ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Homerun International Inc., 2016 ABASC 95 **Date: 20160421**

Homerun International Inc., First Base Investments Inc., Homerun Capital Corp., Homerun Equities Inc., Homerun Capital II Corp., Homerun Equities II Inc., 1496044 Alberta Ltd., 1539149 Alberta Ltd., Candice Anne Graf (a.k.a. Candi Hayward) and Christopher Robert Hayward

Panel:	Stephen Murison Tom Cotter Fred Snell, FCA
Representation:	Peter Verschoote Robert Stack for Commission Staff Candice Anne Graf Christopher Robert Hayward for themselves
Hearing:	2 March 2016
Decision:	21 April 2016

TABLE OF CONTENTS

I. INTRODUCTION

[1] Candice Anne Graf (also known as Candi Hayward, and whom we refer to as **Graf**) and eight companies – Homerun International Inc. (**HII**), First Base Investments Inc. (**First Base**), Homerun Capital Corp. (**HCC**), Homerun Equities Inc. (**HEI**), Homerun Capital II Corp. (**HC2**), Homerun Equities II Inc. (**HE2**), 1496044 Alberta Ltd. (**149**) and 1539149 Alberta Ltd. (**153**) – illegally distributed securities in contravention of section 110 of the *Securities Act* (Alberta) (the **Act**). The illegal distributions by HII and First Base, and some of those by Graf, also involved illegal trades in securities, in contravention of section 75 of the Act. Graf and HII made the equivalent of misrepresentations in contravention of section 92(4.1) of the Act. Graf authorized, permitted or acquiesced in the contraventions by all eight companies, as did Christopher Robert Hayward (**Hayward**) in respect of those companies other than First Base. The facts and the findings of misconduct are discussed in a 17 December 2015 decision of this Alberta Securities Commission (**ASC**) panel (the **Merits Decision**, cited as *Re Homerun International Inc.*, 2015 ABASC 990).

[2] Upon issuance of the Merits Decision the proceeding moved into its current, second phase (the **Sanctions Hearing**), for the determination of appropriate orders against Graf, Hayward and the mentioned eight companies (together, the **Respondents**). In accordance with a panel direction, prior to this phase of the hearing ASC staff (**Staff**) gave written notice of the orders Staff would be seeking. At the Sanctions Hearing we received further evidence (supplementing the evidence admitted in the first phase of the proceeding (the **Merits Hearing**)), and we heard submissions from Staff and from Graf and Hayward.

[3] For the reasons given below, we are ordering significant market-access bans against all Respondents, together with administrative penalties and cost-recovery orders against Graf and Hayward.

II. BACKGROUND

[4] For convenience, we summarize here certain of the background concerning the Respondents and our findings on Staff's allegations, all of which are explained in the Merits Decision.

[5] Graf sold investment products largely using the "Homerun" name (the entities involved included the corporate Respondents and others, in what we refer to as the **Homerun Group**). She was the guiding mind of the eight corporate Respondents, as well as a director and officer of each (except perhaps an officer of First Base, for which we were directed to no evidence about its officers). Hayward, Graf's brother, was a director of the corporate Respondents other than First Base (with which he apparently had no involvement) and an officer of at least HII, HCC and HEI.

[6] On 30 November 2010 Graf and Hayward each became registered under the Act as dealing representatives for a connected company (not a Respondent). Graf also became registered as that company's "ultimate designated person", and Hayward as its "chief compliance officer". These registrations were all suspended effective 19 September 2012.

[7] All of the corporate Respondents except First Base obtained protection from their creditors under the *Companies' Creditors Arrangement Act* (Canada) (the **CCAA**) in October 2012. A report by the CCAA monitor (the **Monitor Report**) was in evidence. First Base is apparently now under trusteeship in bankruptcy.

[8] The Respondents' misconduct arose in connection with various investment offerings sold from 2007 to 2012.

- Graf and HII raised money from investors to help fund the purchase of land in the Rocky Ridge neighbourhood of Calgary, for which investors received promissory notes. These were trades and distributions of securities, some made in breach of the registration and prospectus requirements under the Act such that Graf and HII each contravened sections 75 and 110 of the Act.

- Graf and HII raised money from investors in exchange for promissory notes relating to land near Balzac, Alberta. The sales of these promissory notes were trades and distributions, some made in breach of the registration and prospectus requirements such that Graf and HII each contravened sections 75 and 110.

  Graf and HII (through Graf and others) also made oral and written representations to investors that their promissory notes were being secured against the Balzac land, but for the most part this was untrue. Graf and HII thus each contravened section 92(4.1) by making the equivalent of misrepresentations.

- Graf and First Base sold interests in a mortgage on a property in Calgary's Tuscany neighbourhood. One such sale was made in breach of the registration and prospectus requirements such that Graf and First Base each contravened sections 75 and 110.

- HCC and HEI sold bonds and shares (respectively) in a joint offering. Some of these sales were made in breach of the prospectus requirement such that HCC and HEI each contravened section 110.

- HC2 and HE2 sold bonds and shares (respectively) in another joint offering, in which Graf also sold or acted in furtherance of the sales. Some of these sales were made in breach of the prospectus requirement such that Graf, HC2 and HE2 each contravened section 110.

- 149 and 153, with Graf's involvement, each sold shares to fund the purchase of properties for redevelopment. One such sale for each of 149 and 153 was made in breach of the prospectus requirement such that 149, 153 and Graf each breached section 110.

[9] In addition to her direct contraventions of the Act and consistent with her central role with the corporate Respondents, Graf authorized, permitted or acquiesced in all of their contraventions. Although Hayward's role was less prominent overall, he too authorized,

permitted or acquiesced in all of the contraventions by each of HII, HCC, HEI, HC2, HE2, 149 and 153.

[10] Some allegations against various of the Respondents were not proved, and none were proved against former respondents 1484106 Alberta Ltd. or 1515997 Alberta Ltd. Allegations against another original respondent, Jessica Bennett (**Bennett**), were resolved by an October 2014 settlement agreement between her and Staff (the **Bennett Settlement**, cited as *Re Bennett*, 2014 ABASC 415).

III. APPROPRIATE ORDERS

[11] Staff urged that we issue two types of orders in this case: sanctions under sections 198 and 199 of the Act, and orders for the recovery of investigation and hearing costs under section 202. The purpose of this phase of the hearing is to determine whether it is appropriate to do so and, if so, on what terms.

A. Sanctions: The Law

1. Rationale and Principles

[12] The ASC administers the Act with a view to protecting investors and fostering a fair and efficient capital market that merits confidence. The ASC's public interest sanctioning powers under sections 198 and 199 of the Act are protective and preventive, not punitive or remedial (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at paras. 39-45).

[13] Any sanctions ordered against a respondent "must be proportionate and reasonable" (*Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 at para. 154). Both specific deterrence (deterring future misconduct by a particular respondent) and general deterrence (deterring misconduct by others) are "legitimate considerations" in determining appropriate sanctions (*Walton* at para. 154; and see *Re Cartaway Resources Corp.*, 2004 SCC 26 at paras. 52-62).

[14] The determination in a particular case of whether deterrence is required and, if so, the type and extent of sanctions appropriate for that purpose, will turn on the circumstances of the misconduct and of the particular respondent, and on an assessment of the risk posed to investors and the capital market by a particular respondent or by others who might be minded to emulate the respondent's misconduct.

[15] Pertinent to assessing the proportionality and reasonableness of a contemplated sanction is the Alberta Court of Appeal statement in *Walton* (at para. 154) that "general deterrence does not warrant imposing a crushing or unfit sanction on" a respondent. Specifically in the context of an administrative penalty, the Court of Appeal stated (at para. 156) that it must "be proportionate to the offence, and fit and proper for the individual offender".

[16] Ensuring that sanctions are proportionate involves appropriate consideration of other decisions and settlement outcomes, while recognizing that decisions or outcomes seldom involve identical factual circumstances or wrongdoing.

[17] Panels may be faced with assessing the proportionality of contemplated sanctions against a respondent claiming impecuniosity, or at least a constrained ability to satisfy any monetary order. In this regard, we note the statements in *Walton* that an administrative penalty "beyond the capacity of the individual offender cannot be justified on the basis that it will deter others who are in a better financial condition" (at para. 165) and that the amount of an administrative penalty should not be "determined after overemphasizing the requirement of general deterrence, without having sufficient regard to the individual circumstances" (at para. 166).

[18] We do not understand these statements to preclude consideration of general deterrence in assessing either the need for, or the appropriate extent of, an administrative penalty against an individual respondent. Rather, this was an admonition not to focus exclusively, or excessively, on general deterrence. The Court of Appeal explained this, and the danger to be avoided, as follows (*Walton* at para. 156): "An administrative penalty [focused] purely on general deterrence of an unidentified and amorphous sector of the public could easily become disproportionate to the circumstances of the individual involved". We are mindful, however, that a monetary sanction almost inevitably involves (and indeed that a sanction of any type might impose) a burden on a respondent. This does not in itself demonstrate disproportion or unreasonableness in the *Walton* sense; an order with no real effect on the recipient may be no sanction at all.

[19] Another point sometimes raised by an individual respondent opposed to market-access bans is a resultant claimed impediment to earning money, be it for living expenses, for retirement, or to pay restitution to investors. The capital market is a regulated sector, in which participants choose to operate. Once they make that choice, they are subject to the relevant laws. Should they contravene those laws, they are then subject to our jurisdiction to act in the public interest to prevent or constrain their future participation. Such an outcome, even if it compels a respondent to seek a new livelihood outside the capital market, does not in itself indicate disproportion or unreasonableness.

2. Factors

[20] In making the requisite sanctioning assessment and determination, several factors are considered. Numerous potential factors have been discussed in past ASC decisions including *Re Lamoureux*, [2002] A.S.C.D. No. 125 at para. 11 (affirmed on other grounds 2002 ABCA 253); *Re Workum and Hennig*, 2008 ABASC 719 at para. 43 (affirmed 2010 ABCA 405); and *Re Hagerty*, 2014 ABASC 348 at para. 11. With a view to clarifying the interaction of principles and factors, it is helpful here to recast the analytical framework by coupling the principles discussed above with a refined enumeration of sanctioning factors:

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

[21] We turn now to a brief discussion of these factors.

(a) Seriousness of the Misconduct

[22] The seriousness of misconduct can be considered in three respects: the nature of the misconduct; intention (whether the misconduct was planned and deliberate, not deliberate but attributable to recklessness, or simply inadvertent); and the harm to which the misconduct exposed identifiable investors or the capital market generally.

[23] Some misconduct is self-evidently serious. Fraud would typically fall into this category, given that it generally involves a combination of deceit or falsehood and the risk of pecuniary loss to its victims. Misrepresentation likely also falls into this category, involving as it does the provision of material misinformation.

[24] Intentional misconduct might generally be considered more serious than inadvertent misconduct, but inadvertence alone does not render misconduct insignificant; all participants in the capital market are responsible for adhering to the law.

[25] Potential or actual harm to others may itself establish the seriousness of misconduct. Such harm can range from the direct and quantifiable – pecuniary deprivation (of invested money, or of anticipated profit) – to the less direct and quantifiable, but nonetheless important, notably diminished efficiency or confidence in the capital market generally. Thus harm (or risk of harm) to identifiable investors, or to the capital market more generally, is relevant.

[26] Absent other considerations, the more serious the misconduct, the greater the future risk implied and thus the greater the deterrence required. Even inadvertent misconduct may require both specific and general deterrence, to ensure that the wrongdoer and others take seriously the need to adhere to the law when operating in the capital market.

(b) Respondent's Characteristics and History

[27] A respondent's characteristics and history may be important indicators of the degree of risk posed and, in turn, the extent of deterrence required. They may also be relevant to assessing the proportionality of sanctions under consideration.

[28] Relevant individual characteristics may include education, work experience, registration or other participation in the capital market, any disciplinary history and (with particular reference to proportionality) claimed impecuniosity.

[29] Experience in the capital market (through employment or otherwise) or securities-related education, if predating the misconduct found, may indicate that the respondent acted despite having understood the need to adhere to securities laws. This could be pertinent to assessing the seriousness of the misconduct – perhaps indicating deliberation or elevating what might otherwise be thought mere inadvertence into recklessness. Such a characteristic may in any event demonstrate a particular need for specific as well as general deterrence, because an individual who engages in misconduct despite having knowledge that should have averted it may present a heightened risk of doing so again.

[30] A disciplinary history – in the securities sector, or perhaps elsewhere – may itself demonstrate considerable risk and a need for commensurate deterrence. An individual who has already been sanctioned for a transgression should be particularly mindful of the need to behave in accordance with the law. Such an individual who engages in further misconduct may be thought to present a distinct risk of further recidivism, demanding specific deterrence. This may also call for general deterrence, to discourage like-minded others from similar misconduct.

[31] That said, an absence of relevant education, experience or disciplinary history is not necessarily a moderating consideration. This will depend on all the circumstances, including the nature of the misconduct found, and evidence of what the respondent has learned from the events giving rise to the misconduct found. Thus, for example, deceiving investors is obviously wrong, so lack of education or experience is unlikely to moderate in cases of knowing misrepresentation or fraud.

[32] By contrast, for some other types of misconduct, a naïve or inexperienced individual who has since made efforts to self-educate could present a diminished risk of future misconduct, whereas such an individual who has learned nothing may present a heightened risk – indicating respectively a diminished or a heightened need for specific deterrence. In either case, there may be a need for general deterrence, to remind others of the need to operate within the law.

[33] Similar considerations may be relevant even in respect of a corporate respondent. In addition, it may be appropriate to attribute to a corporate respondent pertinent characteristics of its guiding individuals. Other, more unique circumstances may also be present; for example, continued activity by a company that had been created to further a scheme of misconduct may itself pose a significant risk to investors and the capital market.

[34] As noted, panels may be faced with assessing the proportionality of contemplated sanctions against a respondent claiming impecuniosity, or at least a constrained ability to satisfy any monetary order. If founded in fact, this will be an important consideration in determining what sanction or combination of sanctions (in type and extent) would proportionately and reasonably achieve the deterrence required. A somewhat related, and important, consideration may be the effects of a monetary sanction on victims of the misconduct. It may be appropriate to moderate or forego a monetary sanction that would foreseeably diminish investors' prospects of financial recovery.

(c) Benefit Sought or Obtained by Respondent

[35] The extent to which a respondent sought to benefit, or did in fact benefit, from misconduct can be a compelling indicator of risk.

[36] The most obvious form of benefit is financial – monetary gain – but less tangible forms of benefit may also arise (for example, reputational benefit from ostensible business or investment acumen).

[37] Participants in the capital market intend to make money, which of course is not itself objectionable. What is relevant here is the seeking, or the obtaining, of a benefit from or through

capital-market misconduct. This can present an obvious incentive for, and therefore a risk of, similar misconduct in future, by the respondent or by others.

[38] The extent of the risk, and therefore the extent of deterrence required, will typically be greater the larger the benefit sought or obtained (there may be little enticement to engage in misconduct that, even if undetected, offers little prospect of benefit).

(d) Mitigating or Aggravating Considerations

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

[40] Mitigating considerations can take a variety of forms. The most obvious would be efforts by a respondent to undo the harm done to victims – payment of financial restitution, for example. For sanctioning purposes, that sort of mitigation might diminish the risk of future harm, not least by reducing any element of financial incentive for future misconduct. That in turn might diminish the need for specific deterrence, and perhaps also for general deterrence.

[41] Persuasive indications that a respondent appreciates the wrong done, and its seriousness, may indicate a diminished likelihood of the respondent again engaging in misconduct, and therefore moderate the need for specific deterrence. However, the absence of such persuasive indications is by itself merely a neutral consideration. A respondent might – as is their right; see *Walton* at para. 155 – deny (or not acknowledge) responsibility as part of the conduct of their defence (or to preserve appeal rights). This in itself would not necessarily indicate a failure to appreciate the wrong done and its seriousness.

[42] The mitigating effect of appreciating a wrong done and its seriousness may be bolstered considerably by a genuine acceptance of responsibility. A compelling indication of personal remorse, which might take the form of sincere apologies to victims, could have a similar effect. While these would not undo the harm done, they could demonstrate a diminished risk of future misconduct by the respondent, and consequently a diminished need for specific deterrence.

[43] Evidence that misconduct resulted from a respondent's reasonable reliance on faulty professional advice does not assist victims or convert illegality into legality, yet it can still be important as mitigation. Such a circumstance might indicate little risk of future misconduct, and a correspondingly reduced need for either specific or general deterrence.

[44] Cooperation with Staff in the investigation or hearing is generally more relevant to the issue of cost-recovery orders (discussed below) than to sanctioning, but in some circumstances it may reinforce a mitigating consideration (for example, appreciation of wrongdoing and acceptance of responsibility for it). Cooperation with Staff might even amount to mitigation in its own right (perhaps, for example, where such cooperation assists Staff in detecting and curtailing ongoing misconduct by others).

[45] An absence of mitigation is not the same as an aggravating consideration.

[46] An aggravating consideration might take the form of a respondent displaying a belligerent contempt for either the victims of the misconduct or the law. Such behaviour might reasonably indicate a pronounced risk of future misconduct (and send a disconcerting message of defiance to observers), demanding heightened specific and general deterrence.

B. Cost Recovery: The Law

[47] Section 202 of the Act authorizes a hearing panel, if satisfied after conducting a hearing that a respondent has contravened Alberta securities laws or acted contrary to the public interest, to order the respondent to pay "costs of or related to the hearing or the investigation that led to the hearing, or both". Section 20 of the *Alberta Securities Commission Rules (General)* sets out categories of costs that may be subject to an order if the hearing panel "is satisfied that such costs are reasonable in all the circumstances":

> (a) costs of [Staff] involved in the investigation or the hearing, or both, based on the time expended for purposes of or related to the investigation or the hearing, or both, and the applicable hourly rates;
>
> (b) costs paid or payable to a person or company, other than [Staff], appointed or engaged by the [ASC] or the Executive Director for purposes of or related to the investigation or the hearing, or both;
>
> (c) costs paid or payable in respect of witnesses, other than costs referred to in clause (a) and (b), for purposes of or related to the investigation or the hearing, or both; and
>
> (d) any other costs paid or payable for purposes of or related to the investigation or the hearing, or both.

[48] An order under section 202 of the Act is distinct from a sanction. The purpose of a cost-recovery order was described in *Re Marcotte*, 2011 ABASC 287 (at para. 20):

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

[49] Accordingly, the relevant costs will be those related to the investigation into the misconduct found, and the hearing in which that misconduct was proved. It would be inappropriate to assess costs attributable to allegations ultimately withdrawn or dismissed. A panel will therefore be mindful of which allegations were proved and which were withdrawn by Staff or dismissed by the panel. Where a cost item can be readily ascribed to a particular respondent and particular allegation, the task is straightforward. More often, however, it would be impractical for Staff's supporting documentation and submissions to make such plain distinctions, given the complexity and evolving nature of the investigation process or the scope of a particular hearing. In those cases the panel faces the task of estimating the proportion of claimed costs fairly attributable to specific respondents and specific allegations.

[50] In assessing the reasonableness of claimed costs, the panel also considers aspects such as time spent by Staff on a matter; indications of duplicated effort for which some reduction might be warranted; the nature and scale of claimed disbursements; and any prior recovery of costs arising from the same matter (for example, through settlement with another respondent). Through that process the panel determines the amount of costs prima facie recoverable.

[51] The panel must also make an allocation of recoverable costs based on its assessment of which respondents should bear responsibility, and in what respective proportions. In this task the panel will focus on the extent to which investigation and hearing resources (as reflected in the recoverable costs) were applied to proving the respective respondents' misconduct. Other considerations may lead the panel to conclude that cost responsibility is properly allocated wholly among one of multiple classes of respondents (for example, wholly among individual respondents for whom corporate respondents were mere vehicles for the misconduct found).

[52] Having made that allocation, the panel then considers the efficiency (or inefficiency) that each party brought to the proceeding as a whole, and the associated contribution to the broader public interest objectives of our regulatory system. This factor may argue for moderation – sometimes substantial – in the extent of cost recovery to be ordered against a particular respondent (and therefore may result in less than full recovery of the prima facie aggregate amount).

[53] Finally, there may be concern that a cost-recovery order could diminish prospects of recovery for investor victims. This, too, may warrant moderating the amounts of cost recovery ordered against certain respondents, or wholly foregoing cost recovery in a particular case.

IV. POSITIONS OF THE PARTIES

A. Sanctions

[54] Staff sought significant sanctions against all of the Respondents.

- Against Graf, Staff sought an administrative penalty – initially, of $400,000, but modified in closing arguments to an amount in the range of $250,000 to $400,000. Staff also sought orders under section 198 of the Act that would, for not less than 20 years (the actual duration dependent on when Graf paid any administrative penalty), prevent Graf from: trading in or purchasing securities or derivatives; using any securities-law exemptions; engaging in investor relations activities; being or acting as a director or officer of various types of entity; advising in securities or derivatives; acting as a registrant, investment fund manager or promoter; or acting in a management or consultative capacity in connection with activities in the securities market.

- Against Hayward, Staff sought an administrative penalty – initially of $150,000, but modified in closing argument to an amount in the range of $75,000 to $150,000. Staff also sought bans paralleling those sought against Graf but for not less than 10 years, the actual duration similarly dependent on when he paid any administrative penalty.

- Against each of the corporate Respondents, Staff sought permanent bans under section 198 on: trading in or purchasing securities or derivatives; using exemptions; engaging in investor relations activities; advising in securities or derivatives; acting as a registrant, investment fund manager or promoter; and acting in a management or consultative capacity in connection with activities in the securities market. Staff stated that they intentionally did not seek an order under section 198(1)(a) that would ban trades or purchases – by anyone – of securities or derivatives of the corporate Respondents.

[55] Graf and Hayward each made oral submissions. Each accepted as appropriate the types and durations of the section 198 market-access bans sought by Staff, but disputed the need for a large administrative penalty, or any at all. They also contended that they would be unable to pay any large monetary orders made against them. Hayward, for example, submitted that any monetary orders should be no greater than the $20,000 (inclusive of investigation costs) for which Bennett had settled; while Graf characterized the $400,000 administrative penalty sought against her as "very extreme". Graf and Hayward alternatively stated they would be willing to have permanent bans ordered against them, if we were to make administrative and cost-recovery orders totaling no more than $20,000. Staff responded that such low (or non-existent) administrative penalties would be inappropriate, citing the need for deterrence. Graf also offered to write a statement for posting on the ASC website that might cite her unhappy experience leading to this proceeding, to emphasize that others should be diligent regarding compliance with Alberta securities laws; Staff did not comment on that offer.

[56] No Respondent addressed the orders sought by Staff against the corporate Respondents, except that we were informed at the outset of the Sanctions Hearing that First Base's bankruptcy trustee apparently did not object to the orders sought by Staff against First Base.

B. Cost Recovery

[57] Staff sought cost-recovery orders against Graf and Hayward only, in the amounts of $95,783.27 and $31,927.76 respectively.

[58] Staff explained that they excluded all "investigative or prosecution costs" relating to Bennett, to arrive at total investigation and hearing costs of $170,281.37. This amount was set out in a statement of costs (the **Costs Statement**), which included supporting documentation. Discounting this total by 25% (to reflect the fraud allegations not proved in the Merits Hearing) produced a total of $127,711.03, which Staff suggested be allocated 75% to Graf and 25% to Hayward.

[59] Graf argued against any cost-recovery orders against her or Hayward or, alternatively, that any such orders should not exceed either 30% of the total (that would be roughly $51,000, using $170,281.37 as the starting point) or the $20,000 agreed to in the Bennett Settlement. We were told that this position was based on the fact that some allegations were not proved, and on suggested inefficient, even inappropriate, Staff conduct in the hearing. Graf also pointed to evidence concerning Bennett's role in the Homerun Group (we discuss what we define as the Bennett Application below) as favouring moderation in any cost-recovery orders. Graf and

Hayward further submitted that Staff failed to respond appropriately to the Respondents' own pre-hearing offers of, or attempts at, settlement.

[60] Graf advanced a further argument that we understood to be directed at the issue of cost recovery. She asserted that the main reason for the contested hearing was the need to defend against Staff's fraud allegations. There had been two such allegations, both levelled directly against HII and Graf (and also, but indirectly in the sense of authorizing, permitting or acquiescing, against Graf and Hayward). Staff withdrew one of the fraud allegations in the course of the submissions at the Merits Hearing, and the remaining fraud allegation was not proved.

V. ADDITIONAL EVIDENCE

[61] Four pieces of new evidence were admitted at the Sanction Hearing: documentation reflecting employment earnings of Graf and Hayward in recent periods, respectively tendered by those two Respondents; a statement of investigation and hearing costs (with supporting material) tendered by Staff; and an affidavit sworn and tendered by Hayward (the **Sanction Affidavit**). The first three items were largely self-explanatory and their admissibility was not challenged. The Sanction Affidavit was challenged by Staff.

[62] The Sanction Affidavit essentially addressed two topics: pre-hearing settlement discussions between the individual Respondents and Staff; and a June 2010 application by Bennett (the **Bennett Application**, which was also signed by Graf) for registration under the Act. Staff asserted, and declined to waive, "settlement privilege" concerning the first topic. On the basis that such privilege cannot be waived unilaterally by only one side to such discussions (see, for example, *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd.*, 2013 ABCA 10 at para. 26), we excluded the paragraph of the Sanction Affidavit and two related exhibits to which settlement privilege applied.

[63] The remainder of the Sanction Affidavit was admitted into evidence without objection. This dealt almost exclusively with the Bennett Application, or with efforts by the Respondents to have it presented to us. As we understood Hayward's and Graf's oral submissions, this material was meant to demonstrate two things. First was claimed Staff inefficiency: Hayward stated that "a lot of hearing time" and "a lot of argument" could have been saved had this been "disclosed" earlier. This argument was presented in opposition to the cost-recovery orders sought by Staff. Second, the Bennett Application was presented as proof of Bennett's important roles in the Homerun Group and argued in support of Hayward's and Graf's contentions that they had relied on Bennett. We were told that this was not meant to contradict our Merits Decision findings of their own contraventions, but rather was (as we understood it) presented as mitigation for sanctioning purposes, specifically in respect of administrative penalties.

[64] Among other things, the Respondents' arguments failed to distinguish clearly or consistently between, on the one hand, pre-hearing disclosure of material among parties and, on the other hand, material tendered by a party for admission as evidence in the hearing itself. The Respondents did not establish that Staff failed in their pre-hearing disclosure duty in respect of the Bennett Application. According to the Sanction Affidavit and submissions, the Respondents had a copy of the Bennett Application in their possession before the Merits Hearing began, and

they were familiar with it; they were not relying on Staff to disclose its content. The Respondents thus did not suffer in this regard from any disclosure failure.

[65] Nor did the Respondents establish any obligation on Staff to have tendered the Bennett Affidavit into evidence at the Merits Hearing. We reject the Respondents' insinuation that Staff engaged in sharp practice, namely when a Staff investigative accountant gave testimony while having knowledge of the existence of the Bennett Application but without discussing it. This assertion failed, not least because the claimed importance of the document was not established (a topic to which we will shortly return).

[66] Important or not, the Respondents were free to tender the Bennett Application as evidence themselves. They could have done so in several ways, including: asking the Staff investigative accountant if he knew of it or had received it from the Respondents; calling Bennett as a witness and putting the document directly to her; or having Graf (who signed the Bennett Application) or Hayward (who told us that he witnessed Bennett's signature) testify and authenticate the document. The Respondents chose to do none of those. (Hayward stated that the Respondents had planned to enter the document through Bennett, but Staff did not call her as a witness. As just indicated, nothing prevented them from themselves calling her as a witness.)

[67] In any event, we ascribed little importance to the Bennett Application.

[68] The document was Bennett's application for registration as a "Dealing Representative" with a company (not a Respondent) in the Homerun Group. (She also indicated that she was seeking registration in a category for firms, surely an error.) As noted, Graf also signed the application, as "CEO + UDP" – "UDP" presumably meaning "ultimate designated person", a significant category of registration that Graf obtained a few months after the date of the Bennett Application. The document content to which Hayward drew our attention was found in a schedule to the Bennett Application, in which Bennett identified her respective duties with several Homerun Group companies, including each of the corporate Respondents other than First Base. Hayward drew our attention specifically to the information provided concerning Bennett's employment with HII, which we quote here:

> As Director, a list of my duties is provided below:
>
> - Arranging audits
> - Completing/analyzing budgets
> - Working with marketing
> - Participating in information seminars
> - Overseeing architects
> - Basic office management
> - Advising on legal matters
> - Organizing charity events
> - Overseeing geomatics engineers
> - Overseeing marketing campaigns
> - Overseeing data processing
> - Working with realtors
> - Organizing shareholders meetings
> - Training staff
> - Securing financing

- Client management
- Dispute management
- Updating procedures
- Overseeing third party trust activities and paperwork
- Overseeing dealer representatives
- Purchasing properties
- Overseeing website development
- Initial start up of this company required more time devoted than maintenance does

[69] Similar (but not identical) lists of duties were set out in respect of the other identified companies.

[70] Particularly noteworthy, according to Hayward, was the identification of Bennett as "Director" of HII (and of the other companies, although his submissions primarily focused on HII). He contrasted this with what he presented as Staff efforts at persuading us (in the Merits Hearing) that Bennett had not been a director of HII, despite Staff's knowledge of the Bennett Application and its contents. We discern neither impropriety nor inefficiency in those Staff efforts. The evidence they adduced on this point was straightforward, principally reports from the Alberta corporate registration system. For HII, these plainly showed Bennett to have been one of several directors when the company was incorporated in November 2007, but for only a short period. A change of directors was recorded (without details shown) on 5 December 2007, after which Bennett (like several other individuals) no longer appeared as an HII director. Another change of directors (again without details shown) was recorded on 19 July 2010 – shortly after the date of the Bennett Application – but Bennett still did not appear on the corporate registration system as an HII director after December 2007.

[71] Hayward did not indicate how we should reconcile that with Bennett's self-identification in the Bennett Application (and Graf's endorsement of that through her signature on it) as a "Director" of HII in June 2010. He asserted, though, that Bennett was clearly acting as a director, and he seemed to suggest that this was the case throughout the period of the misconduct at the heart of this proceeding.

[72] We do not, of course, know what Bennett meant, or understood, by the term "Director" as it was used in the Bennett Application. A perusal of the specific duties listed for her role (and quoted above) certainly indicated a broad range of responsibilities (including at least one surprising duty – the provision of legal advice – along with others touching directly on the sale of securities, her involvement in which was already clear and recognized in the Merits Decision). However, none of these enumerated responsibilities were obviously indicative of the role of a director in corporate law.

[73] In any event, little turned on this issue of Bennett's supposed director role. Whether Bennett was, or considered herself to be, a director (de jure or de facto) of HII or any of the other corporate Respondents was not a major aspect of the Merits Hearing. Nor should it have been. Graf and Hayward bear responsibility for their own positions and actions, regardless of Bennett's role. Graf was the guiding mind of the various corporate Respondents. Graf engaged directly in some of the misconduct. Graf and Hayward both authorized, permitted or acquiesced in misconduct by all or several (respectively) of the corporate Respondents. Nothing in the Bennett

Application affected any of those conclusions from the Merits Decision. Nor did anything in the Bennett Application amount to mitigation of that misconduct, of the harm done or of current risks, which might moderate an otherwise appropriate sanction. (If anything, the document has a modestly contrary effect, Graf's signature underscoring an already apparent lack of clarity, inattention to factual accuracy and hazy appreciation of the laws governing her chosen business activities.)

[74] Nothing in the Bennett Application told us anything about appropriate cost-recovery orders. However, Hayward suggested that the Merits Hearing would have been considerably shorter had Staff "disclosed" the Bennett Application earlier. We return to the topic below in our analysis of the issue of cost recovery.

VI. ANALYSIS

A. Sanctioning Factors

[75] We now apply the sanctioning principles and factors to the facts, in light of the submissions made.

1. Seriousness of Respondents' Misconduct

[76] The prospectus and registration requirements under the Act are cornerstones of our securities regulatory system. The prospectus is meant to assist prospective investors make informed decisions by providing them with reliable information about the issuer of offered securities, the securities themselves, and how invested money will be used. The registration requirement delivers protection through the involvement of intermediaries knowledgeable about the securities offered and the circumstances and risk tolerances of their client investors. Exemptions from either of these requirements are designed to apply only where, and to the extent that, these fundamental protections are not needed or where protection can be delivered through other means.

[77] Breaches of the prospectus and registration requirements, and abuses of exemptions, may lead investors to make ill-informed investment decisions and expose them to unanticipated risks. Such breaches also undermine fairness and confidence in the capital market. Here, the contraventions of section 75 or section 110 of the Act (or both) by Graf and each of the corporate Respondents also resulted in actual financial harm to investors – significant losses to some who testified, with profound negative consequences for individuals and families.

[78] Misrepresentations – materially misleading or untrue representations – to investors similarly may lead to ill-informed investment decisions, unanticipated risks and, in this case, actual financial harm. Misrepresentation also has the potential of undermining confidence in capital-market investment generally, to the detriment of businesses that seek to raise capital legally. As explained in the Merits Decision, some investors in certain promissory notes were told, wrongly, that their investments would be secured against certain land – something that would prompt a reasonable investor to ascribe more value to the securities than otherwise.

[79] Authorizing, permitting or acquiescing in misconduct implies having been in a position to act otherwise. In this case, both Graf and Hayward could have averted or halted the serious

misconduct discussed above. Their failures to do so contributed to the harm that ensued. This, too, was serious misconduct.

[80] All of the Respondents' misconduct was, in short, serious – by its nature, in the types of harm to which it exposed investors and the capital market, and in the financial harm done to affected investors.

[81] The seriousness of the misconduct argues for significant sanctions against each Respondent sufficient to deter them from repeating their misconduct. Given the apparent ease with the Respondents raised money, this factor also argues for sanctions that will deter others who might otherwise be tempted to act in a similar way.

2. Respondents' Characteristics and History

(a) Education and Experience

[82] Neither Graf nor Hayward appeared to have had education or training in the capital market (or any other similarly regulated sector) before the impugned activities began. Staff suggested that we should consider Graf's years of work before the relevant period – notably, the seminars she presented – to constitute such experience. We described those in the Merits Decision (at para. 10) as "real estate and investment seminars". We do not regard Staff as having established the sort of experience relevant for sanction purposes here.

[83] To some extent, Graf's and Hayward's lack of relevant background argues for moderation in sanction in respect, at least, of illegal trades and distributions. However, the effect is offset in Graf's case, because of her misrepresentations. In our view, no lack of experience or training explains or justifies misleading investors, or gives any comfort that such misconduct might not recur.

[84] In the circumstances we do not consider this factor relevant to the corporate Respondents.

(b) Disciplinary History

[85] None of the Respondents has previously been sanctioned for misconduct in the capital market; such a history might have indicated a heightened need for specific deterrence. However, the contrary does not apply; no one, after all, should engage in sanctionable conduct, so an absence of prior sanction does not merit reward.

[86] We note that there was a regulatory history here, albeit apparently without sanctions. The details were unclear, but Graf herself referred to what we understood to have been multiple inquiries from Staff concerning various Homerun Group capital-market activities.

[87] From this we infer that Graf (and the entire Homerun Group) had been alerted to the fact that they were operating in a regulated sector, and that some of their activities had attracted regulatory attention (seemingly unfavourable attention). It follows that Graf in particular (as the guiding mind of the entire operation) should have given serious attention to the legal environment in which she and the other Respondents were operating, and made vigorous personal efforts to understand the relevant laws and ensure adherence to them. Her evident failure to have done so argues for significant, indeed heightened, sanctions against her.

[88] Graf drew a converse conclusion. In her interpretation, the fact that the Staff inquiries apparently came to an end without sanctions or other adverse consequences to her or the Homerun Group meant that Staff had effectively blessed the manner in which the Homerun Group operated in the capital market. This, Graf suggested, argued for moderation in sanction. This interpretation struck us as wishful thinking rather than sound logic, but we accepted that Graf believed it to at least some extent. As such it partially offsets the effect of the first-described inference.

[89] On balance, therefore, we consider this factor to argue somewhat in favour of significant sanctions against Graf and the corporate Respondents, but to be neutral in respect of Hayward.

(c) Impecuniosity

[90] Both Graf and Hayward suggested that their financial circumstances and prospects made any administrative penalty (and any cost-recovery order, or any such order of a magnitude sought by Staff) pointless and inappropriate. They each spoke of their respective current financial circumstances, and they tendered documentation that we accepted as evidence that they had only modest employment income in recent periods. Both suggested that there was no prospect of an improvement in their financial circumstances, although evidence for this was lacking.

[91] We do not doubt that significant monetary orders would be burdensome to Graf and Hayward. This dictated careful consideration on our part. It did not, however, rule out monetary orders, if such be found necessary for purposes of public protection based on analysis of all pertinent factors and circumstances (including, but not limited to, these Respondents' current financial circumstances).

[92] The misconduct here arose in the course of an operation to raise money for various businesses of the Respondents, all headed by Graf and all but First Base involving Hayward. Money was the objective, and a considerable amount was raised illegally.

[93] Market-access bans as sought by Staff would deliver important protection, but in the circumstances here we think they would, without more, be wholly inadequate for the purpose of specific deterrence. We reject Graf's and Hayward's apparent contention that their stated intention to never again participate in the capital market means that no specific deterrence is required. We do not consider it appropriate to rely exclusively on their intention as now stated; significant and sharp specific deterrence that both restricts their access to the market and delivers a direct monetary message through administrative penalties is required to ensure that they never forget the necessity of refraining from future misconduct.

[94] There is a further consideration, and an important one: general deterrence. As discussed, *Walton* cautioned that an exclusive focus on general deterrence alone can produce disproportionate results, but that does not mean that considerations of general deterrence are to be ignored. In our view, this is a case in which general deterrence is of great importance. The Respondents improperly raised a great deal of money from many investors, and they did so with apparent ease. It seems self-evident that others could well be enticed to emulate this misconduct,

unless adequately deterred. For reasons already mentioned – this case was above all about the improper raising of money – we are in no doubt that any outcome lacking a direct monetary component would fail to deliver the requisite general deterrence.

[95] For all these reasons, we conclude that market-access bans against Graf and Hayward must be coupled with direct monetary orders in the form of administrative penalties. We do not reach the same conclusion in respect of the corporate Respondents, all of them now under monitorship or in bankruptcy and in some cases, as we understood it, with their remaining assets already distributed or allocated for distribution. Even if corporate assets remain, their application toward satisfying monetary orders could come at the expense of their investors, the very victims of the misconduct.

[96] We also consider that these administrative penalties must be substantial – much more than a nuisance, or a cost of doing business.

3. Benefit Sought or Obtained by the Respondents

[97] There was no dispute that all of the misconduct here was motivated by a desire to fund business ventures operated by the various corporate Respondents. Staff submitted that the illegal trades and distributions totalled approximately $17,375,000. The derivation of this figure was not given, and we do not rely on it. Among other things, the evidence was that some of the securities selling did qualify for exemptions, despite the lack of care with which the activity was conducted. This does not, of course, diminish the seriousness of the misconduct, but it does preclude us from quantifying with precision the trades and distributions that were illegal.

[98] Although the evidence (principally the Monitor Report) was that the flow of money to and among the entities was somewhat opaque, it did appear that the money raised was by and large applied in the respective ventures.

[99] Graf and Hayward, who held senior (in several instances, the most senior) positions with these companies, presumably hoped to benefit reputationally from the success of the ventures. We are also satisfied that Graf and Hayward also anticipated personal financial rewards for that success. That said, the evidence (again from the Monitor Report) was limited to remuneration that did not appear extravagant for the overseers of an operation on the scale of the Homerun Group.

[100] In short, we are in no doubt that the misconduct found was prompted by a desire and expectation of benefits, and each Respondent enjoyed reputational benefits for a time, as well as financial benefits, albeit not apparently on an extravagant scale.

[101] This factor reinforces the need for sanctions delivering both specific and general deterrence.

4. Mitigating or Aggravating Considerations

(a) Respondents' Recognition of Their Misconduct

[102] We received emotional submissions from both Graf and Hayward in which both stated their recognition that they acted wrongly, and their appreciation that the Merits Decision findings

against them are serious. Graf in particular acknowledged the harm done to investors, and her difficult encounters with some of them.

[103] Hayward clearly acknowledged his responsibility for his misconduct, but he conditioned that acknowledgement by characterizing himself as having "unknowingly acquiesced" in wrongdoing by others, specifically Bennett. Graf said essentially the same. We return below to this characterization.

[104] The evidence did not support the attribution of most of the blame to Bennett, which (despite some statements denying this) is exactly what we understood Graf and Hayward to be attempting.

[105] That said, we accept that Hayward's role can be readily distinguished from that of the other Respondents. He did not appear to have been directly involved in the sale of securities. The misconduct found against him was more in the nature of a dereliction of duties of oversight.

[106] Therefore, and despite concerns about the finger-pointing at Bennett, we accept that Hayward did essentially recognize and accept responsibility for having authorized, permitted or acquiesced in the misconduct of the corporate Respondents other than First Base.

[107] This in our view diminishes considerably the prospect of Hayward repeating his misconduct, and therefore the extent of specific deterrence required. It does not, in our view, moderate the need for general deterrence.

[108] Graf's case is very different. Her misconduct was far more than merely passive, and went far beyond merely acquiescing in misconduct by others.

[109] Moreover, Graf repeatedly emphasized the effects on her of the fraud allegations that Staff had levelled but which were either withdrawn or unproved. She cited the fraud allegations as a cause of her difficult interactions with investors. She clearly perceived the withdrawal or dismissal of the fraud allegations as vindication of her conduct in general. As with her brother, it was apparent (despite her denials) that she was trying to shift blame for the illegal trading and distributions, and in her submission on sanctions she said little about her misrepresentations.

[110] We are in no doubt that Graf has regrets. However, it was apparent that she sees herself primarily as a victim. She suggested that her life has been ruined, and alluded to causes including claimed (but undemonstrated) Staff impropriety and unspecified but supposedly profound failings by Bennett and the rest of the Homerun Group "team" that Graf implied let her down. It was not clear that she recognized herself as a perpetrator of wrongdoing, and indeed the primary perpetrator. We conclude that Graf neither accepted responsibility for her proved misconduct, nor seemed truly to appreciate how serious it was.

[111] In the result, this factor does very little to moderate the need for sanction against Graf. Although she stated her intention not to enter the capital market again, her deficient appreciation of her misconduct indicates that, were she to do so, there is a real risk of her repeating her

misconduct in the absence of sanctions that deliver a strong measure of specific deterrence. There is also no amelioration of the need for strong general deterrence.

[112] There is no evidence as to whether the corporate Respondents can be said to recognize the seriousness of their misconduct, and therefore nothing on this basis to moderate the sanctions appropriate against them.

(b) "Unknowing" Acquiescence

[113] While claiming not to dispute our findings, both Graf and Hayward asserted that they had "acquiesced", but "unknowingly", in wrongdoing by others (specifically by Bennett). The evidence did not, however, persuade us that the actual wrongdoing could all be ascribed to subordinates, Bennett among them.

[114] Regarding Graf, her unknowing acquiescence argument did not accurately reflect the nature of her misconduct. She was neither a passive observer nor an assistant in the selling of securities and associated illegalities; Graf stood at the very centre, and she was the guiding mind. Moreover, she was directly involved in some of the illegal trades and distributions, as of course was each corporate Respondent in respect of sales of its own securities. The evidence persuades us that, at least until Graf became a registrant, she and the corporate Respondents she controlled engaged in those activities with little or no consistent and satisfactory attention to the legal requirements, notably the conditions of exemptions supposedly relied on. In none of this was Graf a passive follower – of Bennett or anyone else. This misconduct cannot be dismissed as an inadvertent slip-up; the errors were repeated and persistent. Graf's claim of unknowing acquiescence contradicted the plain facts and our Merits Decision findings. It assists her not at all on the issue of sanction, as a mitigating factor or otherwise.

[115] Further, Graf was directly responsible for material misrepresentations to investors (as well as indirectly responsible through HII). Misleading others in this way – in the plainest English, lying – was not unknowing or inadvertent. We discern here no mitigation of the direct misrepresentation findings against Graf.

[116] As noted, Hayward was an officer of some corporate Respondents and a director of all but First Base. We found him to have authorized, permitted or acquiesced in the respective contraventions of each corporate Respondent other than First Base. He seemed not to have been directly engaged in the impugned securities-selling activities, and no findings (indeed no allegations) of direct involvement were made against him. It is plausible, and we accept, that he went along with what was being done in the sales process – likely without undertaking much, if any, questioning, supervision or diligence (although he apparently became somewhat more attentive after his registration). It follows that, at least until then, Hayward may indeed have unknowingly authorized, permitted or acquiesced in the contraventions by those companies.

[117] In this, we find some mitigation of Hayward's misconduct. Such mitigation is limited, however, given that it turned on his having abdicated important responsibilities that he owed to the capital market. Directors and senior management must ensure that their companies' capital market activities are appropriate and legal. Hayward was in a position to avert much of the illegality found here. He should have done so, but he did not. It is not clear from his

submissions that he understands even now how far he fell short in fulfilling his obligations to the capital market and the investors in those companies.

[118] On balance, we conclude that Hayward's unknowing acquiescence, at least early on, was a somewhat mitigating factor. No such conclusion can be made in respect of Graf.

B. Outcomes of Other Proceedings

1. Enforcement Hearing Decisions

[119] Staff drew our attention to several recent ASC decisions: *Re Chandran*, 2015 ABASC 717; *Re Global 8 Environmental Technologies, Inc.*, 2016 ABASC 29; and *Re Platinum Equities Inc.*, 2014 ABASC 376 (affirmed 2015 ABCA 323).

[120] Both *Chandran* and *Global 8* involved amounts raised, at least in part, for genuine business purposes – at least $30 million in *Chandran*, up to some $9 million in *Global 8*, and some $58 million in *Platinum*. Investor losses were extensive in each of the cases. The findings in each involved illegal trades, illegal distributions, and prohibited representations or misrepresentations (and, in *Platinum*, fraud).

[121] We determined that *Chandran* and *Global 8* had some useful parallels and guidance, but were able to draw little from *Platinum* because that case involved a much larger amount illegally raised, more significant financial benefit received by at least one of the individual respondents, and findings of fraud against some respondents.

[122] In *Chandran* the guiding mind of the corporate respondents had previously been given a trading ban in another jurisdiction. The respondents admitted all the misconduct found, and agreed with Staff as to appropriate orders. Those involved an array of permanent market-access bans against each respondent together with a $400,000 administrative penalty against Chandran.

[123] In *Global 8* the two individual respondents (one the guiding mind of the companies, the other a director of all three and an officer of two companies) each directly engaged in all of the misconduct and authorized, permitted or acquiesced in certain misconduct by the companies. That one operation began immediately after the first was cease-traded was considered the "most serious" aspect of their misconduct. The companies were given some permanent (or potentially permanent) market-access bans, while the individual respondents were each given an array of market-access bans (for at least 20 years in the case of the guiding mind, and at least 12 years for the other individual) and administrative penalties ($350,000 for the former; $75,000 for the other). We note a parallel between Graf's role and the role of the guiding mind in *Global 8*, but Hayward's role, activities and influence were markedly less than those of the other individual respondent in *Global 8*.

[124] Graf pointed us to *Re Harris operating as Harris Agencies*, 2011 ABASC 138, which was not helpful given – as Graf noted – the more egregious misconduct in *Harris* (including findings of fraud), the lack of a genuine business, and the character of Harris (who had previously been convicted of criminal fraud in connection with a Ponzi scheme). In *Harris*, the panel ordered an array of permanent market-access bans and a $500,000 administrative penalty.

We do not consider that *Harris* set any sort of cap on sanctions appropriate in the present circumstances; it simply was not relevant to our determination of appropriate sanction.

[125] From the relevant cases cited, we conclude that wrongdoing of the type seen in the present case can be expected to attract an array of market-access bans of significant duration, coupled (at least for individual respondents) with significant administrative penalties. The appropriate amount of such administrative penalties could reach the $400,000 first sought by Staff against Graf (as guiding mind) but less than the $150,000 first sought by Staff against Hayward (as a director and officer with little direct involvement).

[126] As noted, Staff conceded that administrative penalties in ranges with lower ends of $250,000 for Graf and $75,000 for Hayward would be appropriate.

2. Bennett Settlement

[127] Hayward and Graf appeared to contend that any administrative penalty ordered against each of them should be no more than the $20,000 agreed to by Bennett in the Bennett Settlement.

[128] However, a settlement will seldom provide useful guidance as to orders appropriate following a full contested hearing. Among other things, the factors and considerations that prompted parties to settle will seldom be apparent, nor the reasoning behind the terms ultimately agreed. The Bennett Settlement was no exception to this. The Bennett Settlement also told us little or nothing about the role and conduct of Graf or Hayward, or the relative gravity of Bennett's misconduct compared to theirs.

[129] In the result, the Bennett Settlement assisted not at all in determining what orders might be appropriate in the present, contested hearing.

C. Conclusion on Principles and Factors

[130] In summary, the circumstances here persuade us that the public interest in this case warrants sanctions against each Respondent, with a view to both specific and general deterrence.

D. Appropriate Sanctions

1. General

[131] As noted, Staff sought an array of market-access bans against each of the Respondents, coupled with significant administrative penalties against the individual Respondents. Graf and Hayward accepted that those types and durations of market-access bans would be appropriate, even stating their willingness to endure permanent market-access bans in lieu of monetary orders. They argued strenuously that there was no need for – and that they had no ability to pay – any significant monetary penalties.

[132] We agree that broad market-access bans are warranted in this case, in respect of each of the Respondents. As noted, we also consider that market-access bans alone for Graf and Hayward would provide insufficient specific and general deterrence.

2. Corporate Respondents

[133] We conclude that specific and general deterrence require that none of the corporate Respondents should have access to investors' money, ever again. This warrants an array of permanent market-access bans. In addition to the bans sought by Staff, we consider it also necessary to include a prohibition on trades and purchases – by anyone – of securities or derivatives of each corporate Respondent; no new investors must be burdened by involvement with these companies. But for the chance of further recovery of investor money, we would have also ordered a significant administrative penalty against each corporate Respondent.

3. Appropriate Sanctioning Terms

[134] We turn now to the specific terms of sanctions appropriate in this case: the durations of necessary market-access bans and the amounts of administrative penalties.

[135] We are generally satisfied that market-access bans of the types and durations sought by Staff would, if accompanied by payment of appropriate administrative penalties, be in the public interest. There is one exception, however: the proposed ban on Graf's and Hayward's use of securities law exemptions. The misconduct in this case turned largely on misuse of, or unfounded reliance on, such exemptions. We believe that this aspect should be addressed directly, by bans of longer duration on Graf's and Hayward's future access to such exemptions. In practical terms this would mean that were either Graf or Hayward to seek again to raise money in the capital market (after other market-access bans have expired) they could do so only through appropriately qualified registrants and using a prospectus. This additional protective measure would directly address, and further protect investors and the capital market from a recurrence of, some of the abuses found here. We conclude that in Graf's case, this denial should be permanent; in Hayward's case (coupled with the other sanctions discussed), 20 years would be sufficient.

[136] Given our conclusion above that the levels of specific and general deterrence required here necessitate significant administrative penalties against both Graf and Hayward, we now consider what amounts would adequately and appropriately serve that protective purpose.

[137] In light of the circumstances here, and mindful of the outcomes of other matters discussed above, an administrative penalty in the amount originally sought by Staff against Graf would prima facie be supportable, although the public interest could still be served by a lower administrative penalty if it were coupled with appropriate market-access bans. Using the same approach, we conclude that a lesser amount than initially sought by Staff would be appropriate for Hayward (again coupled with appropriate market-access bans).

[138] We have noted that the fact that administrative penalties impose a financial burden does not itself lead to disproportionality or unreasonableness in the *Walton* sense. We also observe that in *Walton*, the administrative penalties appealed from had been ordered in conjunction with a second type of monetary sanction: disgorgement orders under section 198(1)(i) of the Act. No similar combination of monetary orders was sought against Graf or Hayward in the present case.

[139] Still, the fundamental principle of proportionality requires us to consider Graf's and Hayward's current claimed impecuniosity. Having regard to the individual Respondents' current

financial circumstances and the other factors discussed, we conclude that the public interest requires packages of sanctions coupling the mentioned market-access bans with administrative penalties at the lowest ends of the ranges ultimately proposed by Staff ($250,000 for Graf and $75,000 for Hayward). In our view such combinations of sanctions, of not less than the amounts and durations specified, are imperative in this case.

[140] To summarize, we conclude that it would be in the public interest to order the broad array of market-access bans proposed by Staff against each of the Respondents, supplemented by a ban on all trades and purchases of any securities or derivatives of the corporate Respondents, and coupled with administrative penalties of $250,000 against Graf and $75,000 against Hayward. The market-access bans would be permanent in respect of the corporate Respondents, and (subject to payment of the respective administrative penalties) remain in effect generally for 20 years against Graf (but with a permanent denial of exemptions for her) and 10 years against Hayward (with a 20-year denial of exemptions for him).

VII. COST RECOVERY

A. Relevance of Purported Fear of Imprisonment

[141] As a preliminary to our broader analysis of the principles and evidence pertinent to the issue of cost-recovery orders, we consider Graf's assertion that the entire hearing had been necessitated by the need to defend Staff's fraud allegations against her (and against HII), largely because the spectre of imprisonment for fraud induced in her a state of "sheer panic". In explanation, she quoted to us from the Supreme Court of Canada decision in *R. v. Théroux*, [1993] 2 S.C.R. 5. The *Criminal Code* (Canada) fraud provision she quoted (from para. 12 of *Théroux*) included words to the effect that a conviction for criminal fraud could result in up to 10 years of imprisonment.

[142] This imprisonment argument was a red herring – unconvincing and irrelevant.

[143] Although *Théroux* was a criminal law case, its exposition of the elements of fraud has been adopted into securities law. We applied it in the Merits Decision (and, in so doing, dismissed the sole remaining fraud allegation against HII and Graf). The copy of *Théroux* from which Graf quoted had been circulated by Staff as part of their Merits Hearing submissions, which were delivered after most of the evidentiary portion of the Merits Hearing had concluded.

[144] There was never any prospect of imprisonment as a result of this proceeding. Staff's 28 August 2014 notice of hearing set out the various allegations in issue, including fraud. It also identified the provisions of the Act under which Staff might seek orders if the allegations were proved, as well as the scope of such potential orders. None of those provisions contemplates imprisonment. An ASC hearing panel does not have the authority to order imprisonment.

[145] Graf's supposed fear was unfounded. More importantly, we do not believe that it was genuine. Her own explanation tied it to a source (Staff's Merits Hearing submissions) arising in the concluding stages of the Merits Hearing. Fear of imprisonment could not have explained her conduct before then. Moreover, nothing in that apparent source for this claimed fear offered any reasonable basis for her to have imagined that she risked imprisonment in this proceeding. We do not believe she was truly of that impression.

[146] Graf's claim to have defended herself out of a fear of imprisonment was thoroughly unconvincing. It was, in any case, irrelevant. A respondent is fully entitled to defend against allegations; no explanation is required for doing so.

[147] That said, in the course of Graf's arguments on this topic it became apparent that, potential sanctioning consequences apart, she had been greatly troubled by Staff's fraud allegations, and considered them unfounded. The existence of those allegations, the part they played in the investigation and hearing, and their ultimate withdrawal or dismissal were all relevant to cost recovery. We considered them in our analysis, to which we now turn.

B. Relevant Principles and Circumstances

1. Appropriateness of Cost Recovery Here

[148] Having regard to the principles underlying cost-recovery orders (discussed above), this case in our view is clearly one in which recovery of costs reasonably attributable to the misconduct found should be recovered.

[149] This was a complex case involving a major investigation and a rather lengthy hearing. Serious misconduct was proved. Perhaps most pertinent to the topic of cost recovery, we do not consider either that the Respondents made any discernable contribution to the efficiency of the hearing, or that Staff's conduct detracted from its efficiency. (We discuss below – and reject – a contrary suggestion by Graf and Hayward.) Indeed, we consider that the Respondents needlessly complicated and prolonged the hearing. In this regard, we do not criticize them for factors beyond their control, specifically their apparent inexperience in legal matters or unfamiliarity with legal processes. Rather, our observation relates to Hayward's and, more noticeably, Graf's penchants for irrelevant disputes, mischaracterization of evidence, and self-serving but wrong expositions of law. The Respondents were entitled to challenge the allegations, but this could have been accomplished with greater economy and efficiency had they focused more on the real issues. That they did not was, in our view, attributable not to a lack of expertise, but rather a deliberate choice. It is therefore appropriate that they, rather than (indirectly) other market participants whose fees fund the ASC, bear the associated costs.

[150] Graf and Hayward alluded frequently to what they portrayed as Staff behaviour that they painted as improper or inefficient (or both). Impropriety on Staff's part was not established. Nor was inefficiency in any sense that would fairly relieve the Respondents of responsibility for costs.

[151] One specific example put forward by Hayward will illustrate. In connection with the introduction of the Bennett Application into evidence at the Sanctions Hearing, Hayward suggested that it ought to have been "disclosed" by Staff very much earlier in the process, and that had this been done, "the entire proceeding from start to finish would have been reduced drastically". Accordingly, Hayward contended, "we should not be charged for costs related to [Staff] supplying late disclosure".

[152] For present purposes we leave aside the Respondents' recurrently-demonstrated confusion between things that must be disclosed by Staff to a respondent before a hearing, and the typically

much narrower category of material that any party is free to adduce as evidence during a hearing (if it is relevant). It was not evident that the Respondents suffered any prejudice. Whether or not it was included in Staff's pre-hearing disclosure, the Respondents themselves (as noted) possessed a copy of the Bennett Application even before the Merits Hearing began. Graf had signed the Bennett Application, and Hayward had witnessed Bennett signing it, so there could be no reasonable assertion that its existence or (except possibly in Hayward's case) its content surprised any of the Respondents. More germane to the present analysis is the extent of any associated procedural inefficiency attributable to Staff's handling of the document. As discussed, we ascribed little importance to the Bennett Application. It added nothing significant to the facts as otherwise established in the Merits Hearing. Nothing in the document, or in the interactions between Staff and the Respondents concerning the document, demonstrated any compelling reason to relieve any of the Respondents of responsibility for any otherwise recoverable costs.

[153] Concerning the allocation of responsibility for costs among the Respondents, we are satisfied that such responsibility is appropriately limited to the two individual Respondents, not to any of the companies. To a large extent this reflects the reality that the corporate Respondents were simply vehicles that operated in the capital market through Graf (and through Hayward, although his role was more limited). In part also, this reflects the central role that Graf played with all those companies. We are mindful too that monetary orders against the companies might be either meaningless (particularly given the insolvency and bankruptcy proceedings) or positively detrimental to any further prospects of financial recovery on the part of their respective investors, some of whom are victims of the misconduct found.

[154] As between the two individual Respondents, Graf's was clearly the more significant role in terms of the misconduct found (logically indicating a greater resource allocation at both the investigative and hearing stages), and she played a very active, indeed leading, role for the Respondents in the hearing. We are satisfied that she should bear a significantly greater responsibility for costs than Hayward.

[155] In these respects, we concur with Staff's general position on cost recovery. The Respondents' position that they should bear little or no responsibility for costs is, in our view, unreasonable. Their more specific alternative contention that their responsibility should not exceed the outcome negotiated by Bennett as part of her settlement is untenable. On this, it suffices to observe that (as discussed) a settlement generally does not communicate all the factors, considerations and reasoning underlying its particular terms, and is therefore unlikely to provide useful guidance as to specific outcomes appropriate for other proceedings or other parties.

2. Quantifying Recoverable Costs

[156] There was no dispute that the costs reflected in the Costs Statement were indeed incurred. We do not disagree in principle with Staff's approach to calculating recoverable costs. However, we consider that the specific application of that approach requires refinement, some of it significant.

[157] First, while we recognize that circumstances here (as, perhaps, in most cases) preclude any precise allocation of costs to specific allegations against specific respondents, we are not

persuaded that Staff's global 25% cost reduction fully or fairly reflected the outcomes of the Merits Hearing. We are also not persuaded by Graf's suggestion that a 70% global reduction is warranted.

[158] As discussed, serious misconduct was proved against both Graf and Hayward. On the other hand, other serious allegations were either withdrawn or unproved. The most significant of these were unquestionably the fraud allegations.

[159] We considered above, and rejected, Graf's imprisonment-related argument. That does not, however, diminish the relevance or significance of the unsuccessful allegations to the present analysis. Her success in defending against the fraud allegations should be fully recognized in any cost-recovery order.

[160] Staff specifically asserted that they made the 25% cost deduction to reflect the unproved fraud allegations. We are satisfied that this adjustment is inadequate in the circumstances. While appreciating that it may be impossible to quantify precisely the scale of resources expended in respect of any particular allegation, we are mindful that the fraud allegations were not the only allegations unproved, and that no allegations at all were proved against two of the original corporate respondents. We also take into account that Bennett was among the original respondents. Although we accept that Staff endeavoured to factor in the separate resolution of the allegations against her, it appeared possible that some of the investigation and hearing-preparation costs claimed here may still to some uncertain extent have involved Staff's concerns about Bennett's conduct.

[161] In the circumstances, and given the obstacles to complete precision, we would reduce the aggregate recorded costs of $170,281.37 by 50%. In our view this would amply reflect the evolution of the investigation and hearing, the separate resolution of the allegations against Bennett, and Staff's incomplete success in proving the remaining allegations. Even if perhaps generous to the Respondents, in all the circumstances we consider the outcome appropriate.

[162] Accordingly, we consider a total of $85,000 to be fairly recoverable here. The Respondents did not dispute Staff's 75% and 25% allocation of costs as between Graf and Hayward. Those proportions in our view do fairly reflect two things: a fair approximation of the Staff resources directed toward their respective misconduct; and the manner in which Graf and Hayward (she with the leading role between them) conducted themselves (in terms of contributions to efficiency) during the hearing.

[163] In the result, we consider it appropriate that Graf pay $63,750, and that Hayward pay $21,250, of the investigation and hearing costs.

VIII. CONCLUSION

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

Graf

[165] Against Graf we order that:

- under section 198(1)(d) of the Act, she must resign all positions she holds as a director or officer of any issuer, registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository or recognized quotation and trade reporting system;

- until the later of 21 April 2036 and the date on which the administrative penalty ordered against her below has been paid in full to the ASC:

    - under section 198(1)(b), she must cease trading in or purchasing securities or derivatives;

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

    - under section 198(1)(e), she is prohibited from becoming or acting as a director or officer (or both) of any issuer (or other person or company that is authorized to issue securities), registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository or recognized quotation and trade reporting system;

    - under section 198(1)(e.1), she is prohibited from advising in securities or derivatives;

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

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

- under section 198(1)(c), all of the exemptions contained in Alberta securities laws do not apply to her, permanently;

- under section 199, she must pay an administrative penalty of $250,000; and

- under section 202, she must pay $63,750 of the costs of the investigation and hearing.

Hayward

[166] Against Hayward we order that:

- under section 198(1)(d) of the Act, he must resign all positions he holds as a director or officer of any issuer, registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository or recognized quotation and trade reporting system;

- until the later of 21 April 2026 and the date on which the administrative penalty ordered against him below has been paid in full to the ASC:

    - under section 198(1)(b), he must cease trading in or purchasing securities or derivatives;

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

    - under section 198(1)(e), he is prohibited from becoming or acting as a director or officer (or both) of any issuer (or other person or company that is authorized to issue securities), registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository or recognized quotation and trade reporting system;

    - under section 198(1)(e.1), he is prohibited from advising in securities or derivatives;

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

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

- under section 198(1)(c), all of the exemptions contained in Alberta securities laws do not apply to him, until the later of 21 April 2036 and the date on which the administrative penalty ordered against him below has been paid in full to the ASC;

- under section 199, he must pay an administrative penalty of $75,000; and

- under section 202, he must pay $21,250 of the costs of the investigation and hearing.

HII, First Base, HCC, HEI, HC2, HE2, 149 and 153

[167] In respect of the corporate Respondents, we order, with permanent effect, that:

- under section 198(1)(a) of the Act, all trading in or purchasing of securities or derivatives of HII, First Base, HCC, HEI, HC2, HE2, 149 and 153 must cease;

- under section 198(1)(b), each of HII, First Base, HCC, HEI, HC2, HE2, 149 and 153 must cease trading in or purchasing securities or derivatives;

- under section 198(1)(c), all of the exemptions contained in Alberta securities laws do not apply to HII, First Base, HCC, HEI, HC2, HE2, 149 and 153;

- under section 198(1)(c.1), each of HII, First Base, HCC, HEI, HC2, HE2, 149 and 153 is prohibited from engaging in investor relations activities;

- under section 198(1)(e.1), each of HII, First Base, HCC, HEI, HC2, HE2, 149 and 153 is prohibited from advising in securities or derivatives;

- under section 198(1)(e.2), each of HII, First Base, HCC, HEI, HC2, HE2, 149 and 153 is prohibited from becoming or acting as a registrant, investment fund manager or promoter; and

- under section 198(1)(e.3), each of HII, First Base, HCC, HEI, HC2, HE2, 149 and 153 is prohibited from acting in a management or consultative capacity in connection with activities in the securities market.

[168] This proceeding is concluded.

21 April 2016

For the Commission:

"original signed by"
Stephen Murison

"original signed by"
Tom Cotter

"original signed by"
Fred Snell, FCA