, 2011	$20,000	unknown, received by E-Wealth
	August 16, 2012	$80,540.50	unknown, received by E-Wealth
	July 7, 2014	$507.57	unknown, received by E-Wealth
QP/MP	May 6, 2013	$3425	unknown, received by E-Wealth
BJ	July 2, 2013	$20,000	cheque payable to "Engineered Wealth"
	March 26, 2014	$7800	cheque payable to "Engineered Wealth"
the Js	August 15, 2013	$100,000	bank draft payable to "Engineered Wealth"
# co. Ltd. (WS)	March 1, 2014	$20,000	bank draft payable to "Engineered Wealth"

	August 15, 2017	$8784.40	e-transfers to Ward
DL	March 24, 2014	$15,000	bank draft payable to "Engineered Wealth"
DS / HC Holdings Ltd.	June 16, 2014	$2205.55	cheque payable to "Engineered Wealth"
	June 16, 2014	$3942.08	cheque payable to "Engineered Wealth"
	April 13, 2015	$2750	unknown, received by E-Wealth
	April 22, 2015	$7000	cheque payable to "Engineered Wealth"
	February 22, 2016	$1800	unknown, received by E-Wealth
	July 19, 2017	$750	e-transfer to Ward
GO	November 27, 2014	$10,000	cheque payable to "Engineered Wealth"
TY	January 5, 2015	$15,000	cheque payable to "Engineered Wealth"
MT	February 5, 2015	$10,000	bank draft payable to "Engineered Wealth"
TS	February 26, 2015	$10,000	bank draft payable to "Engineered Wealth"
RC	October 2, 2015	$10,000	cheque payable to "Engineered Wealth"
EN	June 29, 2016	$25,000	cheque payable to "Engineered Wealth"
LL	July 14, 2016	$100,000	bank draft payable to Ward
JA	August 3, 2016	$15,000	cheque payable to "Engineered Wealth"
TOTAL:		**$500,307.52**	

[133] We therefore conclude that during the Relevant Period, Ward raised at least $500,307.52 from the distribution of E-Wealth Securities in contravention of s. 110(1) of the Act.

VII. MISREPRESENTATIONS

A. Law

[134] Section 92(4.1) of the Act states in part:

> (4.1) No person or company shall make a statement that the person or company knows or reasonably ought to know
>
> (a) in any material respect and at the time and in the light of the circumstances in which it is made,
>
> (i) is misleading or untrue, or

> (ii) does not state a fact that is required to be stated or that is necessary to make the statement not misleading,
>
> and
>
> (b) would reasonably be expected to have a significant effect on the market price or value of a security . . .

[135] Previous ASC hearing panels (see, e.g., *Arbour* at para. 753) have held that a breach of the section is established where Staff proves that:

> (i) a statement was made by the respondent;
>
> (ii) the respondent knew or reasonably ought to have known that the statement was, in a material respect, untrue, or omitted a fact required to be stated or necessary to make the statement not misleading; and
>
> (iii) the respondent knew or reasonably ought to have known that the statement would reasonably be expected to have a significant effect on the market price or value of a security.

[136] Materiality – i.e., whether the statement or omission would reasonably be expected to have a significant effect on the market price or value of a security – is an objective standard based on reasonable expectations (*Chmelyk* at para. 84). Prior ASC decisions have stated that "common sense" inferences may suffice to establish materiality, and that as members of an expert tribunal, a hearing panel may draw inferences as to the objective views of a reasonable investor (see, e.g., *Arbour* at paras. 764-765). The panel in *Aitkens* explained (at para. 138):

> A hearing panel will find that a statement or omission would reasonably be expected to have a significant effect on the market price or value of a security if it can reasonably be concluded that the misrepresentation would influence an investor's decision to purchase the security and the price that investor would be prepared to pay for it. Stated another way, the determination is "whether there is a substantial likelihood that such facts would have been important or useful to a reasonable prospective investor in deciding whether to invest in the securities on offer at the price asked" (*Arbour* at para. 765, citing *Sharbern* [*Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23] at para. 61).

[137] Misrepresentations to both existing and prospective investors fall within s. 92(4.1), because "misleading information may 'prompt existing investors to continue with or augment their investments' (*Re Mandyland Inc.*, 2012 ABASC 436 at paras. 196, 203)" (*Fauth* at para. 258).

[138] Staff are not required to prove that any particular investor relied on the misrepresentation alleged (*Cloutier* at para. 360).

B. The E-Wealth Statements

[139] Staff argued that from approximately February 26, 2012 to August 15, 2017, Ward made misrepresentations to investors and prospective investors contrary to s. 92(4.1). They alleged that both orally and in writing, he conveyed "a consistent and materially misleading story" about

E-Wealth that included misleading or untrue information, or failed to include information necessary to keep his statements from being misleading (collectively, the **E-Wealth Statements**).

[140] Staff further argued that the E-Wealth Statements were material and would reasonably have been expected to have a significant effect on the market price or value of the E-Wealth Securities and the willingness of investors and prospective investors to invest in them. They submitted that Ward enticed people to invest based on the E-Wealth Statements, as he led them to believe that the level of risk involved was low or non-existent by giving them a "no-lose promise" or an offer of "principal protection". He also led them to believe that they would earn specified rates of return, and that their funds would be used exclusively for E-Wealth's lucrative investing activities. In reality, Staff said, he knowingly made volatile and high-risk investments that had no guarantee of success, did not pay out most of the purported returns, and used a portion of the funds for undisclosed purposes. The E-Wealth Statements therefore prevented investors from making fully informed investment decisions based on reliable and accurate information.

[141] Finally, Staff argued that Ward knew or ought to have known that the E-Wealth Statements were materially misleading. He knew or reasonably ought to have known that investors would be more likely to invest based on the E-Wealth Statements, but also knew or ought to have known that the E-Wealth Statements were not true. He could not ensure that investors' principal was protected, or that it would generate specified returns. As the sole individual responsible for E-Wealth's activities – including its banking – he also knew that he was using investment funds in unauthorized ways that did not generate returns for investors.

[142] Ward disputed that he made the specific misrepresentations comprising the E-Wealth Statements, or that he intended his words to be construed in the manner alleged by Staff and described by investors. He also referred to his unfamiliarity with the requirements of securities laws and his reliance on the legal advice he received from AC, whom he alleged failed to give him sufficient guidance as to what he should and should not say.

1. Principal Protection

(a) Evidence

[143] The earlier forms of E-Wealth's subscription agreement included an attached Schedule "B", which set out the applicable terms and conditions of the "Fund". For example, Schedule "B" for the "Engineered Wealth 2011 Fund" in which LH invested stated in part that, "[t]he Issuer undertakes and promises that the amount disbursed to Unit holders on the termination of the Fund shall not be less than the initial subscription amount received by the Fund." The 2012 version included the same statement.

[144] As E-Wealth moved from its "2011 Fund" to its "2012 Fund", on February 26, 2012, Ward sent an email to at least some investors with information about the new fund. He stated in part:

> Whether you're currently a happy investor with Engineered Wealth, or you're curious about how to grow some wealth with us, here is some info to help clarify how it works.
>
> . . .

> And, after some consideration, I've decided to keep the "No-Lose Promise" policy in the 2012 Fund. So, all investors in the 2012 Fund will have the promise of principle [sic] protection! As we're expanding, I hope this incentive helps attract new qualified investors.

[145] LH testified that he understood that "no matter what happened", he "would be paid at least the value of the principal" at the conclusion of his investment term, and the February 26, 2012 email confirmed his understanding that he was not at risk of losing his principal. While he said that he did not recall a specific discussion with Ward about the security of the investment, he also said that he "was given the feeling that it was going to be relatively secure". This incentivized him to continue investing with Ward after his initial investment in February 2011.

[146] MB testified that part of the reason he decided to invest in E-Wealth was that Ward offered "a no-loss guarantee that none of your capital would be lost". He indicated that Ward mentioned this "a few times", and said that the content of the initial subscription agreements he signed reinforced his understanding.

[147] MB noted that his later subscription agreements (under Ward's promissory note structure) did not include the express promise or undertaking with respect to his principal. He explained that Ward told him he had taken the "no-loss guarantee" out of the document on the advice of his legal counsel, but MB felt it was still "implied" and still "on the table" because no one ever told him it was no longer available or that his capital was then at risk. He said he therefore still understood that this meant his "capital would be safe", and thought there was no chance he would lose his money.

[148] BJ indicated that on May 16, 2013, before he invested with E-Wealth for the first time, Ward sent him an email answering some questions, including BJ's question whether "the principal [was] still guaranteed" if the fund decreased in value by the end of the year. Ward advised:

> Yes, my investment contract has had a principal protection promise (because my securities lawyer says I can't use the word "guarantee"). So, yes, even if the value of the investment went down, investors wouldn't lose money. I've been in the investing business for many years. I'm very confident in the investment performance.

[149] Based on that assurance, BJ said that he felt comfortable investing with Ward, did not think the investment carried much risk, and did not believe he would lose his principal.

[150] On February 26, 2015, some of the witnesses received an email from Ward addressed to "Investors and Friends". It stated in part:

> Do you have any investments working for you that include full principal protection, and will earn you a +56% return over the next three years? And a +108% return over the next 5 years?
>
> If you're lucky, you might only have one investment like that. And it's with ENGINEERED WEALTH.
>
> If you don't have it yet, this is the time to consider getting it.
>
> My mission is to protect your capital, and grow it faster than any other traditional investment.

[151] BJ testified that this email confirmed his understanding that there was "full principal protection", and noted that Ward referred to "principal protection" a few times over the years that BJ invested with him. In cross-examination, BJ acknowledged that he was surprised there would be principal protection, but said he understood that Ward's investment strategy somehow "protected the downside".

[152] RC invested in October 2015. His evidence was that Ward told him his investment principal was guaranteed and there was no risk of losing it.

[153] On June 24, 2016, before EN invested, Ward sent him an email with some details concerning E-Wealth and attached two information sheets. The email explained that, "ROI begins at 15% per year, based on 1% per month, plus a 3-5% bonus each year. (With principal protection.)" EN said that he understood "principal protection" to mean that his initial investment amount was protected and guaranteed to be returned. He therefore understood that his E-Wealth investment carried "[z]ero risk" because "it was an investment with principal protection".

[154] EN also spoke about the document attached to the email entitled, "Highlights of Investing with Engineered Wealth", which was sent to other investors as well. This information sheet indicated that there was a "No-lose Promise" and explained that, "Investors will receive at least the principal amount originally invested + plus [sic] monthly gains + plus [sic] yearly bonuses at the maturity date". EN testified that he understood this to mean that his $25,000 investment and the one percent per month return were guaranteed, but that if he withdrew his principal before the three-year investment term expired, he would lose any bonus percentages. An earlier version of the "Highlights" sheet did not refer to monthly or yearly returns, but instead simply stated, "[n]o-lose promise – Investors will receive at least the principal amount originally invested at end of the Fund life".

[155] JA testified that based on her conversations with Ward, she did not think it was possible that she would lose her principal.

[156] LX's Investment Loan Agreement and Loan Agreement did not contain terms referring to protection of the principal amount invested. However, she testified that she understood her and LL's investment funds were "very safe", since Ward had "guaranteed" the returns. She said that he assured her he was "very good" at trading on the market and would not lose her money. She believed that the money was guaranteed based on the documents she was given and Ward's assurances that her principal was secured and would be returned to her. According to LX, if Ward had not told her that her money was safe and if she had not believed that it was safe, she would not have invested with him.

[157] JL did not think that Ward discussed the risk of loss with her parents, the Js, but recalled that they were told they could withdraw their investment at any time. Presumably, the implication was that if their funds were available for withdrawal at any time, they would not be lost.

[158] In addition to the statements in the documents already described – i.e., the earlier subscription agreements, the February 26, 2012 and February 26, 2015 emails to investors, the "Highlights of Investing with Engineered Wealth" information sheets, and the specific

correspondence such as Ward's May 16, 2013 email to BJ and his June 24, 2016 email to EN – Ward sent periodic updates to investors that contained similar representations with respect to the protection of their principal.

[159] For example, Ward's third quarter update concerning the "2012 Fund" noted, "[a]s you all know, I promise principal protection to all investors within this fund." Updates for 2014 (after the introduction of the promissory note structure) variously referred to "maintaining" E-Wealth's "promise to protect your capital", the returns being earned while investors were "being protected" such that E-Wealth was able to deliver "an unparalleled combination of performance plus protection", and made the claim that "we specialize in protecting and growing capital in any environment".

[160] Ward testified that when he referred to "principal protection", he meant that his investors' funds were backed by his personal assets. He said he deliberately did not incorporate E-Wealth, in part to avoid extra administration, tax complexities, and regulation, but in part because he knew and cared about his investors and did not want to hide behind a "corporate shield". He preferred to be personally liable and rely on his own assets to "back [his] promises". When asked about his May 16, 2013 email to BJ, Ward maintained that he had told the truth: "I intended to repay people their principal plus interest no matter what it took, and I believed that I could." He argued that his business simply was not as successful as he had anticipated, and "the considerable assets he had at the beginning of his business eroded".

[161] Ward admitted that there was no protection mechanism in place other than the ostensible availability of his personal assets, but denied that he promoted "principal protection" simply to induce people to invest with him. He also denied that he ever used the word "guarantee", because his legal counsel had warned him not to do so. He agreed that he used the word "promise", however, and explained that his "principal promise" meant that he promised "to repay it".

[162] Although Ward acknowledged that investors may have thought that a "promise" and a "guarantee" were the same, he argued that the two are very different things "in the world of debt contracts" such as the promissory notes that purportedly comprised the later E-Wealth Units. He contended that all such contracts include a promise of future payment of principal and interest, but not all are guaranteed.

[163] During their respective cross-examinations, several of the investor witnesses conceded that they either did not discuss it or they had no specific recollection as to what Ward said, if anything, about exactly how their principal would be protected or what he meant by "principal protection". LH agreed on cross-examination that he did not recall Ward using the word "guarantee". At least two – LH and RC – also acknowledged that they understood the investment still carried some risk.

[164] However, RC said that he nonetheless understood there was no risk he would lose his principal. In a similar vein, while MB conceded that he had no specific memory of Ward telling him that his investments were safe, he also noted that he had no specific memory of Ward saying his money was subject to risk. BJ pointed out that the phrase "principal protection" appeared "in [Ward's] correspondence quite a bit".

(b) Analysis

[165] We are satisfied that Ward made both written and verbal statements to E-Wealth investors and prospective investors that induced them to believe they were not at risk of losing the principal amount of their investments. We think it no coincidence that the investor witnesses were consistent in their evidence in this regard, whether they invested early in the Relevant Period or later. This consistency rebuts Ward's suggestion that the witnesses simply misunderstood or misremembered what he said to them, and that he is the only one who has an accurate recollection. Moreover, the witnesses' testimony corroborated each other, and was further corroborated by the written communications they received from Ward – communications that were consistent throughout the Relevant Period.

[166] On the facts of this case, we find that nothing turns on whether Ward used the word "guarantee". Staff did not allege that he did so, but only that he advised and promised investors that "their principal would be protected". Whatever significance a "guarantee" might have in other contexts – for example, civil litigation – in the securities regulatory context, it is sufficient that the language used led investors to understand that a particular investment carried less risk than other investments, and that in some way – even if it was not clear exactly how – Ward had a mechanism or a strategy to protect them from loss. Ward admitted that he gave investors his "promise" to repay their principal, and intended to stake his own assets to back that promise. On cross-examination, LX explained that she considered a "guarantee" and a "promise" to amount to the same thing: that if someone tells you something will happen, it will happen. Based on the documentary evidence and the oral testimony, we consider it likely that other E-Wealth investors drew similar conclusions.

[167] Therefore, we are satisfied that with respect to the protection of principal, Staff has met the first part of the test to establish a breach of s. 92(4.1) of the Act.

[168] We are also satisfied that Staff has met the second and third parts of the test. Common sense dictates that Ward knew or reasonably ought to have known that his statements about "principal protection" were untrue, or omitted the facts necessary to prevent the statements from being misleading: i.e., that there was no mechanism in place to secure anyone's investment beyond his personal liability, and there was nothing stopping him from at any time dissipating the personal assets that he was relying on to back the promise.

[169] Given that he was solely responsible for E-Wealth, knew the state of his own fortune, and knew that he was making unsecured investments in opportunities with no certainty of success, Ward knew or ought to have known there was a reasonable chance his investments would fail and eventually exceed his capacity to repay E-Wealth investors – as was the ultimate outcome. Moreover, Ward's Qtrade account applications from February 2013 suggest that he had limited resources: he reported an annual income of $170,000 and a net worth of $215,000, including $140,000 in liquid assets and $75,000 in fixed assets. His bank account records indicate that he was making regular payments to collection agencies and on credit cards and loan facilities throughout 2013, 2014, 2015, and 2016, servicing his significant debt obligations. He had much of that debt at the beginning of 2013 and made fairly regular payments through 2017, but never fully paid it off.

[170] There is no evidence Ward shared this with E-Wealth investors, or otherwise explained what he meant by "principal protection", the realistic limits of that protection, and the risks that investors' principal could be lost. As the issuer, it was his responsibility to ensure that people had the information they needed to make informed investment decisions, regardless of his confidence in his own abilities. In the Ward Submissions, Ward pointed out that, "[i]t is sadly the case that many business loans are not repaid". That is true, and if E-Wealth investors had been told that they were making simple unsecured business loans that may or may not be paid back, they might have expected that result and Staff may not have alleged misrepresentations in that regard. However, the evidence does not indicate investors were given any such qualifying information.

[171] Ward also knew or reasonably ought to have known that his promises of "principal protection" would reasonably be expected to have a significant effect on the market price or value of the E-Wealth Securities. In *Re Smylski*, 2010 ABASC 320, the panel stated (at para. 107), "[a]ny representation about the safety of an investment is bound to affect its price or value – the riskier the investment the less valuable it will generally be." We have no doubt that E-Wealth investors were influenced by the promise of "principal protection" in making their decisions to invest (and indeed, some gave direct evidence in that regard). We also have no doubt that Ward knew his "promise" would have that effect – he stated as much in his February 26, 2012 email. Ostensibly having been warned by his counsel not to use the word "guarantee", he found another phrase to convey essentially the same message, as he suggested in the email he sent to BJ on May 16, 2013. In his Hearing testimony, he acknowledged that "no-lose promise" was intended to convey to people that they would not lose their principal.

2. Specified Rates of Return

(a) Evidence

[172] The earliest E-Wealth subscription agreements in evidence did not refer to particular rates of return on investment. However, by early 2013 and the introduction of Ward's promissory note structure, Schedule "B" to some of the agreements indicated in part:

> . . .
>
> 2. The Units shall bear interest at a fixed rate of 12% per annum (based on 1% per month, using simple interest), calculated and compounded annually, not in advance.
>
> 3. The Units ("Notes") shall have a term of one year from the date of issue. The full principal amount of the Units, together with interest thereon, shall be payable on the maturity date. . . .
>
> 4. Units held to maturity, through a full one-year term, will receive a bonus equal to 3% of the principal amount of the Units, on the maturity date.
>
> . . .

[173] Schedule "B" to other versions of the subscription agreement included the same item 2, but revised items 3 and 4:

> . . .

> 3. The Units ("Notes") shall have a term of one, two, or three years from the date of issue. The Subscriber shall choose which of these lengths their term will be. The full principal amount of the Units, together with interest thereon, shall be payable on the maturity date. . . .
>
> 4. Units held through each full one-year period will receive a bonus. Interest is calculated and compounded annually, not in advance.
>
> a. The first-year term maturity bonus is equal to 3% of the initial principal amount of the Units, and payable on the maturity date (Thus, 12% + 3% = 15% total annual interest), and
>
> b. The second-year term maturity bonus is equal to 4% of the new principal amount (previous year's principal amount plus interest) of the Units, and payable on the maturity date (Thus, 12% + 4% = 16% total annual interest), and
>
> c. The third-year term maturity bonus is equal to 5% of the new principal amount (previous year's principal amount plus interest) of the Units, and payable on the maturity date (Thus, 12% + 5% = 17% total annual interest).
>
> . . .

[174] These agreements also indicated on the front page that the investor – or "Subscriber" – could choose a one-year term "with bonus of 3%", a two-year term "with bonuses of 3%, [sic] and 4%", or a three-year term "with bonuses of 3%, 4%, and 5%". Some included handwritten notes indicating that an adapted bonus amount was payable on partial terms of less than a year.

[175] The quarterly updates Ward said he sent to "existing investors and lenders" and a "short list of prospects" also contained information with respect to rates of return. This included the following:

> **2014 Investment – Q1 Update – for end of 1st Fiscal Quarter, June 2014**
>
> . . .
>
> We are in the process of raising $500,000 of new capital for business growth and expansion. Investors will get a steady 1% a month, plus yearly bonuses of at least 3%. Where else can you get returns like this?
>
> . . .
>
> **2014 Investment – Q2 Update – for end of 2nd Fiscal Quarter, September 2014**
>
> . . .
>
> How long can this growth pace last in the stock markets? Nobody knows. But, one thing you do know is you'll always get at least 15% per year growth from Engineered Wealth, no matter how the markets are doing.
>
> We are making progress towards our target of raising $500,000 of new capital for business growth and expansion. And, there's still . . . some space available. Remember, investors will get a steady 1% a month, plus yearly bonuses of at least 3%. That's a minimum of 15% per year, 56% in three years, and 108% in five years. Where else can you get returns like this?

. . .

2014 Investment – Q3 Update – for end of 3rd Fiscal Quarter, December 2014

. . .

How did all your investments do? It was a generally good year for growth for equities, in real estate, and for businesses – but did your other assets and investments beat the +15% (or higher) returns you're getting from Engineered Wealth?

. . .

This is truly a win-win environment, where investors make solid returns, while being protected, and with the luxury of liquidity. . . .

. . .

Nobody knows how things will play out with oil prices, but what you do know is we specialize in protecting and growing capital in any environment.

As Engineered Wealth continues delivering an unparalleled combination of performance plus protection, we invite you to consider how we might further expand our business relationship. . . .

[176] In addition, the "Highlights of Investing With Engineered Wealth" information sheet contained representations concerning rates of return. This included the "No-lose Promise" referenced previously, with footnotes that explained, "[i]nvestment gains are set to 1% after each full month invested, plus a minimum bonus of 3% after each full year invested" and "[b]onus structure for a 3-year term is 3% after the first full year, 4% after the second full year, and 5% after the third full year. . . . ". Another footnote indicated that, "[f]rom 2010 to present, all past and current investors have received positive gains from their investments in Engineered Wealth." This is in contrast with an earlier version of the "Highlights" sheet that was more conservative, and warned in a footnote that, "[t]he Fund has no history of earnings and no historical basis to determine possible returns. There is no assurance that the Fund will meet any expected return."

[177] Certain emails in evidence also contained information about rates of return. For example, an August 1, 2013 email Ward addressed to "Investors and Friends" announced a "New and Improved" E-Wealth that had made "some adjustments and improvements":

The new setup has raised the floor for your potential minimum return, regardless of our performance. And, we've eliminated volatility.

Now, your investment will grow by 15% a year – based on a steady 1% every month, plus a bonus of 3% at the end of the year (using simple interest). The rate of this gain is based on last year's stellar growth!

And, you can now choose a multi-year setup (1-3yrs), where your bonus increases by 1% each consecutive year. This gives you a 16% return for your second year, and a 17% gain in your third year – compounding on your previous year's growth.

. . .

> As we've had a solid track record of delivering substantial growth, more and more investors these days are adding larger amounts to grow with us – into the 6-figure range. We're committed to growing our business, and creating more wealth for you.
>
> How are your other investments doing? Are you investing the right amounts in the right places?
>
> We invite you to consider adding to your investment at Engineered Wealth, and maximizing your compounding returns.

[178] BJ responded to this email with some follow-up questions, and commented, "[t]hese rates of return are incredible!!" Ward explained in reply:

> . . . these rates of return are possible due to the sophisticated investments I have access to. And, by pooling the capital together through my business, we qualify to invest in some higher quality and typically higher-return investment opportunities, that regular people wouldn't have access to on their own.

[179] In a January 12, 2014 "Investors and Friends" email, Ward wrote, "[c]urrent (full-year) investors in Engineered Wealth will earn a 15% gain for this fiscal year ". His February 8, 2014 communication expanded on this with a subject line that read, "[r]ight now you can earn a +56% return in the next 3 years". The body of the email stated that investors "will receive a return of more than a +56% [sic] over the next three years", based on "compounding returns of 15% in the first year, 16% for the second, and 17% after the third year". This was consistent with the February 26, 2015 "Investors and Friends" email referenced in the previous section of these reasons, in which Ward referred to returns of 56 percent or more in three years, and 108 percent or more in five years.

[180] In addition, the investor witnesses gave evidence concerning their understanding of the returns they would earn by investing in E-Wealth, and addressed some of the other written information they received from Ward.

[181] Concerning his initial investment in the "2011 Fund", LH received a "Performance Results & Summary" statement from Ward that indicated he had realized a gain of 6.97 percent over the previous year. On July 26, 2013, he received an email and a "Performance Results & Summary" statement from Ward that said that LH had earned a 15.42 percent return on his re-investment in the "2012 Fund". This email offered LH the opportunity to re-invest that amount and add a "top-up" to purchase an additional E-Wealth Unit. The email also stated, "[s]tarting from March 2013, your investment capital with Engineered Wealth WILL GROW by 15% per year, or MORE!"

[182] MB received a similar email from Ward on July 22, 2013. It also reported gains of 15.42 percent, encouraged him to re-invest and add additional funds, and stated in bold lettering, "[s]tarting from March 2013, investors['] capital WILL grow by 15% per year, or MORE!" It was accompanied by a "Performance Results & Summary" statement reflecting a 15.42 percent return for March 2012 through February 2013. MB testified that one of the reasons he decided to invest in E-Wealth initially was the rate of return Ward offered. He continued to re-invest afterward because he saw good returns on paper. Returns of 15 percent were reflected in MB's "Investment Performance Results & Summary" statements for March 2013 through February 2014 and March 2014 through February 2015.

[183] A graph included in a Q4 update for the "2012 Fund" that MB received showed E-Wealth as having outperformed the real estate markets, the prices of gold and oil, and major indices including the S&P 500 and the NASDAQ. A table underneath the graph indicated that E-Wealth had generated over 40 percent in returns in the aggregate "since inception". When Staff suggested to Ward that these numbers were simply manufactured, Ward said that they were based on returns from all of his various trading accounts at the time.

[184] On March 31, 2014, LH received an email and a 2013 "Investment Performance Results & Summary" statement from Ward indicating that he had earned a 15 percent return from March 1, 2013 to February 28, 2014. It again invited him to add to the investment, and stated, "[s]tarting now, March 2014, your investment capital with Engineered Wealth can GROW by 15% per year, or MORE! You can chose [sic] to invest for up to a 3-year term, and earn LARGER BONUSES!" BJ received a similar email on March 13, 2014, which attached a "2013 Investment Performance Results & Summary" statement. The statement reported that BJ had gained $2200 on his investment from July 1, 2013 to February 28, 2014, for a return of 11 percent. A consolidated statement for the three years from March 2014 to February 2017 showed a total 55.73 percent return: 14.74 percent in year one (slightly less than 15 percent, apparently because of the timing of BJ's "top-up" investment), 16 percent in year two, and 17 percent in year three.

[185] At the Hearing, LH testified that he was persuaded to add "top-up" amounts because of his understanding that his investment was doing "very well". He told his sister, JA, about the opportunity and recommended that she invest, too, because it was going so well for him. JA said that she understood that the returns set out in her subscription agreement were "guaranteed" for each year she invested.

[186] According to RC, when Ward told him about E-Wealth, Ward said that he "was offering to individuals the opportunity to invest with a guaranteed rate of return" of 1 percent per month (12 percent per year), plus yearly bonuses each year for three years if the investor kept the funds with Ward for the entire time. He received an email from Ward on October 9, 2015 that indicated that because RC was investing partway through a fiscal year, he would get "the regular 1% per month, plus a custom 2% bonus, for a total 7% gain" until the spring, at which time he would be "onto the regular 15%, 16%, and 17% yearly returns" thereafter.

[187] As mentioned, Ward's June 24, 2016 email to EN included the representation that, "ROI begins at 15% per year, based on 1% per month, plus a 3-5% bonus each year". EN testified that he understood that if he left his $25,000 investment with E-Wealth for three years, he would receive returns of 1 percent per month, plus 3 percent, 4 percent, and 5 percent bonuses for each year he left the funds with E-Wealth. At the end of the term, he would receive all of the accumulated interest, plus repayment of his principal. He understood that it was "[v]ery certain" he would receive returns in those amounts.

[188] With respect to the investments made under arrangements other than E-Wealth subscription agreements, JL testified that her parents understood returns would be paid on their E-Wealth investment that would cover their bills annually and potentially allow them to take a trip to China. However, she did not think there was ever a specific discussion with Ward about specific rates of return. While she acknowledged that Ward made some payments on her parents' HELOC as

agreed, she did not know how much he paid in total. Ward suggested it was approximately $9000, but we were not directed to any evidence that would verify that amount.

[189] LX testified that she chose to invest with Ward because he offered a much better rate of return than a bank. He told her he could do so because he was so good at trading on the market he could pay investors their returns and still make a living for himself. She said Ward told her returns could fluctuate monthly, but he still "guaranteed" a return of "10 percent annually". However, she also referred to a return of $1000 monthly (1 percent per month or 12 percent annually), and said she understood the same return would be paid on LL's investment. When she invested her later $50,000 in July 2016, she expected to be paid the same rate of return – 1 percent per month – even though the pertinent Loan Agreement stated on its face that the rate was 1 percent per year. According to LX, she had asked Ward if the return on her $50,000 investment would be the same as for her initial $100,000 investment, and he told her it would.

[190] LX said that both she and LL received payments of $1000 per month for a few months, but then the payments stopped. When she asked Ward why, he told her the market was not doing very well at that time. She testified that she thought she had received approximately $2000 to $3000 in returns, and that LL had received approximately $7000 to $9000. However, her returns were deposited into a bank account she held jointly with Ward, and he ended up using the money a few months later. She therefore considered that she had never really received any returns.

[191] The only evidence that substantiated whether returns were paid to LX or LL and if so, in what amounts, were two 2017 "*Interim* Loan Summary" (original emphasis) statements issued on E-Wealth letterhead. LX's statement showed that on her $100,000 loan, interest at 1 percent per month had accrued from April 2016 to December 2017, $12,000 of which had purportedly been paid, and $9000 of which was "Owed in Arrears". On her $50,000 loan, interest at 1 percent per year had accrued from July 2016 to December 2017, $1000 of which had purportedly been paid, and $500 of which was "Owed in Arrears" (we note that this does not appear to be mathematically correct). LL's statement showed that on his $100,000 loan, interest at 1 percent per month had accrued from July 2016 to December 2017, $9000 of which had purportedly been paid, and $9000 of which was "Owed in Arrears".

[192] While most of the investor witnesses were fairly consistent in their evidence as to their understanding of what they would receive in returns and how certain it was, BJ gave evidence to the contrary on cross-examination. He said that he understood the rate of return was expected but not formally guaranteed, and noted that Ward "was always careful not to say that it was guaranteed".

[193] In argument, Ward indicated that he did not make guarantees, but rather promised a fixed rate of interest that is a standard way to compensate those who invest in debt securities such as the promissory notes that ostensibly comprised the later E-Wealth Units. Some investors may simply have wrongly viewed the fixed rate as a "guarantee".

[194] Ward therefore testified that when he made statements in E-Wealth documents and communications touting the rate of return, he was only referring to the fixed rate of interest provided for under his promissory note structure. He understood that the amounts he owed to

people under the promissory notes would not change no matter how he did with his investing activities. Accordingly, when he wrote, "[s]uccess is our History – All investors through our history have made gains on their investments with Engineered Wealth" in his "Highlights of Investing With Engineered Wealth" information sheet, he was only referring to the ostensible interest growth pursuant to the fixed rate of return, not the actual performance of any of the investments he made.

[195] Ward provided the same explanation about the "Performance Results & Summary" and other account statements he sent to some investors. Staff submitted that these account statements contained misrepresentations, as they purported to reflect returns that Ward knew had not actually been earned. Ward replied that the statements reflected the calculation of the amounts he owed to each individual based on the fixed rate of return set out in the contracts the investors entered into, and were consistent with his legal counsel's advice "to treat the investments as loans and not to talk about the underlying business". According to Ward, the numbers shown had no connection to how any of his trading accounts or other investments were actually performing.

(b) Analysis

[196] It is clear that Ward made statements to E-Wealth investors and prospective investors that investments under the promissory note structure would pay interest at specified rates. He also issued a form of account statement to at least some investors that indicated their investments had earned those rates of return.

[197] Accordingly, we find that with respect to specified rates of return, Staff met the first part of the test to establish a breach of s. 92(4.1) of the Act.

[198] We also find that these statements would reasonably be expected to have a significant effect on the market price or value of the E-Wealth Securities, and that Ward knew or reasonably ought to have known that was the case. It is uncontroversial that people would be more likely to invest on the understanding that their returns are not subject to volatility, and that they will earn returns in excess of those paid by a bank or other, more typical investment vehicles. Ward sent communications announcing these rates of return that were highly promotional in nature, obviously designed to encourage the reader to choose E-Wealth over other opportunities, and to continue to re-invest in E-Wealth.

[199] The "Performance Results & Summary" documents and other reporting statements Ward sent to some investors would have had the same effect. Indeed, some of the investor witnesses who testified at the Hearing confirmed that this information induced them to invest, and to keep investing. LH encouraged his sister, JA, to invest based on the returns he thought he had earned.

[200] Whether Staff met the remaining part of the test is less clear. Ward's evidence was that he believed he would be able to pay the returns indicated in the subscription agreements and other written materials, and Staff did not direct us to any evidence that showed that before the actual collapse of E-Wealth in 2017, he could not have paid any individual investor at any given point in time such that he knew or ought to have known his rate of return representations were false. Staff alleged in the NOH that "Ward could not reasonably offer specific rates of return to investors because he used investor funds in a manner that carried a high level of risk". While he may have

made high-risk investments with the money that flowed into E-Wealth, it does not necessarily follow that it was therefore inevitable that he would not be able to pay returns as indicated.

[201] In *1205676 Alberta*, Staff similarly alleged that certain respondents had made misrepresentations to investors by telling them that they should expect returns on their investments ranging from 5 percent in 60 days to 152 percent per year (see para. 176). Two of the respondents in the case argued that to prove the misrepresentation, Staff had to prove that the company was unable to pay returns at those rates at the time the statements were made to investors, and that they (the respondents) knew or ought to have known it (see para. 181). Like Ward, another respondent argued that he had genuinely believed the company would be lucrative enough to pay returns at those levels (see para. 182). Also like Ward, a fourth respondent argued that in making statements about the rates of return, he was simply describing the contractual terms set out in the subject promissory notes, and Staff had not led any evidence to prove the statements were inaccurate. To the contrary, at least one investor witness had testified that for approximately six months, he received returns at the rate indicated (see para. 183).

[202] The *1205676 Alberta* hearing panel found that while the impugned statements concerning rates of return had been made by the respondents, the evidence was that the underlying business was both legitimate and capable of generating lucrative returns, investor money was used for the business in the ways investors understood it would be, and the promised rates of return were being paid (see paras. 185-186 and 188). The panel therefore concluded that despite its concerns about the sustainability of the business over the long term, "nothing in the evidence before [it] demonstrate[d] that the rates of return promised by [the respondents] during the [r]elevant [p]eriod were, in context, unrealistic, improbable, misleading or untrue in a material respect or reasonably ought to have been considered by them to be such" (at para. 188).

[203] We draw the same conclusion here. Staff did not prove that E-Wealth was a sham or that it was incapable of generating high returns before its ultimate collapse. In addition (as will be discussed further in the next section of these reasons), while not all investor money was used in the ways the investors understood it would be, some of it was, and some returns were paid at the rates indicated.

[204] In the result, we are not persuaded that Ward knew or reasonably ought to have known that his statements concerning the interest to be paid on investments in E-Wealth were untrue.

[205] That said, we find merit in Staff's argument that Ward omitted facts required to be stated or necessary to keep his statements concerning the interest to be paid from being misleading, and that he knew or reasonably ought to have known that was the case. In his written submissions, Ward suggested that, "[t]he most [that] can be said about [his] representations regarding the fixed returns is that they should have been qualified by additional risk disclosure". Although he went on to argue that he was not advised properly in this regard by his lawyer, AC, and that he had not understood the need for qualifying statements, we agree with his initial premise that his representations regarding the fixed returns should have been qualified. As with respect to the promise of "principal protection", Ward should have provided clear information to investors about the risk the returns would not be paid.

[206] The panel came to a similar conclusion in *1205676 Alberta*. After having found that the rate of return statements were not in and of themselves untrue, the panel went on to consider Staff's argument that the respondents had failed to describe the risks of the investment in the context of other alleged misrepresentations – specifically, the respondents' representations to some investors that their principal or interest (or both) was "guaranteed" (see paras. 180, 189, and 197-200).

[207] The panel concluded that the representations in this regard made by two of the respondents to certain investors were "patently misleading and untrue" because the investments were not "risk-free" or "guaranteed in any way" (at para. 203). Since the panel was also satisfied that the two respondents knew or ought to have known this and that the representations would have a significant effect on the value of the subject securities, these allegations were sustained (see paras. 203-207).

[208] While Ward did not use the word "guarantee" as some of the respondents did in *1205676 Alberta*, we have already noted that the use of that specific word is not determinative for securities regulatory purposes. When describing E-Wealth's rates of return in his promotional communications, Ward used other language we consider unreservedly affirmative and largely to the same effect: for example, telling investors that they "will" (and sometimes "WILL") receive the returns indicated, that they would "always get" at least those amounts "no matter how the markets are doing", and that he had "raised the floor" for minimum returns "regardless of our performance" because he had "eliminated volatility". Moreover, Ward drew a distinction between E-Wealth and other investments on the basis of these returns, which were sometimes confirmed in E-Wealth account statements. He therefore conveyed the impression that receipt of the returns was certain and risk-free.

[209] Concerning Ward's argument that he did not understand the need for qualifying language, we consider his purported reliance on legal advice later in these reasons. Here, we note that as mentioned, his earliest "Highlights of Investing With Engineered Wealth" information sheet did not suggest payment of returns in any particular amount, and it included a footnote stating that, "[t]here is no assurance that the Fund will meet any expected return". This suggests that he was aware of the concept of and the need for disclaimers and qualifications in at least some contexts.

[210] In conclusion, although we have found that Staff did not prove Ward knew or reasonably ought to have known that his representations regarding the interest he would pay to E-Wealth investors were untrue in a material respect, we are satisfied that he knew or reasonably ought to have known that those representations, in light of the circumstances in which they were made, required risk disclosure to make them not misleading. He should have appreciated that while it was possible the investments he was making would pay off in amounts that would allow him to make the required interest payments, it was also possible they would not, and that his personal assets would be insufficient to cover the payments. Investors required that information in order to make fully informed investment decisions.

3. Use of Investment Funds

(a) Evidence

(i) Witnesses and Investor Documents

[211] According to Ward, AC advised him that E-Wealth's promissory note structure would fall under the Private Issuer exemption from the Prospectus Requirement as long as Ward did not talk

about the underlying business with investors or tell them what he was going to do with their money, but instead simply paid them a flat rate of return like any business loan. Ward's position was therefore that as long as he followed this advice, he was entitled to use the funds however he wished, including to pay himself a "reasonable" salary and compensate himself for business expenses. However, he acknowledged that he did not have "a set salary" or a specific method for calculating his compensation once E-Wealth made the change from "fund" to "promissory note".

[212] Staff argued that according to the investor witnesses, Ward did not explain to them that he was simply borrowing money for his discretionary use and that he would repay them their principal and a fixed rate of return. In Staff's submission, the investors would not have invested if they had known that was Ward's intention. To the contrary, their expectation was that through E-Wealth, Ward would make investments on their behalf to generate the returns promised.

[213] Ward testified that while he initially used the Qtrade online trading platform, in late 2012, he set up a trading account through Maverick Trading (**Maverick**), as it used a trading platform he considered better than Qtrade's. He said he also had a trading account or accounts for binary options trading. Ward further explained that he invested E-Wealth investors' money in a variety of things in addition to binary options, including bonds, foreign exchange, commodities, and equities. He also looked into several real estate investments, but only put funds into one. It ultimately did not proceed, so the funds were returned.

[214] Although the failure of E-Wealth indicates that Ward's investing activities were ultimately unsuccessful, it was unclear from the evidence how much success he had at any given point in time. During cross-examination at the Hearing, Ward admitted that it was "possible" he had lost approximately $130,000 in Qtrade between April 2011 and April 2018, and that he lost over $100,000 in Maverick. He acknowledged that all of the money he invested in one or more binary options opportunities and a cell phone application was lost, but the amounts lost were not specified.

[215] Ward also admitted it was "possible" that he used investor funds for personal expenses. However, he said that based on AC's advice, he had understood he could do so under the promissory note structure. Further, in some instances, funds for E-Wealth's investing activities had to go through one of his personal accounts. He therefore testified that he would sometimes move money from E-Wealth's account to one of his accounts, then on to its ultimate destination.

[216] Staff led evidence from each of the investor witnesses about their understanding as to how Ward would use their money to generate the promised returns. As with the other E-Wealth Statements, use of funds was also addressed in various written materials.

[217] As mentioned, Schedule "B" to E-Wealth's earliest form of subscription agreement, used before Ward switched to his promissory note structure, set out the applicable terms and conditions of an investment in that year's E-Wealth "Fund". Schedule "B" to the agreement for the "Engineered Wealth 2012 Fund" stated in part:

> . . .
>
> The Fund, and the Units in the Fund, shall have the following terms and conditions:

> 1. The Issuer shall have the absolute discretion to invest the cash reserves of the Fund in such [a] way that the Issuer determines[,] including, but not limited to, the purchase of shares, exchange traded funds (ETF's) [sic], exchange traded notes (ETN's) [sic], options, bonds and debentures, GIC's [sic], mutual funds, loans, real estate, etc., and the Fund's cash may be held in any currency that the Issuer determines, including Canadian dollars, U.S. dollars and other currencies.
>
> . . .
>
> 4. The Issuer shall be compensated by the Fund through the payment of management fees as follows:
>
> a. The payment of an annual management fee equal to two (2%) percent of the aggregate original issue price of the total Units issued by the Fund, to be paid pro rata on a monthly basis;
>
> b. The payment of an amount equal to 20% of the profits earned by the Fund (over and above the original issue price of the Units), which may be calculated and paid to the Issuer at such intervals as the Issuer determines, from time to time (for example, the calculation and payment may be made on a monthly, quarterly, annual or other basis).
>
> 5. Upon the termination of the Fund, the remaining proceeds of the Fund, after payment of the management fees described above, and all expenses, shall be disbursed to the unit holders in proportion to the number of Units held unless the Unit holders direct otherwise.

[218] LH testified that he understood Ward would use investment funds in the ways described in these terms and conditions. Accordingly, he acknowledged that Ward would be compensated through management fees based on percentages of the original investment amounts and any profits. On cross-examination, LH also acknowledged that he was aware E-Wealth became Ward's full-time job and his source of personal compensation.

[219] Under the promissory note structure, the terms and conditions appended to the subscription agreements did not include representations concerning the specific use of funds or any amounts Ward would take as compensation. Instead, they inserted the fixed rate of return and "bonus" percentages, including the yearly bonuses for those who left their funds with E-Wealth for one to three full years.

[220] Despite these changes, the investor witnesses were generally consistent in their understanding that Ward would use their funds to make investments that would generate returns, even if they did not know anything about his specific strategies or the specific investments he intended to make.

[221] MB testified that he understood Ward would pool all of the funds from investors and use them for options trading and other investment purposes. He said he asked Ward how he (Ward) would be compensated at one of their initial meetings, and Ward told him that he made his money on the returns earned over and above the amounts he owed to his investors. MB was clear that he never considered his investment a loan, and that Ward never indicated he might use MB's funds to pay his personal expenses or to pay returns to other investors.

[222] BJ gave very similar evidence about Ward's compensation, and said he intended for his money to be used for investment purposes only, not for Ward's personal use or other non-investment purposes. Emails Ward sent to BJ in May and September 2013 represented E-Wealth as an "investment opportunity", and repeated the words "investment", "investing", and "investors". There was no mention of loans or a lending arrangement.

[223] The same is true of emails MB received, including some of Ward's "Investors and Friends" (or "Friends and Investors") emails. An "Investors and Friends" email from August 2013 described E-Wealth as an "investment", while another from January 2014 spoke of E-Wealth's successes with its "current business investments". A March 13, 2014 email to MB reporting on his "gains" touted E-Wealth's ability to "continually generate all our investors strong, steady returns" and "outperform traditional investments, under all market conditions" because its "proprietary business and investing strategy works, and continues to evolve, ahead of the curve". In an August 8, 2014 email, Ward explained that he might have difficulty honouring MB's payout request prior to fiscal year end because the business was "generally set up for year-long investments".

[224] BJ and MB both received Ward's February 8, 2014 "Investors and Friends" email. Ward again described E-Wealth as an "investment" and an "exempt securities business", and claimed that it specialized in "high-end, sophisticated investments" that "regular people wouldn't have access to on their own". The email further explained that "by pooling investment capital together through [Ward's] business", E-Wealth investors would "qualify to invest in special, higher quality, and typically higher-return investment opportunities".

[225] An "Investors and Friends" email MB received in January 2016 discussed "current market conditions" and Ward's ability as a "shorter term trader[. . .]" not only to weather volatility, but also to "do even better when markets are volatile". An email from June 2016 similarly spoke about market conditions and "times of volatility", which were the times Ward said "[his] investing strategy really excels".

[226] In April 2017, in response to an email from BJ seeking payment of his returns to date, Ward explained that he had been very busy working on a variety of different types of investments:

> Lots of things in the works here. We've done some multi-lot real estate investments, we're building a new dental clinic, doing business development for a few companies, we're involved with a new oilfield safety company in Calgary, invested and participating in a technology start-up company developing a new cell phone technology, getting into wholesale textile imports from India, doing financing for residential and commercial construction projects, actively seeking local real estate re-build opportunities (partnering with a builder), we're also working with a few charities (Rotary Club, Mental Illness, Community Leagues, and more) to upgrade their structures to a more sustainable social enterprise model, and lots more.

[227] RC's evidence concerning the use of his investment funds was similar to BJ's, although RC did not recall discussing how Ward would be compensated. Regardless, he said he had the impression Ward would pay himself from the profits earned, as he was never told that any of his investment funds would be used to cover Ward's personal expenses.

[228] EN was somewhat more specific. He testified that he understood his money would be used "for investment purposes", primarily in "somewhat liquid assets or stocks or whichever else", in

order to generate the "guaranteed interest". Based on his communications with Ward, he further understood that Ward would only be compensated if he earned more from his investing activities than the amount of the returns he owed to EN. EN asserted that he did not authorize Ward to use any of his funds for personal or non-investment purposes.

[229] As mentioned previously, before he invested, EN received an email from Ward on June 24, 2016 that described the "investment opportunity", and referred to "investors" and the "minimum investment" amount. The two attached documents provided further information about E-Wealth. One was a one-page sheet (also received by RC), which referred to E-Wealth's "Investment Objective" and "Investment Strategy", and gave a list of potential investments including "equities, real property, social enterprises, strategic business partnerships, foreign or local currencies, bonds, commodities, and others". Like the February 8, 2014 "Investors and Friends" email, this sheet further indicated that E-Wealth investors would "benefit financially" from "special growth opportunities" that "most people wouldn't normally have access to on their own".

[230] The second document was the "Highlights of Investing With Engineered Wealth" information sheet discussed above, which was also received by RC. It too referred exclusively to "investing", "investments", and "investors", and advised that "this investment qualifies as an exempt security". It included no information with respect to Ward's compensation. By contrast, an earlier version of the "Highlights" sheet expressly referred to Ward's "performance-related fee structure", implemented so that his interests would be "aligned with the investors".

[231] JA also testified that she understood Ward would use her money to make investments – specifically, investments in the stock market and real estate. Like RC, she stated that she did not know how Ward would be compensated, but assumed that his compensation would come from whatever he earned above the amount of the returns that were to be paid to her. She denied that she gave any money to Ward for his personal use, or that they ever discussed that possibility.

[232] JL understood that Ward would invest her parents' funds for them to generate dividends. She acknowledged that Ward would compensate himself if he made money on her parents' investment, but did not think his compensation would come out of their principal. As mentioned, she denied Ward's contention that her parents' money was an "early inheritance", intended to assist with her and her children's expenses while they were living with him.

[233] LX testified that she understood Ward would "buy different stocks" with investor money including her own, buying low and selling high. Like other investor witnesses, she understood he would be compensated from anything he earned on her investments above the amount of her monthly returns. She said that she specifically told Ward her money should only be used to invest in the stock market through a certain online platform, and she neither gave him permission to invest through anyone else, nor to invest in real estate, use her money to pay other investors, or use her money to fund his personal expenses.

[234] Ward disagreed that he told LX he would only invest her money in the stock market and that she did not know he would use it to make a real estate investment, to pay his personal expenses,

or to pay back another investor. He suggested that LX simply has a poor memory because she works too hard and does not get enough sleep.

[235] Parts of Ward's quarterly update emails are also relevant to the investors' understanding about the use of their funds. Despite the switch to the promissory note structure, the updates continued to represent E-Wealth as an investment business that provided an investment opportunity. For example, the first quarter update for the "2014 Investment" stated in part:

> Our business model's scope has expanded, and is now more open to new opportunities in areas like real property, sustainable development projects, social enterprises, international equity investments, strategic business partnerships and joint ventures. As these types of opportunities arise, we'll apply due diligence and carefully consider how well they match with our principals [sic] and ideals. We are committed to growing your investments for you, outperforming traditional investments, and maintaining our promise to protect your capital.
>
> . . .
>
> I believe social enterprise is the "new tech", with tremendous growth opportunities, and I'm working on effective ways that Engineered Wealth might expand into this field, as well as others.
>
> . . .

[236] The updates for both the first and second quarters of 2014 referred to a $500,000 target for raising new capital "for business growth and expansion", advised that there was still "some space available" to get involved, and reminded investors of the possibility of earning up to a 108 percent return in five years. The third quarter update referred to E-Wealth as a "win-win environment, where investors make solid returns", and reminded recipients that "we specialize in protecting and growing capital in any environment".

[237] Staff also relied on Ward's LinkedIn profile, which as late as November 2017 told investors, prospective investors, and other readers that his "proprietary investing strategy" had allowed him to retire from engineering at the age of 32, and that he would use those strategies to help them "grow their wealth" through the "business investment opportunity" he had created in E-Wealth. The profile further described the opportunity as an "exempt security" that was "generally geared towards high-end, sophisticated, and accredited investors, as well as [his] business associates, and [his] close friends and family".

(ii) Financial Records and Related Testimony

[238] Bonazzo testified that he compiled the banking information collected during Staff's investigation and created a series of spreadsheets we described previously as the Source and Use Analysis.

[239] The Source and Use Analysis tracked deposits to and debits from E-Wealth's bank account at the Royal Bank of Canada (**RBC**), which Ward said was its only account. Using the bank records and other documents in evidence, Staff sorted the sources and uses of funds into categories. While the Source and Use Analysis in this matter included information dating back to April 1, 2011, we have already determined that Staff cannot rely on the compelled third-party records relating to the time period prior to the date indicated on the Investigation Order. However, as Bonazzo explained, the spreadsheets were easily adjusted to filter out any transactions prior to January 1, 2013.

[240] According to the Source and Use Analysis, from January 1, 2013 to April 30, 2018, $388,130.44 was deposited to E-Wealth's bank account. This was comprised of:

- $293,134.56 from investors (including $27,800 invested by BJ, $13,704.36 invested by MB or MB's company, $100,000 invested by the Js, $10,000 invested by RC, $25,000 invested by EN, and $15,000 invested by JA);

- $45,000 transferred to E-Wealth from one of Ward's personal bank accounts on July 15, 2016 (taken from the $150,000 in investment funds from LX and LL that was deposited to his account on the same date);

- $41,742 from Qtrade; and

- $8253.88 from depositors characterized as "unknown" by Staff (i.e., transactions for which Staff could not identify a source, or did not identify a source because the individual amounts involved were not significant; we note, however, that when aggregated, small individual amounts can become a significant total, and we have done that math in this decision where appropriate).

[241] Despite Staff having classified $8253.88 as originating from unknown depositors, the evidence indicated that this sum was actually received in various increments over time from two of Ward's personal RBC accounts. Ward therefore transferred a total of $53,253.88 to E-Wealth, including the $45,000 that was taken from LX's and LL's investment funds.

[242] According to the Source and Use Analysis, from January 1, 2013 to April 30, 2018, $388,156.78 was paid out of the E-Wealth account. This was comprised of:

- $322,469.07 transferred to Ward;
- $15,450 paid to Qtrade;
- $119.90 in bank fees; and
- $50,117.81 paid to parties characterized as "unknown" by Staff.

[243] However, at least $43,609.05 of the "unknown" sum was used to pay out investor GB (using the $45,000 Ward transferred to E-Wealth referenced above). In addition, the evidence indicated that another $2358.76 of the "unknown" amount was transferred to Ward's bank accounts, and $1600 of the "unknown" amount was paid on one of Ward's Visa cards. Therefore, the total E-Wealth transferred to Ward or paid on his behalf was $326,427.83, and only $2550 was paid to unknown parties.

[244] To determine the use of the funds E-Wealth transferred to Ward, Staff also collected records for Ward's personal RBC accounts. Between January 1, 2013 and April 30, 2018, a total of $810,579.33 (net of adjustments) was deposited to what appeared to be Ward's main account at RBC. This was comprised of:

- $323,622.32 from E-Wealth (the remaining $1205.51 E-Wealth transferred to Ward was deposited to other Ward accounts at RBC);

- $150,000 from investors LX and LL (plus an additional $5000 from LX deposited in February 2016 that did not appear to correlate with an investment agreement);

- $94,700 from an individual, AG (at least in part relating to the real estate investment that apparently did not proceed as planned, so the funds were returned);

- $70,828.29 transferred from other Ward accounts;

- a total of $59,539.03 from miscellaneous sources such as Ward family members, the government, and retail purchase returns;

- a total of $53,492.64 from depositors Staff classified as "unknown";

- $43,049.55 from Select Engineering Consultants Ltd. (apparently Ward's former employer – all funds from this source were deposited between January and June 2013); and

- $10,347.50 from Maverick.

[245] We also note that $8784.40 in investment funds from WS was deposited to one of Ward's other RBC accounts in August and September 2017, apparently because WS sent e-transfers and Ward could only accept them in his personal account. Ward's investor list included two additional small investments made by e-transfers to his other accounts: $802.42 from LH in April 2014 and $750 from DS in July 2017. In addition, Ward testified that he deposited the $100,000 LX initially invested in the spring of 2016 to his account at TD Canada Trust. He transferred at least $18,000 of that sum to his main RBC account between March 29, 2016 and April 29, 2016. It is therefore included in the $70,828.29 total transferred in from other Ward accounts set out above.

[246] Ward testified that of the remaining funds from LX's first $100,000 investment, he sent approximately $55,000 to Maverick for investment purposes and paid approximately another $20,000 for binary options trading in Europe. Excerpts from the statements for the TD Canada Trust account confirmed that wire payments in those approximate amounts were made on March 30, 2016 and April 1, 2016 respectively, but the payees were not shown.

[247] Between January 1, 2013 and April 30, 2018, $816,063.31 (net of adjustments) was paid out of Ward's main RBC account. This was comprised of:

- $279,615.07 paid toward Ward's debt obligations or transferred to other Ward accounts (including $145,941.77 paid on credit cards, $52,667.79 paid toward various loans, and $19,022.51 paid to collection agencies);

- $164,811.29 paid to recipients Staff classified as "unknown" (although there was evidence that $64,980 (nearly 40 percent) of this amount was actually paid toward

two of Ward's credit cards, and that some of this amount was transferred to other Ward accounts);

- $133,823.44 paid to Maverick Trading and $5500 paid to Qtrade;
- $74,443.88 paid for retail purchases and PayPal transactions;
- $55,501.20 paid to AG (again, apparently relating to a real estate investment or investments);
- $51,200 transferred to E-Wealth (including the $45,000 referenced above);
- $22,551.10 paid for insurance and utilities;
- $17,125.82 in cash withdrawals, bank fees, and interest;
- $6000 paid to Modan Management Consulting (apparently a consultant Ward worked with "to help improve [his] business"); and
- $5491.51 in withdrawals Staff described as "Foreign exchange – withdrawal", but the evidence showed that $4889.50 of this amount was actually paid toward two of Ward's Visa cards.

[248] Ward provided explanations concerning some of the above-noted expenditures. He agreed that any payments to collection agencies or for insurance and utility bills did not relate to E-Wealth's investment business. He made the same concession with respect to the retail purchases and PayPal transactions, although he suggested that some of those purchases and transactions were either JL's or made for her benefit.

[249] Similarly, Ward contended that some of his credit card debt and loan payments would have related to expenses for JL and her children, or payments on the Js' HELOC (as mentioned, he estimated that he paid approximately $9000 toward the HELOC, including interest payments). He also contended that some of his other credit card transactions were for E-Wealth business expenses and binary options trading. Bonazzo acknowledged on cross-examination that he had no way of determining whether at least some of Ward's transactions related to business expenses.

(b) Analysis

[250] As alleged by Staff, we are satisfied that Ward made representations to E-Wealth investors and prospective investors concerning his intended use of their funds – i.e., that the funds would be used to make investments that would generate the promised returns. The testimony of the investor witnesses was consistent in this regard, generally varying only as to an individual investor's understanding of the type of investments that might be made. Some, for example, understood that investments in real estate were possible, whereas others expected that all investments would be made in the stock market.

[251] Contrary to Ward's evidence, none of the investor witnesses understood that they were making simple loans that he was entitled to use as he wished as long as investors received their interest payments when due.

[252] This common understanding was corroborated by virtually all of the documentary evidence relevant to this issue. While the earliest form of subscription agreement under E-Wealth's fund structure spoke of the issuer's discretion, it limited the exercise of that discretion to various types of investments. It did not suggest that the issuer's discretion extended to any use at all.

[253] Later documents – whether email correspondence, information sheets, or market updates – all indicated that E-Wealth was an investment opportunity, and made no suggestion that it was a lending arrangement. Despite AC's advice to stay silent about the underlying business (discussed further later in these reasons), Ward's communications repeatedly referred to E-Wealth's investments and market performance. They boasted of his ability to employ strategies that would succeed regardless of market conditions, and the access he had to lucrative opportunities not available to "regular people". E-Wealth's marketing was unambiguously geared toward enticing people to entrust their money to Ward on the basis of his special skill in making savvy, profitable investments. There would have been no point to mentioning economic conditions or Ward's proficiency, unique strategies, and special access to investment opportunities if he were simply accepting loan funds to be used at his discretion.

[254] We reject Ward's argument that most of the investor witnesses testified only as to their "understanding" of how their funds would be used rather than what he actually told them in that regard, and that these individuals simply "assumed their funds would be invested a certain way because they knew that [he] was an investor". We do not believe that they all developed the same understanding for no reason. Leaving aside what Ward may have said, it is obvious that the correspondence and documentation discussed above would have led investors to that conclusion. Any reasonable person who read this material would have been induced to believe that their money would be invested in accordance with Ward's purported investment strategies and expertise, and the investor witnesses' testimony was consistent with those representations.

[255] We are also satisfied that Ward knew or reasonably ought to have known that his statements concerning his intended use of investor funds would reasonably be expected to have a significant effect on the market price or value of the E-Wealth Securities. As Staff pointed out, ASC hearing panels frequently note the importance of this type of information. In *Aitkens*, the panel commented that, "accurate disclosure of an issuer's intended use of investment funds is among the most important information an investor can and should be given", which is why it is mandated disclosure in securities offering documents (at para. 140). In *Arbour*, the panel stated (at para. 776):

> The use to which an issuer proposes to put money raised is obviously one of the most important factors considered by reasonable investors in deciding whether to invest in the issuer's securities. Such decisions would ultimately reasonably be expected to have a significant effect on the market price or value attributed to the securities. As this Commission noted in *Re Dobler*, 2004 ABASC 927 (at para. 220):
>
> > . . . Disclosure of the use of proceeds of an offering of securities has long been a key element of prospectuses and other offering documents, an element taken seriously by securities regulators and market participants. . . . The assumption

> underlying the requirement, and the seriousness with which it is taken, is that investors being asked to put money in a company, and market participants observing the process, care about how the money will be spent. Different proposed uses of proceeds may well affect investors' willingness to invest, and the prices they are willing to pay . . .

[256] We have no doubt that E-Wealth investors would have been less willing to invest or would have reconsidered the amount they invested if they had been aware that Ward intended to treat their funds as personal loans that he was entitled to spend in whatever manner he wanted, rather than as investment funds he would use his skills to invest on their behalf. Some of the investor witnesses did not even know Ward prior to making their investments. We find that they would have been less inclined to make unsecured loans to a stranger at liberty to spend their money as he liked than to make investments in a business operated by a purportedly skilled, experienced investor who would use their funds to make further investments and generate exceptional returns as advertised. A prospective investor's assessment of the risk involved in the investment would have been directly affected, which would in turn have affected the decision whether to invest at all and if so, how much.

[257] We conclude that Ward knew or, as a matter of common sense, reasonably ought to have known, that that was the case. Indeed, we consider it likely to be the reason he continued to market E-Wealth as he did instead of making his true intentions clear from the outset.

[258] Accordingly, we find that Staff has met the first and third parts of the test to prove a breach of s. 92(4.1) of the Act with respect to the use of E-Wealth investment funds.

[259] Again, however, it is less clear whether Staff met the second part of the test. The analysis as to whether Ward's statements concerning the use of funds were materially misleading and whether he knew or reasonably ought to have known that was the case is complicated by the way he operated E-Wealth's business and the limits of the evidence tendered. Based on the records before us, it appears that Ward freely commingled E-Wealth investor money with his own, and made no effort to track its use or separate E-Wealth's financial transactions from his personal transactions. He did not pay himself a regular salary or keep a clear record of business expenses, investments made, profits gained, or losses incurred (or at least no such records were in evidence), but instead appears to have treated all of the bank accounts in the same way. He moved money back and forth among them and made payments and deposits as he wished, without regard for whether those payments and deposits were business-related or strictly personal in nature. He appears to have used his various credit cards in the same way.

[260] In his written submissions, Ward argued that the Source and Use Analysis is unreliable in part because it is based on incomplete information. It is true that Ward appears to have had multiple accounts, lines of credit, and credit cards at a number of different financial institutions, and records were not in evidence for all of them. Further, he was not questioned about the nature of many of the transactions reflected in the Source and Use Analysis and the other financial evidence. This hampered our ability to understand the full picture of what occurred.

[261] That said, we are able to draw certain conclusions from the evidence available, and we consider Staff's Source and Use Analysis helpful as a means of summarizing the underlying

records and making the raw data more easily intelligible. We do not consider it authoritative in and of itself. We also note that if Ward had wished to challenge or explain the Source and Use Analysis or the other financial evidence, he had ample opportunity to do so at the Hearing. He could have cross-examined Staff's witnesses further or adduced his own evidence, either by providing additional testimony with respect to his use of funds or by providing additional documentation. He could have adduced his own form of source and use analysis.

[262] We are satisfied that from January 1, 2013 to April 30, 2018, E-Wealth raised $553,471.38 from investors, not including any funds contributed by Ward's family members. This is clear from both the banking records and Ward's own investor list. $293,134.56 of that amount was deposited to E-Wealth's bank account, while the remaining $260,336.82 was deposited directly to various Ward accounts. Ward transferred $45,000 of that $260,336.82 to E-Wealth so it could in turn pay out a certain investor, GB. E-Wealth therefore received a total of $338,134.56 in investor funds, plus a net amount of $26,292 from Qtrade.

[263] During the same period, E-Wealth transferred the net amount of $318,173.95 – or 87% of the funds it received from investors and from Qtrade – to Ward (for ease of reference, we include the $1600 payment E-Wealth made on one of Ward's credit cards in this amount and consider it part of the total transferred). The bulk of its remaining funds was used to pay out GB.

[264] In some cases considered by ASC hearing panels, the circumstances and the evidence are such that it is fairly simple to conclude that when investment funds have been transferred to an individual, that individual has misappropriated them. Here, however, there are a number of complicating factors:

- E-Wealth investors were not E-Wealth's only source of funds. It also received some money from Qtrade, presumably as either profits on investing activities or a return of funds that were in a Qtrade account.

- E-Wealth investors were not Ward's only source of funds. As set out previously, he also received money from family members, the government, and an employer, among others. Considerably more money was deposited to his main RBC account than E-Wealth raised from investors between January 1, 2013 and April 30, 2018.

- Ward did undertake some investment activities as represented to investors. The evidence discloses that funds were advanced to and received from both Qtrade and Maverick. Ward's transactions with the latter appear to have gone through his personal accounts, as did the funds advanced to AG for the real estate investment that did not proceed. Ward also spoke of funds used for binary options trading and other investments that had to flow through his personal accounts or credit cards. While we were not directed to any evidence that would support this contention or reveal the total dollar amounts involved, we were not directed to any evidence that would contradict it, either. We are therefore unable simply to reject Ward's testimony on the issue.

- Staff obtained limited admissions from Ward concerning his personal or other unauthorized uses of E-Wealth investor funds. He acknowledged that it was "possible" he used some for personal expenses, but specifically acknowledged only that the payments made to collection agencies, for retail and PayPal purchases, and for insurance and utilities were personal (whether or not any of these payments related to expenses for JL or her children is irrelevant given our previous findings that the Js' money was an investment, not funding for JL and her children). He did not admit that all of his credit card payments and loan payments were strictly personal, but instead maintained that some related to investing activities and business expenses. Short of reviewing the available credit card statements line-by-line and attempting to guess which expenditures appear personal in nature – and we note that there were payments made on credit cards for which no statements were in evidence – we have no way to determine what proportion of the total payments made should be considered personal or otherwise unauthorized.

[265] In short, while Ward received virtually all of the funds invested with E-Wealth either directly or via E-Wealth's bank account, he commingled them with funds he received from other sources. He then used some of the commingled funds for investing and business expenses, but used some for other purposes, including those personal in nature or otherwise undisclosed to investors and therefore unauthorized. The difficulty on the evidence before us is in determining the proportion of funds in each category.

[266] Staff argued that Ward misappropriated $285,069.52 in E-Wealth investor funds by relying on the financial records and the Source and Use Analysis to track certain investors' deposits and the expenditures that followed. Although we find that this is a reliable way to identify some of the funds misused in certain instances, for the reasons just described, we do not agree with all of Staff's assumptions.

[267] In particular, while Staff was conservative in not including any cash withdrawals or "unknown" payments in the total they submitted was misappropriated because, as they phrased it, "it is simply not known what those funds were used for", they included all credit card payments without allowing for the possibility that some related to investments or legitimate business expenses. In the absence of more precise evidence in that regard, we are unprepared to do the same.

[268] We strongly suspect that a large proportion of those payments related to personal expenses and what appears to be a substantial amount of personal debt. However, suspicion does not equate to proof on a balance of probabilities. We have therefore erred on the side of caution and excluded the credit card payments from our calculations below.

[269] We do not consider it necessary to try and ascribe a further amount that might be considered a "reasonable" salary to compensate Ward for his efforts. Ward did not suggest an amount or contend that he informed E-Wealth's investors of one, and none of the documentation he distributed after the earliest form of subscription agreement addressed his compensation. Based on the early agreements, LH understood that at least at one time, a small percentage of Ward's compensation would come from the principal amount invested, plus a portion of the profits earned from investing. After the subscription agreements stopped providing that information, however,

the most that later E-Wealth investor witnesses could say on the subject was that they understood Ward would only have made money for himself if he had earned returns in excess of the amounts he owed to them, and that he would not compensate himself from their principal. The evidence before us is insufficient to allow us to determine whether he only took compensation in those circumstances (assuming those circumstances ever existed), and if so, in what amount.

[270] Concerning the investors who testified at the Hearing, we make the following detailed findings with respect to Ward's use of funds where it was possible to trace unauthorized uses directly to a specific deposit of E-Wealth investor funds. Unless noted otherwise below, in each case, the balance in E-Wealth's RBC account was either nominal or in overdraft before receiving the investor funds and there were no deposits from other sources before all or most of the funds were transferred to Ward's main RBC account. In addition, unless noted otherwise below, the balance in Ward's account on receipt of the funds was either nominal or in overdraft, and there were either no additional deposits before the funds were disbursed as described, or the additional deposits were in nominal amounts. Amounts in parentheses are negative.

- E-Wealth transferred BJ's $20,000 investment to Ward in two tranches of $10,000 each, one on July 8, 2013 and the other on July 9, 2013.

  On July 8, 2013, Ward's account balance was ($49.66). Between that date and August 7, 2013, the only other deposit to the account was from an unknown source in the amount of $155. Ward transferred $5351.50 to Maverick, and paid $7900 toward his credit cards.

  We find that Ward used at least $3498.51 of BJ's investment funds for unauthorized purposes, i.e., retail purchases, loan payments, collection agency payments, insurance and utility payments, and personal account fees and interest.

  The remaining funds were paid to "Shane Ward" (on the evidence, it is not possible to determine for what reason) and other recipients described as "unknown" in the Source and Use Analysis, or withdrawn in cash. Ward's account balance was ($295.07) on August 7, 2013.

  BJ's further investment of $7800 was deposited to E-Wealth's account on April 4, 2014, all of which E-Wealth immediately transferred to Ward. It was then commingled with funds from other sources (including $802.42 invested by LH and $2000 from a member of Ward's family) and transferred to Maverick.

- Between August 16, 2013 and January 17, 2014, E-Wealth transferred the Js' $100,000 to Ward in ten $10,000 increments.

  When the first $10,000 increment was transferred on August 16, 2013, Ward's account balance was $1888.77. By February 3, 2014, his account balance was ($498.95). Other than the Js' funds, the only deposits to Ward's account during that period totalled less than $1000.

Ward transferred $16,025 to Maverick, and there was a total of $16,749.54 in cash withdrawals and payments to "unknown" parties. $53,200 was paid on various credit cards, and $2292 (six monthly payments of $382 each) was paid to "Shane Ward".

We find that Ward used at least $15,091.18 of the Js' investment funds for unauthorized purposes, again comprised of retail purchases, loan payments, collection agency payments, insurance and utility payments, and personal account fees and interest.

- Through his company, MB invested $11,366.97 in E-Wealth on April 14, 2014. The same day, E-Wealth transferred $10,000 to Ward, bringing his account balance from ($450.28) to $9549.72. By May 9, 2014, Ward's account balance was ($245.48). Between April 14 and May 9, 2014, only $162 in additional funds were deposited to the account.

  Ward made $4003 in credit card payments, withdrew $1342 in cash, transferred $1240 to "unknown" parties, and transferred another $382 to "Shane Ward".

  On June 12, 2014, Ward received another $1300 from MB's April 2014 investment. He spent that sum between June 12 and June 17, 2014.

  We find that Ward used at least $4199.44 of MB's investment funds for unauthorized purposes in the same categories as those listed above.

  $2300 of MB's earlier investment of $2337.49 on July 29, 2013 was transferred to Ward's main RBC account on August 9, 2013, but it was commingled with other funds before it was spent.

- Following the deposit of RC's $10,000 investment on October 2, 2015, E-Wealth transferred $300 to Qtrade. Between October 2 and 26, 2015, E-Wealth transferred $6700 in various increments to Ward. His account balance was $825.93 before the first transfer, and $695.38 the day after the last transfer.

  Ward used some of the funds to pay credit cards in the amount of $295, withdrew $300 in cash, and transferred a net amount of $857.94 to "unknown" parties.

  We find that Ward used at least $5377.61 of RC's investment funds for unauthorized purposes in the categories listed above.

- EN's $25,000 investment was deposited to E-Wealth's RBC account on June 30, 2016. $10,000 was transferred to Ward on July 7, 2016, bringing his account balance from $87.92 to $10,087.92. Another $5000 was transferred to Ward on July 13, 2016, taking the balance from $399.55 to $5399.55.

Between July 7, 2016 and July 15, 2016, Ward paid $4000 to AG and $2535 toward credit cards, withdrew $300 in cash, and paid $500 to an "unknown" party.

We find that Ward used $3073.32 of EN's investment funds for unauthorized purposes, comprised of retail purchases and loan payments.

- Following these expenditures from the first $15,000 of EN's investment, Ward received $150,000 from LX and LL on July 15, 2016. This sum was commingled with the unspent remainder of EN's funds and brought Ward's account balance to $154,679.60.

  Between July 15 and August 5, 2016, Ward paid $51,501.20 to AG, transferred $45,000 to E-Wealth ($43,609.05 of which was used to pay out GB, as mentioned), and transferred $44,000 to another of his RBC accounts ($43,700 of which was then paid to Highfield Law, apparently in relation to the AG real estate investment). He also paid $1966.60 to "unknown" parties and $2600 on his credit cards. He lost $1236 on foreign exchange relating to a binary options investment.

  We find that during the same period, Ward used at least $50,629.20 of LX's and LL's investments for unauthorized purposes including the repayment to GB, retail purchases, loan payments, collection agency payments, insurance and utility payments, and personal account fees and interest.

- Before JA's $15,000 investment was deposited to E-Wealth's account on August 8, 2016, the balance was $8385.10, largely representing the remainder of EN's $25,000 investment. E-Wealth transferred $8000 to Ward on August 8, $10,000 on August 12, and $3000 on August 25, 2016.

  When the first $8000 was transferred to Ward, his account balance was $1522.49. Between that date and August 29, 2016, Ward paid $4035 on credit cards, transferred a net amount of $4559 to "unknown" parties, and paid $4000 to Modan Management Consulting.

  We find that between August 8 and 29, 2016, Ward used $8514.02 of EN's and JA's investment funds for unauthorized purposes in the categories listed previously.

[271] We conducted the same exercise with respect to the funds invested by those who did not testify at the Hearing, tracking the deposits to E-Wealth's account, the transfers to Ward's account, and the expenditures that followed where the funds were not commingled with funds from other sources (beyond nominal amounts). We make the following additional findings concerning Ward's use of investor funds:

- Of WS's $28,784.40 total investment in 2014 and 2017, $20,000 was deposited to E-Wealth's account and then immediately transferred to Ward in two $10,000 tranches, and $8784.40 was deposited directly to a Ward account as previously

mentioned. Ward transferred $11,273 to Maverick and $6088.41 to "unknown" parties, and paid $7100 on various credit cards.

Ward used $4493.85 for unauthorized purposes in the categories listed previously, i.e., retail purchases, loan payments, collection agency payments, insurance and utility payments, and personal account fees and interest.

- Of the total $18,447.63 invested by DS and his company between 2014 and 2017, $17,697.63 was paid to E-Wealth and then transferred to Ward, and $750 was paid directly to Ward. He transferred $9335.55 to "unknown" parties, withdrew $703.95 in cash, paid $2325 on credit cards, and paid $382 to "Shane Ward".

  Ward used $4964.15 for unauthorized purposes in the categories listed previously.

- Of DL's $15,000 invested and deposited to E-Wealth's account in March 2014, $10,000 was transferred to Ward immediately and commingled with other funds. $11,296 was then transferred to Maverick.

  The remaining $5000 was transferred to Ward the next day. He paid $2000 on credit cards, withdrew $500 in cash, paid another $382 to "Shane Ward". He used $717.03 for unauthorized purposes: retail purchases and loan payments.

- Of GO's $10,000 invested and deposited to E-Wealth's account in November 2014, $5000 was transferred to Qtrade and $5000 was transferred to Ward. Ward paid $2200 on credit cards, withdrew $223.43 in cash, transferred $185 to "unknown" parties, and paid another $382 to "Shane Ward".

  Ward used $1567.26 for unauthorized purposes: retail purchases, loan payments, collection agency payments, and utility payments.

- E-Wealth transferred $9500 of MT's $10,000 investment to Ward. Between February 11 and 18, 2015, Ward transferred $4399.05 to "unknown" parties and paid $2400 on credit cards.

  Ward used $1978.32 for unauthorized purposes in the categories listed previously.

- E-Wealth transferred all of TS's $10,000 investment to Ward in February 2015. Ward then paid $2300 on credit cards, transferred a net amount of $3836.50 to "unknown" parties, paid $382 to "Shane Ward", and transferred a net amount of $625 to one of his other RBC accounts.

  Ward used $2506.33 for unauthorized purposes in the categories listed previously.

[272] In summary, we find that Ward misappropriated at least $106,610.22 of the funds invested in E-Wealth by using it for purposes unauthorized by and undisclosed to E-Wealth's investors.

[273] We therefore conclude that Staff has also met the second part of the test to prove a breach of s. 92(4.1) of the Act with respect to this misrepresentation: Ward's statements concerning the intended use of E-Wealth investment funds were materially misleading, and he knew or reasonably ought to have known that was the case. He was the only person who communicated with investors, and knew the limits of what he had disclosed. He was also the only person responsible for E-Wealth's banking and disbursement of investment funds. He ignored AC's advice not to disclose his use of funds by touting his plan and his abilities to make lucrative investments. He neglected to tell E-Wealth's investors that he also planned to use their funds for himself and to pay back at least one other investor.

C. Conclusion on Misrepresentation Allegations

[274] We find that Staff proved that Ward: (i) made each of the E-Wealth Statements, (ii) knew or reasonably ought to have known that each statement was materially untrue or omitted a fact or facts necessary to make it not misleading, and (iii) knew or reasonably ought to have known that each statement would reasonably be expected to have a significant effect on the market price or value of the E-Wealth Securities. We are satisfied that the E-Wealth Statements induced investors to invest and continue to invest, and that if they had known the true risk involved or that Ward would not use all of their funds to make investments that would generate the promised returns, that information would have affected their willingness to purchase the E-Wealth Securities.

VIII. FRAUD

A. Law

[275] Until October 30, 2014, section 93 of the Act stated in part:

> 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.

[276] Since October 31, 2014, the section has read in part:

> No person or company shall, directly or indirectly, engage or participate or attempt to 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 may
>
> . . .
>
> (b) perpetrate a fraud on any person or company.

[277] Because "fraud" is not defined in the Act, ASC panels have adopted the test for fraud set out by the Supreme Court of Canada (**SCC**) in *R. v. Théroux*, [1993] 2 S.C.R. 5 (at para. 27). That test requires Staff to prove:

- the *actus reus*, which is established by proof of a "prohibited act, be it an act of deceit, a falsehood or some other fraudulent means" and proof of "deprivation

caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk"; and

- the *mens rea*, which is established by proof of "subjective knowledge of the prohibited act" and "subjective knowledge that the prohibited act could have as a consequence the deprivation of another".

[278] With respect to *actus reus*, the SCC explained that an act of deceit or falsehood may include representing that "a situation was of a certain character, when, in reality, it was not", and that "other fraudulent means" may include other dishonest acts such as "the use of corporate funds for personal purposes, non-disclosure of important facts, exploiting the weakness of another, unauthorized diversion of funds, and unauthorized arrogation of funds or property" (at para. 18). It is not necessary to prove that the fraudulent party profited from the fraud or that an investor suffered actual financial loss (at paras. 17 and 19; see also *Arbour* at para. 981).

[279] The SCC further explained that the *mens rea* of fraud is established if the fraudulent party had "subjective awareness that one was undertaking a prohibited act . . . which could cause deprivation in the sense of depriving another of property or putting that property at risk" (at para. 24). Stated another way, the *mens rea* is established if it is proved that the fraudulent party "knowingly undertook the acts which constitute the falsehood, deceit or other fraudulent means", and "was aware that deprivation could result from such conduct" (at para. 39). In *Arbour*, the panel explained (at para. 983):

> In many cases involving allegations of fraud, a panel will reach conclusions based on inferences reasonably drawn from the evidence. Further, given the nature of fraud, it is unnecessary to prove what the transgressor was thinking at the time the dishonest act was committed – subjective knowledge can be inferred from the prohibited act and surrounding circumstances, unless there is some plausible explanation that casts doubt on the inference. The [ABCA] has confirmed that the trier of fact can infer subjective knowledge from the totality of the evidence (*Brost* at para. 48).

[280] See also *Théroux* (at para. 29).

B. Additional Evidence and Positions of the Parties

[281] Staff alleged and argued that from approximately July 2013 to April 2018, Ward directly or indirectly perpetrated a fraud on E-Wealth investors by providing false and misleading information regarding the E-Wealth Securities, and by misappropriating investment funds for personal and other unauthorized uses, contrary to his representations. Staff further maintained that Ward knew or reasonably ought to have known that this conduct could put investors' pecuniary interests at risk or cause investor losses. In most cases, they noted, it caused actual financial loss when investors' principal was lost or they received no payment of returns.

[282] The financial losses were confirmed by the investor witnesses and by Ward. LH testified that after his investment matured on March 1, 2017 and he heard nothing from Ward, he emailed Ward in May, June, and August 2017 inquiring about the return of his investment funds. When he received no response from Ward, he filed a complaint with the ASC and retained legal counsel to issue a demand letter. He did not believe that Ward ever responded to the demand letter. LH also filed a civil claim against Ward and obtained a default judgment for approximately $24,000 after

Ward failed to defend the claim. LH has never been able to collect on the judgment, and has never received repayment of his principal or any returns.

[283] On October 18, 2017, LH received an email from Ward advising him that E-Wealth had failed. The email acknowledged that it would take "years" to generate returns, which would be "much less than originally expected". According to Ward, he let all of his investors know that the business failed by email in October and November 2017, but the Js did not receive such an email until December 2, 2017, and EN did not receive one until March 20, 2018. Although TY did not testify at the Hearing, the records in evidence indicate that he was the last investor to be notified of E-Wealth's demise, by email from Ward on April 9, 2018.

[284] MB said he only ever saw returns "on paper", and did not receive repayment of his principal. BJ, RC, EN, and JA also testified that they received neither returns nor repayment of their principal. Ward acknowledged that no principal and no returns were paid to MB, RC, EN, or JA, or to at least two other investors who did not testify at the Hearing. He recalled that two investors received repayment of their principal, but could not remember if there were any others.

[285] JL said that her parents, the Js, did not receive their principal back or any payments from Ward other than the few payments he made toward their HELOC. As mentioned, LX indicated that neither she nor LL received a repayment of their principal from Ward, although they each received a few payments of monthly returns. Ward acknowledged that he did not repay LX's $150,000 investment or LL's $100,000 investment. He claimed that he and LX had an agreement whereby he would "work off" some of the debt by providing certain services at her office, but admitted that there was no written agreement to that effect. LX was not asked about any such agreement at the Hearing, so we do not give Ward's assertion any weight based on the rule in *Browne v. Dunn*.

[286] Staff argued that the *actus reus* of fraud was established in this case by the evidence that Ward provided false and misleading information to investors and represented that an investment in E-Wealth was of a certain character when in reality it was not. According to Staff, he told investors that their principal would be protected, but engaged in high-risk trading strategies and misappropriated their funds for other purposes without their knowledge. He told them that their funds were generating specified, high rates of return, but no such returns were actually earned. These prohibited acts placed investors' pecuniary interests at risk and caused actual financial loss. Staff further argued that the panel should infer that even the investors who did not testify at the Hearing were similarly misled, given that they signed similar subscription agreements and received similar communications from Ward.

[287] Staff argued that the *mens rea* of fraud was established in this case by the evidence that Ward was solely responsible for E-Wealth and its financial transactions, and was the only person who dealt with E-Wealth investors. He knew what investors were told about E-Wealth and the actual use made of their funds, and therefore knew that he had deceived them. Staff further argued that Ward had motive to misappropriate investor funds because he had left his engineering job and was not earning enough from investing to finance his lifestyle. He knew or ought to have known that his deceit and misuse of funds placed investor funds at risk that could – and did – result in their deprivation.

[288] Moreover, Staff pointed out, according to the SCC in *Théroux*, even if Ward hoped that deprivation would not occur or thought that there was nothing wrong with what he was doing, that provides no defence (see para. 24). In *Arbour*, the panel stated, "[o]nce the elements required for a finding of fraud have been established, a respondent's intention or motivation is irrelevant" (at para. 976). In *Théroux*, the SCC explained (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. If any offence of fraud is to catch those who actually practise fraud, its *mens rea* cannot be cast so narrowly as this.

[289] In his written submissions, Ward pointed out that a number of the elements that are often seen in securities fraud cases are absent here. The underlying business was not fictitious, he did not operate a Ponzi scheme, he did not seek to raise funds from vulnerable groups, and there is no indication that he spent funds to support an extravagant lifestyle beyond "basic business and personal necessities".

[290] Concerning the *actus reus* of fraud, Ward argued that borrowing money and spending the money on bills and expenses is not illegal. He questioned Staff's position as he perceived it: that the funds accepted could only be used for investing activities, and that he could not take anything for personal compensation. He pointed to AC's advice that he could use loan proceeds in any way he wanted, which he took to mean that he could use the funds both to invest and to pay for his personal expenses. Therefore, he argued, he lacked the necessary *mens rea* to support a finding of fraud.

[291] Ward also argued that he had provided a credible explanation as to what he meant by the term "principal protection" and why he thought it was acceptable to use it. Since he thought the term was not used consistently and, as he recalled the evidence, not all of the investor witnesses said that they saw it, he suggested that its use could not ground a finding of fraud.

[292] Ward further submitted that his conduct was not the conduct of a fraudster, but of "an amateur investor who was interested in a world he did not fully understand". He again suggested that he had been misguided by AC, who did not explain how Ward could have avoided the problems he is now facing. He suggested that if his trading had been more successful, Staff still may have intervened on the basis of registration and exemption issues, but speculated that they may have tried to educate him instead of prosecuting him. He acknowledged that his investing was not successful "and there was no early regulatory intervention", but maintained that "[t]hat does not mean he committed fraud".

[293] In response to Ward's submissions, Staff argued in the Staff Reply Submissions that the evidence does not support Ward's characterization of himself as an unregistered and unqualified trader who simply failed at trading and could not pay back his loans. In their view, the evidence showed that he "engaged in a pattern of taking and misappropriating investor funds", spending them for unauthorized purposes, and deceiving investors with repeated misrepresentations.

C. Analysis and Conclusion on Fraud Allegation

[294] Based on the law enunciated by the SCC and the evidence summarized earlier in these reasons, we find that Staff has proved that Ward breached s. 93 of the Act as alleged. The change in the wording of the section on October 31, 2014 does not affect our analysis. The current wording is broader than it was prior to October 31, 2014, but in this case, it is not necessary to rely on the broader wording: we find that Ward did not simply *attempt* to engage or participate in an act, practice or course of conduct relating to the E-Wealth Securities that *may* have perpetrated a fraud; he *did* engage in an act, practice or course of conduct that *did* perpetrate a fraud on E-Wealth's investors.

[295] It is true that E-Wealth was neither a purely fictitious business nor simply a Ponzi scheme. The evidence indicates that Ward undertook some investing activities as represented to the investors, and apart from the use of some of LX's and LL's funds to repay GB, we were not directed to any evidence that would suggest he habitually used investor funds to pay returns or repay principal to other investors as would be the case in a Ponzi scheme.

[296] However, that is not the test. We have already found that Ward engaged in dishonest conduct by misrepresenting significant aspects of an investment in E-Wealth to both the investors who testified at the Hearing and to those who did not – as to whether investment principal was actually protected, the risk that the promised high rates of return would not be paid, and the use of investment funds. Each of these misrepresentations constituted a "prohibited act" within the meaning of the *Théroux* test, as each was a representation that "a situation was of a certain character, when, in reality, it was not" and involved "non-disclosure of important facts". Moreover, Ward expended investment funds for personal purposes and otherwise diverted funds to unauthorized uses. He may have been under the impression that his actions were not illegal, but that is not the test, either.

[297] That deprivation was caused by the prohibited acts is clear from the evidence, whether or not Ward intended that outcome. Almost all of E-Wealth's investors lost their money, and few received any payment of returns. By Ward's admission, his investing activities were unsuccessful and E-Wealth failed. Not only were the investors' pecuniary interests placed at risk by Ward's failure to advise them of what he apparently meant by "principal protection" and the possibility that the promised returns would not be paid, they suffered actual loss, including the loss of the funds that he diverted to unauthorized uses instead of using them to make investments. Both elements of the *actus reus* of fraud have been proved.

[298] We are also satisfied that both elements of the *mens rea* of fraud have been proved. As E-Wealth's sole proprietor, Ward was fully aware of what he deliberately communicated to investors and prospective investors, and was fully aware of the contrasting reality. He therefore had subjective knowledge of his prohibited acts. In addition, despite the confidence he asserted that he had in his own abilities as a trader, he could not have been unaware of the possibility that he would not succeed and that funds in amounts beyond his capacity for repayment would be lost – especially when he did not dedicate all of the funds to investing activities and (as discussed further later in this decision) AC had cautioned him about the viability of his business model in some of the emails in evidence. Accordingly, he had the subjective knowledge that his prohibited

acts could have as a consequence the deprivation of E-Wealth investors, or was reckless as to whether that would occur. As the SCC stated, it does not matter if he sincerely believed that everything would turn out all right in the end.

[299] When the facts are considered in light of the *Théroux* test and the requirements of Alberta securities laws, it is clear that Ward's position on the fraud allegation is untenable. He is correct that in itself, borrowing money and using it for any purpose one sees fit is not illegal. People do so all the time, whether borrowing from a financial institution, a friend, a family member, or a complete stranger. However, that is not what occurred here. Those who advanced funds to E-Wealth understood they were making investments, and understood that Ward would use their funds to make the further investments that would generate the touted returns. They had no reason to believe he would use the funds in any other way, including (at least after the original terms and conditions of the earliest subscription agreements were changed) for his personal compensation. To conduct himself as he did with impunity, he would have had to have been much clearer in disclosing his intentions.

IX. DEFENCES

[300] Although we have found that Staff proved each of the allegations made in the NOH, it remains to be determined whether these findings are attenuated by the two defences raised by Ward: the applicable limitation period and reliance on professional advice. The latter includes whether Ward's claimed reliance on AC's legal advice affects our finding that he breached s. 93 of the Act or leads to the conclusion that he did not have the necessary *mens rea*.

[301] We turn first to the issue of the applicable limitation period.

A. Limitations

1. Law and Positions of the Parties

[302] Section 201 of the Act, in effect since December 17, 2014, states:

> No proceedings under this Part [i.e., Part 16 of the Act, Enforcement] shall be commenced in a court or before the [ASC] more than 6 years from the day of the occurrence of the last event on which the proceeding is based.

[303] The previous version of s. 201, in effect from 2002 to December 16, 2014, stated:

> No proceedings under this Part shall be commenced in a court or before the [ASC] more than 6 years from the day of the occurrence of the event that gave rise to the proceedings.

[304] Because the NOH was issued on May 29, 2020, the six-year operative date for the purpose of s. 201 is May 29, 2014. Accordingly, Ward argued that Staff's allegations – and therefore this panel's findings – should be limited to the conduct that occurred on and after May 29, 2014.

[305] Staff's position was that s. 201 should be interpreted to mean that where there is a continuing contravention of the Act involving substantially similar conduct that takes place over a length of time, the limitation period does not begin to run until the entire course of conduct is complete – i.e., until the "last event" occurs.

[306] In Staff's view, Ward's breaches of the Act comprised a continuing course of conduct that spanned the Relevant Period, from February 2011 through to April 2018: he accepted the first investment in E-Wealth in February 2011, and thereafter the operations and objectives of the business remained substantially the same, as did the documents used to subscribe investors, the communications sent to provide them with information, and the misrepresentations those documents and communications contained. On maturity, some investors even renewed their investments for further periods of time, including by rolling investments in fund Units into investments in the later Units that were ostensibly comprised of promissory notes. Staff submitted that this course of conduct did not end until April 9, 2018, the date Ward informed the last investor by email that E-Wealth had failed. Until then, they argued, his misconduct was concealed.

[307] In support, Staff cited *Breitkreutz*. In that case, the notice of hearing was issued on August 22, 2016, and alleged that a fraud took place between August 1, 2006 and September 24, 2015 (see paras. 4-5). The hearing panel found that the fraud was a continuing course of conduct, and that the "last event" that gave rise to the proceedings was the last deposit of investor funds in September 2015 (at paras. 100-105). The panel thus held that the limitation period under s. 201 did not begin to run until September 2015 and the allegations concerning conduct between August 1, 2006 and August 21, 2010 were not limitations-barred.

[308] Staff noted that similar reasoning has been employed in other cases, including *Fauth* and two of the decisions cited in *Fauth*, *Re Dennis*, 2005 BCSECCOM 65, and *Re Williams*, 2016 BCSECCOM 18.

[309] In *Williams*, a hearing panel of the B.C. Securities Commission (**BCSC**) concluded that "[t]he fraud [the respondents] perpetrated on a particular investor may have commenced with the taking of that investor's funds but the fraud against that investor was ongoing until the Global Scheme collapsed" (at para. 231). The fraud was perpetuated by ongoing dishonest acts, including the issuance of false account statements and the payment of "returns" from funds invested by others (at para. 232).

[310] A majority of the *Williams* panel drew the same conclusion with respect to the illegal distribution allegations it had to consider. It cited (at para. 238) *Re Wireless Wizard*, 2015 BCSECCOM 100, in which the panel stated (at para. 70):

> We are of the view that a series of separate distributions, whether legal and/or illegal, could constitute a continuing course of conduct that would span a limitation period if the evidence established that there were continuing elements of the offence within the limitation period. For instance, evidence of acts in furtherance of the distributions throughout the period in issue, such as advertisements of the offering, marketing presentations to potential investors or other ongoing efforts to solicit investors could form the basis of a finding of a continuing course of conduct that would include distributions that took place outside the limitation period.

[311] The *Williams* majority went on to find (at paras. 240-241):

> In this case, we find that [the respondents] participated in continuing financing activity that spanned [the putative limitation date of] July 2, 2008. Investors invested in the Global Entities before and after July 2, 2008, and the purported use of their funds was the same before and after that date. The debt instruments issued also were substantially similar, even though the underlying agreements

> varied and the nominal issuers within the Global Entities varied. We find these variations were insignificant and helped obfuscate the scheme.
>
> As part of the continuous financing, Williams signed all subscription agreements, solicited finders and investors, paid fees to finders, took the proceeds of securities issued, provided false and misleading information to finders and prospective and actual investors and disbursed proceeds otherwise than in accordance with promises made to investors.

[312] In the result, the majority determined that as against certain respondents, the illegal distributions that occurred prior to July 2, 2008 were not limitations-barred (at para. 244). A dissenting member of the panel – who had also dissented in *Wireless Wizard* – disagreed and would have found that all of the illegal distribution allegations involving conduct prior to July 2, 2008 were limitations-barred on the basis that each trade should be considered a separate act (see paras. 259-268).

[313] Ward denied that he engaged in a continuing course of conduct. In his view, the structure of his business and the nature of the investment offered changed over time. Different forms and different terminology were used as he moved from discretionary trading on behalf of a few individuals to an investment fund to loans under promissory notes, and he had different types of agreements or arrangements entirely with JL's parents, LX, and LL. He also considered that the written material he provided to people changed over time, as even among the Hearing witnesses, there were differences in what they received.

[314] Ward further argued that the change in the wording of s. 201 in December 2014 is of significance. While the current version of the section refers to "the day of the occurrence of *the last event* on which the proceeding is based", the previous version referred only to "the occurrence of *the event* that gave rise to the proceedings" (emphasis added). He contended that it is the previous version that should apply here because the operative date is in May 2014, prior to the amendment, and the rules of statutory interpretation dictate that legislative amendments such as this should only be applied prospectively. Further, he argued, the December 2014 amendment should be construed as having been made to "effect an actual change in the law" and extend limitation periods in certain cases, whereas the previous version of the section did not lend itself to that interpretation.

[315] In response, Staff again referred to *Breitkreutz* and *Fauth*. In *Breitkreutz*, the panel addressed the import of the legislative amendment (at paras. 104-108):

> The "last event" that gave rise to these proceedings, and on which this proceeding was grounded, occurred on September 22, 2015 when the last deposit of investor funds was made into Base Finance's primary operating account.
>
> We therefore find that the allegations in the notice of hearing are not statute[-]barred pursuant to the current wording of s. 201 of the Act.
>
> The section previously stated (until amended in 2014) that no proceeding could be commenced "more than 6 years from the day of the occurrence of the event that gave rise to the proceedings". The alleged misconduct began as early as August 2006, which would be more than 6 years before the August 2016 notice of hearing.

> The previous wording of the section does not change our analysis, or our conclusion that the allegations in the notice of hearing are not statute[-]barred. We consider that "the day of the occurrence of the event" means, in respect of an ongoing and continuous course of conduct, the last day of the occurrence of the event (see . . . *Dennis* . . .).
>
> Accordingly, we are persuaded that under either the current or the previous wording of the limitation section, these proceedings are not statute[-]barred.

[316] The *Fauth* panel cited these paragraphs with approval (at para. 227). The panel also noted (at para. 228):

> In *R. v. Aitkens*, [2015 ABPC 21,] a pre-trial decision on applications brought by the accused, the Court rejected the argument that conduct which was part of a continuing course of conduct and occurred more than six years before the commencement of the proceeding was statute-barred (at paras. 70, 74). Like the panel in *Breitkreutz* (at para. 107), the Court agreed (at para. 79) with the [BCSC] in . . . *Dennis* . . . : "When a series of events or transactions in a continuing course of conduct spans a period of time, the 'date of the events', in the ordinary sense of that phrase, can only mean the date of the last event in the series that allows staff to allege a breach of the legislation . . ." (at para. 37).

2. Analysis and Conclusion on Limitations Defence

[317] As a starting point, with respect to whether the two versions of s. 201 should be considered to have the same or a different effect, we agree with the panels in *Breitkreutz* and *Fauth*, as well as the panel in *Dennis*.

[318] In *Dennis*, the panel compared the B.C. equivalent of the section (which is similar to the pre-December 17, 2014 version of s. 201) to the Ontario equivalent (which is similar to the post-December 17, 2014 version of s. 201) (see paras. 29 and 33). Following its conclusion cited above that when considering a continuing course of conduct, "the date of the events" must mean "the date of the last event in the series", it found that "'date of the events' in [the B.C. section] means the date of the last event and so has the same meaning as 'the date of the occurrence of the last event' in the Ontario legislation" (at para. 38).

[319] We arrive at the same conclusion comparing "the day of the occurrence of the event" in the previous version of s. 201 to "the day of the occurrence of the last event" in the current version. We are not persuaded that the section must only have been re-worded to effect an actual change in the law. While that may be a general presumption in statutory interpretation, statutes are also amended for clarity (see, e.g., *R. v. D.L.W.*, 2016 SCC 22 at para. 95). We are of the view that the change made in December 2014 simply clarified what was meant by "the event".

[320] The pertinent question is therefore whether the evidence establishes a continuing course of conduct that began before the operative date of May 29, 2014 and continued afterward. As the panel in *Dennis* explained (at paras. 40-41):

> . . . if some breaches in a series of breaches or some part of the conduct occurred before the limitation period, it is appropriate to proceed with respect to those breaches or that conduct which occurred both before and during the limitation period.
>
> In our view, this construction and interpretation is the one which best ensures the attainment of the objects of the securities legislation. The purpose of the limitation period is to provide some certainty

> and finality to respondents while nevertheless allowing the regulator to pursue a course of conduct which may extend over a considerable period of time. That purpose is not achieved (and certainty and finality [are] not prejudiced) by cutting a continuing course of conduct in two so that events falling before the six year period are not caught.

[321] In *Re Boyle*, 2006 LNONOSC 359, a panel of the Ontario Securities Commission considered the meaning of the phrase "course of conduct" (at para. 48):

> . . . "course of conduct" is used as a legal expression in other jurisdictions and has been defined to include three elements: (i) a pattern of conduct composed of a series of acts, (ii) over a period of time, (iii) evidencing a continuity of purpose. A continuity of purpose requires that the subsequent acts be similar to the original act and in line with a person's original intent (See *People v. Payton*, 612 N.Y.S. 2d 815 (1994)).

[322] Turning first to the illegal distribution allegation, we have found that Ward raised $500,307.52 from the distribution of E-Wealth Securities in contravention of s. 110(1) of the Act. As we have also found that Staff cannot rely on any compelled records that relate to conduct prior to January 1, 2013 (the date set out in the Investigation Order), we note that $110,540.50 of the total was raised prior to January 1, 2013, and $389,767.02 was raised after. That $110,540.50 was comprised of: (i) $10,000 LH invested on February 9, 2011, (ii) $20,000 BS invested on May 13, 2011, and (iii) $80,540.50 BS invested on August 16, 2012.

[323] Independently of the compelled records Staff obtained from the relevant financial institutions, LH verified the timing and amount of his investment during his testimony at the Hearing. While BS did not testify, he verified the timing and the amounts of his investments in email correspondence he sent to Fisher on February 13, 2019. We are therefore satisfied that we can make findings that include LH's and BS's earliest investments.

[324] Concerning the investments made both before and after the operative date, Ward raised $277,567.92 from the distribution of E-Wealth Securities in contravention of s. 110(1) of the Act before May 29, 2014 and $222,739.60 after. However, we find that the illegal distribution constituted a continuing course of conduct that extended from February 2011 through to the date of the last deposit of investment funds: $2784.40 by investor WS on September 5, 2017. Ward's fundraising was a pattern of conduct composed of a series of acts that occurred over a period of time and evidenced a continuity of purpose:

- As argued by Staff, from February 2011 through September 2017, E-Wealth's operations and objectives remained substantially the same. Investors provided Ward with funds to make investments on their behalf and generate the returns promised. Despite the ostensible change from fund to promissory note, the business model and the purported use of investor funds were the same throughout, as was the substance of the communications sent to investors to solicit their investments and provide them with updates. Ward engaged in ongoing efforts to solicit investments both before and after May 29, 2014.

- Despite the ostensible change from fund to promissory note, the document used to subscribe most investors – E-Wealth's subscription agreement – remained substantially the same, as did the exemption for which most of the investors claimed

to qualify. Where some of the terms and conditions appended to the subscription agreements were changed after the introduction of the promissory note concept, we find that the changes were only made in a failed attempt to follow AC's advice and camouflage the purpose for which investor funds would be used. However, the actual purpose did not vary, as was made clear by other communications and the financial evidence. Ward used some funds to make investments, but he also took funds for personal and other uses.

- Many E-Wealth investors rolled their original investments into further investments based on Ward's representations that they had earned returns to which they could add "top-up" funds. This and the invitations Ward extended for investors to do so occurred both before and after May 29, 2014.

[325] It is true that LX and LL entered into different forms of agreement with E-Wealth, but all of their investments were made well after May 29, 2014. Even if they had not been, however, we would have considered them part of the same course of conduct in light of LX's testimony that she understood she and LL had advanced funds that would be used in the same way as all other investments in E-Wealth, and subject to the same promise of high returns and principal protection. We draw the same conclusion with respect to the Js' $100,000, invested in August 2013, even though the transaction was not documented. We think it likely that Ward only treated LX's, LL's, and the Js' investments differently in terms of the paperwork completed because of his personal relationship with JL, and later with LX. However, their inclusion on his investor list and the fact that he sent the Js the same email he sent to all other investors about E-Wealth's failure suggest that he did not distinguish their investments from any other E-Wealth investment.

[326] Further, we find that Ward's misrepresentations – and therefore the fraud, since it is based on those misrepresentations – also constituted a continued course of conduct that did not end until E-Wealth collapsed. Both comprised a pattern of conduct that extended over a period of time evidencing a continuity of purpose: encouraging people to invest or re-invest in E-Wealth. Again, despite the ostensible change from a fund structure to a promissory note structure, the substance of Ward's communications to investors remained the same. He continued to tout principal protection and high rates of return without giving risk disclosure, and continued to represent that investor funds would be used to make lucrative investments by utilizing his special market skills and ability to access restricted opportunities.

[327] As in *Fauth* (see paras. 223-224), all of the investors who testified told a similar story with respect to what Ward said about E-Wealth and its business model, and all had a similar understanding as to how their funds would be used and the level of risk involved. Some had their understanding affirmed by the account statements they received, which in some instances encouraged them to renew and add to their investments. Documentation remained substantially the same over time, and even where it varied in form, it generally contained the same information (or misinformation) and the same omissions: promises of principal protection and extraordinary returns regardless of market conditions, but no risk disclosure or disclosure of the true use of funds. Investor witnesses reported that in conversation, Ward made similar representations verbally regardless of the timing of their investments.

[328] Also as in *Fauth* (see paras. 225-226 and 229), the reality did not match the representations. From the outset, there was no meaningful mechanism in place to actually secure investment principal, and no assurance that returns at the levels advertised would be paid. Starting in at least 2013, Ward made use of investment funds in ways that were not disclosed to or authorized by E-Wealth's investors, and that pattern continued through 2017. In some instances, investors received account statements showing accrued returns that perpetuated the appearance of a successful investment and attracted additional funds and investors. Ward's acts of deceit were ongoing until E-Wealth collapsed.

[329] As a result, as alleged by Staff in the NOH, with respect to the illegal distribution allegation, our findings take into account all of the distributions that occurred in breach of the Prospectus Requirement during the Relevant Period. With respect to the misrepresentation and fraud allegations, our findings take into account the entire course of conduct as alleged by Staff. Ward's limitations defence fails.

B. Reliance on Legal Advice

[330] Ward argued that in conducting himself as he did with E-Wealth, he relied on AC's legal advice. We must therefore determine whether such a defence is available in these circumstances. If so, we must determine whether Ward met the applicable requirements for establishing that defence in this case.

1. Law

[331] The common law test to prove reasonable reliance on legal advice – which is often considered a subset of the defence of due diligence – was set out in *Arbour* (at para. 897, citing *Re Mega-C Power Corp.* (2010), 22 O.S.C.B. 8290 at para. 261). It requires the respondent to show that:

- the lawyer had sufficient knowledge of the facts on which to base the advice;
- the lawyer was qualified to give the advice;
- considering all the circumstances the advice was credible; and
- the respondent made sufficient inquiries, properly applied the advice and reasonably relied on the advice.

[332] In other words, if the respondent does not prove that the lawyer was apprised of and understood all of the pertinent facts when giving the advice, the defence will not be established. The respondent must also show that the advice given was followed.

[333] Evidence is required to establish that the test has been met. In *Re Johnston*, 2021 BCSECCOM 79, the BCSC recently observed (at para. 82):

> In the securities law context, it is very difficult to imagine a situation where a respondent can make out a defence of reliance on legal advice simply by asserting the fact that legal advice was received and relied upon. Any decision maker given the responsibility of considering the defence must be given the facts from which to assess the presence or absence of the factors enumerated in *Mega-C* and the other decisions that reference it.

[334] In *Aitkens*, the hearing panel found that the defence of due diligence is not available against allegations of misrepresentation and fraud. Because Staff must prove a knowledge or *mens rea*

element in order to prove those offences, they are not "strict liability" offences for which such a defence may be asserted (see *Aitkens* at paras. 72, 83, 88, and 91-92, and its discussion of the taxonomy of offences articulated by the SCC in *R. v. City of Sault Ste. Marie*, [1978] 2 S.C.R. 1299). However, the *Aitkens* panel concluded, this does not deprive respondents of the ability to advance a defence to those allegations. This is because (at paras. 93-94):

> . . . the knowledge element is part of the misconduct alleged under s. 92(4.1) or s. 93(b) [as it then was], and therefore must be proved by Staff. We also note that assessing the knowledge element may involve an examination of some of the same considerations as for a due diligence defence to a strict liability offence, including consideration of the criteria for reasonable reliance set out in *Arbour* and cited above. Therefore, a reasonable belief or reasonable steps taken may be indicators that a respondent did not know or ought not reasonably to have known of any misrepresentations or fraudulent conduct.
>
> Assessing the knowledge element may also involve a consideration of reliance on professional advice, as such advice may be the foundation of a reasonable belief or constitute reasonable steps taken. . . .

[335] The *Aitkens* panel therefore considered the respondents' arguments concerning the due diligence steps they had taken (including seeking professional advice) "when assessing the requisite level of knowledge" for the misrepresentation and fraud allegations (at para. 97). The panel further noted that these arguments could also be considered at the sanction phase of the proceedings (*ibid.*).

2. Additional Evidence and Positions of the Parties

[336] In support of Ward's contention that he relied on legal advice, he entered into evidence a bundle of email correspondence between himself and AC ranging in date from late November 2010 through to the end of July 2013. The email exchanges appear to have ended on July 30, 2013 when AC advised Ward that a health issue would keep him away from the office for the next four to six weeks. We understand that unfortunately, AC passed away in October 2014. Ward testified that during the time that he was still operating E-Wealth, he did not retain another lawyer after AC.

[337] In addition to the email correspondence, Ward indicated that he met with AC a number of times and spoke to him on the telephone. There are no records of any such conversations in evidence. It was Staff's position that unless corroborated by emails, Ward's testimony at the Hearing regarding his discussions with AC was unreliable. They also pointed out that even the emails do not provide the full context of any advice given, because the material in evidence did not include any of the documents or attachments referenced in the emails. Accordingly, it is not known how any documents purportedly reviewed and approved by AC compare to the documents that were actually given to E-Wealth investors.

[338] Turning first to the illegal distribution allegation, Ward argued that he had a due diligence defence because he made a conscientious effort to obtain proper legal advice about his fundraising activities. He acknowledged that as the issuer, he had the obligation to ensure exemption requirements were met, but suggested that AC did not provide him with "proper advice" about the use of exemptions and he therefore made mistakes. In the alternative, he argued that if this panel were to conclude that he had not established a full due diligence defence, then we should consider

AC's failure to provide better advice as "highly mitigatory". Ward pointed out that it was not his fault that he was unable to provide additional evidence about the nature of that advice, given that AC has passed away.

[339] In response, Staff described Ward's approach to raising investment funds as "casual, if not reckless", and argued that he deliberately chose not to make sufficient inquiries of AC as to how to raise funds legally. They emphasized that Ward testified that AC told him investors would have to indicate how they qualified to participate in the investments, but Ward disregarded AC's advice about the need to properly qualify investors. They submitted that there is no evidence to suggest that Ward asked AC about the meaning of clause (t) of Schedule "A" to E-Wealth's subscription agreements.

[340] Ward further claimed that AC recommended E-Wealth's promissory note structure, and approved the form of subscription agreement Ward used when he switched from funds to promissory notes. Staff argued that Ward ignored AC's advice to use a simple promissory note, but instead continued to use a subscription agreement that was similar to the one he had used under the fund structure. They contended that it had not been AC's idea to move to the promissory note structure – rather, when Ward asked in an email if he could accept investment loans with a fixed rate of return, AC had simply confirmed that what Ward was describing was a promissory note.

[341] Regarding the misrepresentation allegations – and thus the fraud allegation – Ward suggested that because AC steered him away from structures that would have required further disclosure, it was AC's advice that "put . . . Ward at risk that someone would say 'you should have told us more'". Ward argued that he had been unaware of the need to provide qualifying statements to ensure that what he said was not only true but also not misleading, and had relied on AC to explain to him what he needed to do. He suggested that AC told him never to use the word "guarantee" and that he and AC may have come up with the term "no-lose promise" together, but Staff contended that there are no emails in evidence from AC to Ward providing advice about the use of either of those terms, or the term "principal protection".

[342] Ward acknowledged that he did not have AC review all of the emails, newsletters, account statements, and updates he sent to investors, and that AC was not involved in his meetings with investors. However, he contended that he and AC "co-authored" two of E-Wealth's information sheets (referred to earlier in these reasons as documents that described E-Wealth's "Investment Objective" and "Investment Strategy" and set out the "Highlights" of investing with E-Wealth), and he did not provide them to anyone until after AC approved them. In response, Staff submitted that there was no reliable evidence to suggest that AC approved the language in or the use of the sheets. They argued that one of the sheets actually demonstrates that Ward disregarded AC's advice not to tell investors what he was going to do with their money, as the sheet suggests that the funds would be used to make investments and earn high returns using Ward's proprietary investment strategies and access to lucrative opportunities.

[343] Although Ward said that based on AC's advice, he believed he could do whatever he wanted with the "loan" funds he received under E-Wealth's promissory note structure, he admitted that he did not remember whether he ever told AC he was using investor funds for personal or other non-investment purposes. According to Staff, most of the funds Ward misappropriated came

from investors who invested after July 30, 2013, the date of his last communication with AC that is in evidence.

[344] Staff specifically addressed the test set out in *Mega-C*, cited in *Arbour* and other decisions. They did not challenge AC's expertise to give the purported advice, but submitted that Ward did not meet the three other parts of the test. They argued that there is no reliable evidence to prove that AC was fully aware of all of the pertinent facts, including what Ward told investors verbally and in writing. Accordingly, they submitted that AC did not have the proper foundation to give credible advice in the circumstances, and that Ward failed to establish that he made sufficient inquiries by informing AC of his plan in full. At the Hearing, Staff expressed doubt that an experienced securities lawyer fully informed of the relevant facts would have told Ward he could do whatever he wanted with money he took from investors.

[345] Staff further argued that the emails in evidence show that AC repeatedly advised Ward not to continue with his plan for E-Wealth, including by warning him about potential enforcement action by the ASC. Ward disregarded this advice and failed to heed AC's warnings – or as Staff phrased it, "Ward chose to forge ahead with his fraudulent scheme, the substance of which [AC] was not fully aware of at any time." They characterized Ward's inquiries of AC as probing for "loopholes" in the law, and when he did not find any, he went ahead with his scheme anyway.

[346] Staff concluded that Ward was attempting to have it both ways with respect to his reliance on AC, justifying his actions based both on what AC told him and on what AC failed to tell him, and blaming AC "when it suit[ed] him".

3. Analysis and Conclusion on Legal Advice Defence

[347] Given that the only independent evidence of the information Ward gave AC and AC's legal advice is the package of email correspondence Ward produced, it is necessary to examine that evidence in some detail.

[348] The emails cover five general time frames. The first ranges from November 23, 2010 to approximately February 9, 2011 (we say "approximately" because there are at least two emails that have no time or date stamp but appear from their content to fit into the discussion occurring around that date). Ward was in the process of setting up the "paperwork" for investments in E-Wealth, and appears to have exchanged several drafts of the original subscription agreement and two E-Wealth information sheets with AC. None of the attachments were in evidence, so we are unable to determine whether Ward accepted AC's drafting, altered what AC suggested the documents should say, or how AC's versions compare to what E-Wealth investors actually received. Some of the emails refer to meetings or other discussions Ward and AC appear to have had, but as mentioned, there is no record before us of what was discussed.

[349] The emails in this time frame disclose the following:

- AC was already warning Ward about the possibility of scrutiny by the ASC and the need for caution in executing his business plan to avoid breaching securities laws. Ward was determined to proceed regardless. In the first email in the series dated

November 23, 2010, for example, Ward referred to a discussion he and AC had had the day before and stated in part:

> [I]n terms of [the investors'] benefit for investing, I'd like to give them a variable percentage, based on the performance of the investments, which only I have trading authority for. This "share the wealth" model is what all of them want. And, I'm aware that you said this runs the risk as appearing to "be giving investment advice, without a license". **Despite this, I'd still like to do it**, and try to phrase it in ways that appear the best. I believe that by openly stating in the contract that the investors understand that I'm not a licensed broker or dealer, and that they don't consider this arrangement to be rec[ei]ving investment advice from me, then it's in there, in writing. And, I've heard a saying that "contract is king". [emphasis added]

Among other recommendations, AC later warned, "I strongly recommend keeping this short lived and as simple as possible to avoid encountering problems with the Securities Commission."

- Ward was aware of the need to operate under an exemption from securities law requirements, and of the fact that the exemptions have conditions that must be met. Among other allusions to exemptions in Ward's emails, in an email from AC sending Ward the first draft of the "subscription agreement/investment contract", AC noted that the document "requires the subscriber to confirm that they qualify to invest (i.e. close friend or accredited investor)". Later AC noted that they were using the "private issuer and accredited investor" exemptions.

- Ward was focused at least in part on marketing and the need to attract and encourage investors to invest. In his November 23, 2010 email, after describing some of the terms he wanted to see in his "contract", he stated:

  > If you can make this sound "more appealing" to investors, that would be great. So, if you can make the "most likely" case (for everyone to have their capital grown) have more emphasis on it, and sort of simplify and reduce the wording for the less fun stuff, that would be great!

  In an email exchange February 8 and 9, 2011, Ward noted that AC had used the term "above average positive returns" in one of the draft information sheets, which he (Ward) thought "doesn't sound very good, from a marketing perspective". He asked if he could use another adjective that "sounds better", such as "outstanding" – although he also demonstrated his awareness of the need for caution in promotional material, indicating, "I realize that it shouldn't infer [sic] or over-pr[o]mise certain results".

- Contrary to Ward's oral testimony that AC told him not to use the word "guarantee", Ward appears to have been the one to say he did not want to use it. In response to AC's question whether "the investor [is] guaranteed (by [Ward]) to at least get the principal balance back", Ward replied, "In response to your question about var[ia]ble payback and guaranteed principle [sic] – I don't want to use the word 'guarantee', and I'd prefer the contract to say that people invest at their own risk,

and if it doesn't work out, it's their loss . . . ". There is no further discussion of the word "guarantee" or the terms "no lose promise" or "principal protection" in any of the other emails in evidence.

- AC raised the subject of misleading statements and the need for qualifying information. In reply to a question Ward asked about whether he could use pictures in his marketing materials, AC said that Ward could, "as long as they are not misleading". AC then gave as an example using a photo that might be misleading without a caption, but would not be if it included an appropriate caption.

[350] Following these emails, there is a gap of approximately three to four months. Ward got back in touch with AC to ask some questions about converting a pension and obtaining a trade-mark on June 1, 2011. AC replied with answers to those questions, but concluded:

> With regard to your business model in general, frankly, I do not think that your current system is sustainable in the long or medium term. Given the securities commission's recent pronouncements and actions in this area they would likely consider you to be in the business of trading in securities, which would require you to register with the securities commission as a dealer and/or a fund manager to carry on business the way you have set it up. They are getting tougher regarding the registration requirements and focusing their enforcement efforts in this area. And I do not think that the structure (corporation, etc.) is likely to make a difference to the registration requirements.
>
> Obviously, as long as you are trading through a registered firm, you can invest your own money any way you want. But when you are making investment decisions with other people's money the securities commission is going to want to police your conduct and require you to register.
>
> I do not mean to be a wet blanket, but I must caution you that this could be a serious issue with the securities commission.

[351] Despite this advice, we know that Ward continued with his "2011 Fund" and then moved onto his "2012 Fund". There is no reply from Ward to this email included in the bundle in evidence, and we do not know if he simply chose not to reply, replied verbally, or chose not to include the reply in the package before us.

[352] In any event, following AC's reply, there is another gap in the communications until January 9, 2012, a period of approximately seven months. Ward appears to have gotten in touch with AC because the "2011 Fund" was coming to an end, and he wanted to know if AC had any "tweaks" to make to the subscription agreement before he accepted new investors for the "2012 Fund".

[353] AC did not reply until March 2, 2012. He responded to the questions in Ward's January 9, 2012 email, but then said:

> My biggest concern, however, is about your likely requirement to register as a fund manager. With the changes to the securities rules the regulators have eliminated almost all of the registration exemptions, and they are ramping up and focusing their enforcement efforts on the registration and investment fund management issues. Mortgage investment corporations and venture funds in particular are being scrutinized and appropriate enforcement action is being taken.

[354] AC went on to explain that the only possible exemption Ward could rely on to avoid having to register as an investment fund manager was the "private investment club" exemption. He listed its requirements and concluded, "[t]he way your fund is set up presently it would not meet these requirements", then continued to explain why. He concluded by warning:

> As [I] mentioned above, this is an area where the securities commission is stepping up their enforcement efforts, and it is not worth taking chances or "pushing the envelope". If you do not strictly comply with the rules you can expect to get caught and expect to get punished. I strongly recommend that you discontinue the fund and not set up a new one. If you do set up a new fund, it would have to be structured quite differently in order to meet the definition of a "private investment club", and if that was done I expect that it would not be worth your while.
>
> I do not like to be a wet blanket, this is a serious matter and there are serious potential consequences.

[355] Despite this warning, we know that Ward continued with his "2012 Fund". There was no reply from Ward to this email included in the package in evidence, and no further emails until January 4, 2013 (approximately 10 months later).

[356] On January 4, 2013, Ward sent AC an email with questions about another "new fund". There is no reply from AC in evidence, but the two appear to have had a meeting at some point afterward, as Ward's next email on February 21, 2013 referred to his thoughts since that discussion. He was considering how to continue his business despite his agreement to "let go of the fund". He posed a number of questions that appeared to be directed toward arriving at a structure that would allow him to avoid securities law requirements:

> Some of my current investors might still like the idea of having me invest in the stock market for them. Let me know if you can think of other ways to make that work. For example, would it work if I set it up through the US, or overseas? Is there some sort of trust structure that could be set up, to get around the exempt security rules? Any other out-of-the-box ideas?

[357] Ward sent another email to AC the next day, February 22, 2013, with more questions, including:

> … how about the idea of setting up a simple "business loan", between them [i.e., his investors] and my business? In that case, I'd be able to use it however I want, right? (including investing with it, correct?) The regulations might not let me base the interest and/or repayment terms on the performance of my investments – that wouldn't surprise me. But, couldn't I base this loan on a fixed rate o[f] return (like 1% per month, or 15% per year, for example)? That seems legitimate. (I actually know one guy who was doing this.)

[358] There is no reply from AC to this email in evidence, but it suggests that the loan concept was Ward's idea, and not AC's.

[359] After Ward's February 22 email, there was another gap in the communications in evidence from that date until April 28, 2013, approximately two months later. This final stretch of email correspondence continued until July 30, 2013, when AC advised that he was going on leave for health reasons and Ward replied to wish him well.

[360] Ward's email to AC on April 28, 2013 indicates that he was still attempting to find a business model that would allow him to proceed. He asked:

> Can you modify the current investment contract, and change the variable rate of return ("performance based") to a fixed rate, of 16% per year, or 1.25% per month, at simple interest? I've thought about it quite a bit, and I think that a fixed rate "investment" (loan) is the way I'd like to do this.

[361] He then asked AC to modify the agreement to "remove any securities-related info that shouldn't be in there", but indicated that he wanted to keep the paperwork similar to what he had been using, including "the accredited investor qualification parts". On May 1, 2013, AC replied:

> What you have described is essentially a promissory note, with a bonus for not redeeming it early. A promissory note is still a security and we have the same private placement rules to worry about, but you are just borrowing money and not operating a fund (what you do with the money is your business). You really should not even discuss that with investors. A key point about such a structure is that you are taking all the risk. If you have a bad year in the market, then you still have to pay everybody back, with interest, which means your personal assets are at risk. With a 16% interest rate (plus whatever bonus you offer) you are going to have to get a return on investment of at least 16% just to break even.
>
> The investor is not investing in a Fund or investment scheme or anything like that. They are just lending you money.
>
> …
>
> The document that the investor gets would be a pretty simple promissory note.

[362] As Staff argued, it does not appear as though AC was the one to suggest using a promissory note. Rather, he confirmed that what Ward seemed to have in mind was a promissory note, and warned him that such a note was still a security and the same rules still applied. However, this email also confirms Ward's evidence that AC told him not to discuss the use of funds with his investors.

[363] Ward responded with further questions on June 7, 2013, including whether people could invest in a business without it being considered a security. He also indicated that he liked the fact that the revised subscription agreement AC sent him still looked similar to the one he used before. AC sent back a detailed reply on June 10, 2013, which we cite at length because of its significance:

> . . .
>
> With respect to people investing in your business, in some ways that is true and in other ways it is not. Strictly speaking, I would not say that they are investing in your business, because their return has nothing to do with the success or failure of your business. They are making a straight loan and they get their money back and a flat interest rate regardless of the success of your business. . . .
>
> However, I understand that view that this is no different than people investing in (e.g. lending money to) any other private business. That is true. But you are working from a false assumption that an investment in a private business is not a security. This is not correct. Any investment in any business is a security. Every investment in any business is required to comply with securities legislation. Most private businesses will qualify as a "private issuer" (and usually do so without consciously thinking about it), which provides an exemption from most of the securities regulation and does not

> require any filings with the Securities Commission. In order to qualify for the private issue[r] exemption there are a number of conditions that need to be met, one of which is that all of the investor[s] are either close friends or family members or are accredited investors.
>
> If this was a situation, like most private companies, where there were a couple of principals and they [got] two or three buddies or family members to invest, then the company would usually not concern itself with the securities rules because [there] would be very little chance of breaking them, and an even lower chance of the Securities Commission looking into it. But in your case you are going further afield than that, getting a larger number of people involved and raising a very real question of whether all your investors meet the necessary requirement of qualifying as a close personal friend or accredited investor. There is a greater chance that you let in an investor that may not strictly comply with the requirement. And, as always, the more people involved the greater the chance that you get a dissatisfied customer that decides to file a complaint or make trouble, or just tells the wrong person about it and the Securities Commission hears about it and decides to look into it. As a result, it is important that you take greater care to ensure that everybody you deal with meets the required qualifications, so we recommend that you adopt the formal process of clearing people with a formal subscription process and documentation.
>
> It should also be noted that there are a number of businesses that may get people to invest in them without the formal documents that I have suggested. And, indeed, many of these do not strictly comply with the law. The fact that they get away with it and the Securities Commission does not shut them down does not mean that they are doing it right. It just means that they are small potatoes or have not been noticed yet. There are a lot of people that routinely drive at 5-10 km over the posted speed limit and never get caught; they are still breaking the law.
>
> …
>
> It is not legally significant to describe the investment as a "unit", and I have made that change. However, the term "unit" could confuse some people into thinking that they are actually getting an interest in the business, and I suggest that you avoid using the term "unit". But that is your call.
>
> …
>
> As I did before, I would strongly discourage you from continuing with this exercise. Even though the investment has been changed to a simple loan, and it does not have anything to do with what you do with the money and the documents do not in any way describe what you are doing with the money or how you intend to make money, there remains a risk that you will be considered to be running an investment fund and must be licensed as a fund manager. Certainly, when somebody buys a Note (lends you money), you should not talk about your investment program or discuss what you are doing with the money. You should just tell them that you want to borrow money and you promise to pay them back. You are already running an economic risk by borrowing money at 15% to invest in the market, you are also running the risk of getting sanctioned by the Securities Commission. In my view the risk/reward ratio is a negative figure in this case.

[364] AC also indicated he was sending revised documents back to Ward for his review, along with a form of promissory note. As with the other attachments referenced in the package of email correspondence, those documents were not in evidence.

[365] Based on this email and what we know of Ward's conduct as described elsewhere in these reasons, we draw the following conclusions:

- AC advised Ward that regardless of the form, what Ward was contemplating was still subject to securities laws and the need to qualify for and comply with the terms of an exemption. AC expressly warned Ward of the possibility that he might accept

an investor who did not meet the requirements, and that that could lead to serious consequences. He therefore advised Ward to take particular care to ensure everyone qualified, including by adopting a "formal process" for doing so. However, there is no indication as to what that process should include, and therefore we do not know whether Ward complied with AC's advice or adopted a process of his own that, as we found earlier, was insufficient and led most E-Wealth investors to indicate they fell under an exemption that could not possibly apply to them.

- Despite AC's recommendation that Ward stop using the term "unit", Ward continued to use it anyway.

- Despite AC's recommendation that Ward cease the venture entirely – in part to avoid the risk of prosecution by the ASC – Ward continued anyway.

- AC mentioned documents that "do not in any way describe what you are doing with the money or how you intend to make money" and warned Ward not to talk about his "investment program" or discuss what he was doing with the money, as Ward testified. As we have seen, however, Ward continued to circulate documents and send communications that did so anyway.

- AC provided Ward with a form of promissory note, but it does not appear as though Ward ever used it.

[366] On June 12, 2013, Ward sent a short reply to AC's lengthy email, asking whether there would be any difference if he incorporated. AC replied the same day to advise Ward that the same rules would apply, as "[i]t is the substance of the transaction that matters, not the form." Ward followed up with a longer message on June 20, 2013, apparently returning a mark-up of the subscription agreement. He indicated that he wanted to keep using the word "unit", explaining that, "[a]s long as the units are defined as notes, that should be ok, I feel. And, using 'units' goes in keeping the document more similar to the previous one, and has a better 'marketing appeal'." We consider this another instance of Ward declining to follow AC's advice in the interest of marketing.

[367] AC responded on July 12, 2013, sending another revision to the subscription agreement and confirming that the private issuer exemption continued to apply to what Ward was doing, and therefore Ward needed to abide by the same restrictions as before. He also reiterated that Ward should not discuss with investors what he was doing with the money or his investment strategy, as doing so would increase the risk Ward would be considered "an unlicensed fund manager". He then concluded:

> Of course, I have to say again, that I would like to discourage you from going down this path. Quite recently there have been a number of similar offerings, where companies or individuals offer fantastic returns, with promises that the money is being invested in some fool proof investment scheme, but they essentially all turn out to be frauds. So the Alberta Securities Commission is focussing a great deal of their enforcement efforts on this sort of investment and you may well catch their attention. But it is your call at the end of the day.

[368] In his reply later the same day. Ward thanked AC for his "valuable input", but was clearly undeterred. Instead, he gave AC further instructions for the subscription agreement and denied that he was offering a "fantastic return" because he was so confident in his ability to grow the capital much more quickly than at the rate of 15 percent per year: "I can realistically grow capital by 15% in just one to three months".

[369] In the final few emails in this series, AC provided Ward with another revised version of the subscription agreement and Ward requested further amendments. Ward does not appear to have heard back from AC until AC's July 30, 2013 email advising of his health situation and referring Ward to other securities lawyers. Accordingly, it does not appear that AC made Ward's last set of requested changes. We do not know if that means Ward simply used the last version AC had provided, or if he made further changes on his own without the benefit of legal advice.

[370] In light of the foregoing, we are of the view that while a defence of reasonable reliance on legal advice is theoretically available to the illegal distribution allegations and similar considerations would apply to an assessment of the knowledge component of the misrepresentation and fraud allegations, Ward cannot avail himself of such a defence in this case. Simply put, there is insufficient reliable evidence before us for him to meet the test in *Mega-C*. Other than what is contained in the email correspondence between Ward and AC, the only evidence concerning AC's legal advice was Ward's testimony. For the reasons already discussed, we rejected that testimony except where it related to uncontroversial matters or was corroborated by other reliable evidence.

[371] Although parts of Ward's testimony were corroborated by the email evidence, others were not. In some instances, the email evidence either did not support his version of the advice he received, or the email evidence was contrary to his testimony. In several instances as we pointed out above, the emails show that Ward was given specific advice – including repeated advice to discontinue the E-Wealth venture entirely – but disregarded it. Indeed, we were often left to wonder why Ward thought this evidence supported his case at all.

[372] Moreover, there are significant gaps in the email record, in both time and content. Documents were referenced but not attached, emails contemplated a reply but no reply was included, meetings and other discussions were alluded to but not detailed, and considerable periods of time elapsed between communications but there was no indication of what, if anything, occurred or was said in the interim. No records of meetings or telephone calls were provided, nor any other documents that are normally created over the course of a solicitor-client relationship, such as letter correspondence, a retainer agreement, or account statements that might provide other basic information.

[373] Given these issues, we are unable to conclude that AC had sufficient knowledge of all of the pertinent facts – including the content of Ward's actual communications with E-Wealth investors – such that he could give fully-informed advice, nor do we have sufficient evidence to understand the full scope of his advice. We acknowledge that AC's unfortunate passing meant that he was not available to provide additional evidence, but Ward cannot rely on the absence of evidence to establish an affirmative defence. The onus to prove the defence was his, and he failed to meet even the first part of the *Mega-C* test. The email evidence is also insufficient to allow us

to determine whether AC's advice was "credible" in the circumstances, and contradicts any assertion by Ward that he applied and reasonably relied on that advice.

[374] With respect to Ward's specific testimony and arguments about the advice he said he received or did not receive and his reliance on the same, we cannot conclude that AC did not advise him properly about the use of exemptions. As we have indicated, AC mentioned the subject several times in his emails and emphasized the importance of strictly complying with exemption requirements. There was no evidence before us that he told or did not tell Ward what to do to ensure compliance, or that he knew what Ward was actually doing in that regard. There was no evidence before us that AC and Ward ever discussed the use of clause (t) of Schedule "A" on page 6 of the subscription agreements, and no evidence in support of Ward's contention that AC told him he did not have to verify that his investors met the terms of the exemptions they claimed.

[375] Although Ward suggested that AC guided him toward the "promissory note" structure to avoid the regulatory issues around operating an investment fund without registration, we have already pointed out that the email exchanges on the subject do not support that version of events. While it appears that AC was in the process of assisting Ward to revise his investment documentation, AC's health does not seem to have allowed them to conclude the process. It also appears that Ward declined to use the form of promissory note AC provided that might have made it clearer to investors that he considered their investments simple loans.

[376] Similarly, there is nothing in the email correspondence that would attenuate the conclusions we drew concerning Ward's knowledge that he made materially misleading statements to investors and that those statements put investors' pecuniary interests at risk. As mentioned, there was no evidence before us that AC knew what Ward was communicating to them. There was no evidence AC advised Ward what his communications should contain, or that Ward even asked. There was no evidence before us that AC endorsed the terms "principal protection" or "no lose promise", knew that Ward planned to use them, or told Ward there was no need for qualifying information. There was no evidence before us that AC was aware of how Ward used investment funds or advised him that despite promoting E-Wealth as an investment business (and thus ignoring AC's advice not to talk about the business), he could use those funds in any way he wished.

[377] While Ward attempted to rely on the absence of evidence of AC's advice as proof that he sought but simply did not receive adequate advice, we agree with Staff that that is an absurdity. Again, it was Ward who bore the onus to establish his defence and he did not do so.

[378] Thus, Ward's due diligence defence – that he reasonably relied on professional advice – also fails.

X. CONCLUSION AND NEXT STEPS

[379] Having found that Ward breached Alberta securities laws as alleged by Staff in the NOH, this proceeding will now move into a second phase for the determination of what, if any, orders for sanction or cost-recovery ought to be made against Ward in light of our findings.

[380] Staff and Ward are each directed to inform one another and the Registrar, in writing, not later than noon on Friday, November 4, 2022, of the following:

(i) whether they propose to adduce new evidence on the sole issue of appropriate orders; and

(ii) their expected timing requirements and suggested dates.

[381] After we have received and considered the responses to this direction (or after the date specified for such responses has passed), the Registrar will inform the parties of the timing of next steps in this proceeding.

October 19, 2022

For the Commission:

"original signed by"
Kari Horn

"original signed by"
Karen Kim

"original signed by"
Maryse Saint-Laurent