ALBERTA SECURITIES COMMISSION

DECISION

Citation: Delta 3 Capital Corporation Inc., Re, 2010 ABASC 465 **Date: 20101004**

**Delta 3 Capital Corporation Inc., Darrell W. Dunn,
Michael Gottselig and Lucas "Luke" Brzeski**

Panel:	Stephen Murison Beverley Brennan, FCA Roderick McKay, FCA
Representation:	Richard Finn for Commission Staff Darrell Dunn for himself Michael Gottselig for himself Lucas "Luke" Brzeski for himself
Submissions Completed:	3 September 2010
Date of Decision:	4 October 2010

I. INTRODUCTION

[1] Delta 3 Capital Corporation Inc. ("Delta"), Darrell W. Dunn ("Dunn"), Michael Gottselig ("Gottselig") and Lucas "Luke" Brzeski ("Brzeski") acted contrary to Alberta securities laws and the public interest by trading and distributing securities without the requisite registration and prospectus, and by making prohibited representations to investors. These conclusions, and the underlying facts, are discussed in the decision (the "Merits Decision", cited as *Re Delta 3 Capital Corporation Inc.*, 2010 ABASC 328) issued by this panel of the Alberta Securities Commission (the "Commission") on 20 July 2010 following a hearing (the "Merits Hearing") into the merits of allegations levelled by Commission staff ("Staff"). This decision should be read together with the Merits Decision.

[2] Following issuance of the Merits Decision, we received written submissions from Staff, Dunn, Gottselig and Brzeski on the issue of whether – and, if so, what – orders ought to be made against any or all of Delta, Dunn, Gottselig and Brzeski (together, the "Respondents"). For the reasons given below, we are ordering the following:

- in respect of Delta: a permanent ban on trades and purchases of its securities; and a permanent denial of its use of exemptions under Alberta securities laws;

- against Dunn: securities-trading-and-purchasing, use-of-exemptions and director-and-officer bans, in each case for ten years; a $60 000 administrative penalty; and payment of $7600 of the investigation and hearing costs;

- against Gottselig: securities-trading-and-purchasing, use-of-exemptions and director-and-officer bans, in each case for five years; a $30 000 administrative penalty; and payment of $7600 of the investigation and hearing costs; and

- against Brzeski: securities-trading-and-purchasing, use-of-exemptions and director-and-officer bans, in each case for three years; a $15 000 administrative penalty; and payment of $7600 of the investigation and hearing costs.

II. THE MISCONDUCT

[3] It will be helpful to recount briefly the facts and our findings from the Merits Decision.

[4] Dunn, Gottselig and Brzeski (together, the "Individual Respondents") were the principals of Delta. Together – with Dunn leading – they developed what they called a Secured T-Bill Trading Program (the "Program"), from which the investors were to derive fixed, periodic returns from trading in United States government treasury bills ("T-Bills"). The actual trading was to be conducted by a Dean Joseph Frattinger ("Frattinger"), an acquaintance of Dunn who operated through a company in Hong Kong.

[5] Delta entered into investment agreements (the "Investment Agreements") with four investors who paid a total of US$1 million to participate in the Program. The Investment Agreements specified the rates and – incorrectly – the timing of the returns to be received by the investors. For its role in the Program, Delta was also to receive a share of the T-Bill trading profits, although this apparently was never documented.

[6] Delta gave Program investors informational and promotional material (the "Program Information"), which included extensive commentary on the nature and safety of T-Bills. However, it appeared that the investors themselves were not meant to buy, own or sell T-Bills. Rather, under the Program, investors were sold investment contracts or profit-sharing agreements – "securities" within the meaning of the *Securities Act*, R.S.A. 2000, c. S-4 (the "Act"). Everything depended, ultimately, on Frattinger's obligations to the investors, his performance of those obligations and their enforceability. This and the associated material risks were not adequately communicated to the investors.

[7] The US$1 million was sent to Hong Kong, where it apparently came under Frattinger's control. None of the Program investors – nor, we understand, Delta itself – has received any return on or of that money.

[8] We found the activity of each of the Respondents to involve trading and distributing securities. The Respondents were not registered appropriately or at all for the trading, and there was no prospectus for the distributions. We therefore found that each of the Respondents contravened the registration and prospectus requirements of the Act – the trading and distributions were illegal – and that their conduct was also contrary to the public interest.

[9] We also found that each of the Respondents made statements to the Program investors that contravened section 92(4.1) of the Act and that this too was contrary to the public interest.

III. POSITIONS OF THE PARTIES

A. Staff

[10] Staff sought sanction orders that would permanently end trading and purchasing of securities of Delta and deny Delta the use of exemptions under Alberta securities laws. Staff also sought securities-trading-and-purchasing, use-of-exemptions and director-and-officer bans of ten years for Dunn, five years for Gottselig and three years for Brzeski; and administrative penalties of $60 000 against Dunn, $30 000 against Gottselig and $17 500 against Brzeski.

[11] In Staff's submission, any "conduct that has the purpose or effect of defeating or weakening the protective measures afforded by the [Act]" – such as the Respondents' illegal trading and distributions – is serious and "ought to be deterred". According to Staff, the Respondents' prohibited representations to the Program investors were also "serious contraventions . . . worthy of significant sanction". However, Staff distinguished among the Respondents on the basis of their circumstances and respective roles – for example, observing that Delta has apparently "ceased to operate as a going concern", and noting Dunn's history as a registrant under the Act and Gottselig's "significant experience in the capital markets as a securities salesperson", contrasted with Brzeski's "relative lack of prior securities industry experience" and what Staff described as his "smaller role in the illegal distribution".

[12] Staff also sought orders that the Individual Respondents pay equal portions totalling $26 680.65 of the costs of the investigation and hearing.

B. The Respondents

[13] The Individual Respondents each suggested that the orders sought by Staff would be excessive. All claimed an inability to pay monetary orders, and suggested that those sought by Staff (or those together with the other orders sought) would be punitive. Delta itself did not

make a submission on the issue of appropriate orders, and (unlike the situation in the Merits Hearing) it was not apparent that Dunn in making his submission was also acting on the company's behalf.

[14] In Dunn's submission, he emphasized that there had been "no deliberate intent to ignore" Alberta securities laws – that what happened was "neither malicious nor deliberate" but, essentially, a series of events attributable to his initial failure to correctly identify the investments in the Program as "securities". In that regard, Dunn referenced a "discussion with the lawyer regarding the contract being a security", subsequently stating: "It simply never occurred to me that a 'contract' would be considered a security, and obviously, in the context of what we were doing, it did not occur to those that we sought an opinion from either." Dunn pointed to what he termed his clear "acceptance of accountability", and said that he had "always been very straightforward and open with the Commission". Dunn expressed "significant frustration" that Frattinger – not a respondent in this proceeding – "appears to have walked away completely unscathed". Dunn acknowledged the harm done to – the "severe negative impact on" – the Program investors. He stated that neither he nor any of the other Respondents received any direct benefit from the Program. Dunn declared that "the impact of this entire episode on my wife and myself has been devastating", that "[w]hat few resources I had early on went into supporting the development of the [P]rogram", that he is effectively bankrupt, and that monetary orders would "simply [ensure] that my wife and I have no future". Calling for "some leniency", Dunn urged that any market-access orders against him be limited to five years and that no monetary orders be made against him.

[15] Gottselig's submission (like Brzeski's) was in many respects very similar (in parts, identical) to Dunn's: what happened was a result of error, not malicious, deceptive or deliberate intent; the Respondents had acted on legal advice – "a verbal opinion . . . that we were not selling a security as defined by the [A]ct"; the Respondents had "co-operated fully with the investigation"; and none of the Respondents received any direct benefit. Gottselig stated that he "recognized the error of my ways", and he acknowledged the harm done to the Program investors. Gottselig stated that "the impact of this entire episode on my wife and myself has been horrendous", that he has "been ruined personally, professionally and financially", and that his savings are gone and he is "on the edge of bankruptcy", with "very little future upside for any further 'finance' activity/career on my part". Gottselig neither agreed with nor disputed the market-access orders sought against him, but urged a carve-out to permit limited personal trading. He asked that no monetary orders be made against him.

[16] Brzeski similarly submitted that what happened was a result of error, not malicious or deliberate intent; that the Respondents had acted on a "lawyer's opinion"; that the Respondents had "always been very straightforward and open with the Commission"; and that none of the Respondents received any direct benefit. Brzeski acknowledged the harm done to the Program investors, and stated: "I am very clear that these issues are extremely serious and about what my responsibility is in these matters". While Brzeski (like Dunn) noted that Frattinger "appears to have walked away completely unscathed", Brzeski went further, suggesting that Staff have ignored Frattinger's role or evidence relating to it. Brzeski said that "[w]hat few resources I had early on went into supporting the development of the [P]rogram", that he has lost his home and two vehicles and that he is effectively bankrupt. Asking for "some leniency", Brzeski urged that no monetary orders be made against him and that any market-access orders against him be limited to one year (with a carve-out to permit limited personal trading, including his being

enabled, as we understand it, to be remunerated in shares of companies for which he provides business development consulting services and then, presumably, to sell or otherwise realize on such shares).

IV. SANCTIONS

A. Sanctioning Principles and Factors

[17] The Commission's authority to order sanctions in the public interest under sections 198 and 199 of the Act is to be exercised prospectively, with a view to protecting against and preventing future harm to Alberta investors and our capital market, not to punishing or remedying capital market misconduct (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission*), 2001 SCC 37 at paras. 39-45). In making these protective and preventative orders, the need for specific and general deterrence is an important consideration (*Re Cartaway Resources Corp*., 2004 SCC 26 at paras. 52-62; and *Re Podorieszach*, 2004 ABASC 567 at para. 17).

[18] In determining what, if any, sanctions are in the public interest in respect of a particular respondent in the circumstances of a particular case, several factors may be relevant, including those identified in *Re Lamoureux*, [2002] A.S.C.D. No. 125 at para. 11 (affirmed on other grounds 2002 ABCA 253), and restated in *Re Workum and Hennig*, 2008 ABASC 719 at para. 43:

- the seriousness of the findings against the respondent and the respondent's recognition of that seriousness;
- characteristics of the respondent, including capital market experience and activity and any prior sanctions;
- any benefits received by the respondent and any harm to which investors or the capital market generally were exposed by the misconduct found;
- the risk to investors and the capital market if the respondent were to continue to operate unimpeded in the capital market or if others were to emulate the respondent's conduct;
- decisions or outcomes in other matters; and
- any mitigating considerations.

B. Application of Sanctioning Principles and Factors

[19] We summarize here our analysis of how the sanctioning principles and key factors apply in this case.

Seriousness of Misconduct and Harm Done

[20] The Respondents traded and distributed securities illegally – without the requisite registration or a prospectus. As discussed in the Merits Decision, this deprived the Program investors of fundamental protections to which they were entitled under Alberta securities laws. This was serious misconduct.

[21] In conjunction with this serious misconduct, the Respondents engaged in other serious misconduct – the making of prohibited representations to the Program investors. As noted, the Respondents erred in describing the timing of the returns to be received by the investors. More fundamentally, the Respondents failed to adequately communicate the very nature of what they were selling, the centrality to the Program of Frattinger's role and obligations and the enforceability of those obligations, and the associated material risks. As mentioned in the Merits

Decision, enticing investment by means of prohibited representations is clearly inconsistent with fairness to investors and capital market integrity.

[22] As noted, the Individual Respondents submitted that what happened stemmed from an initial failure to appreciate that they were selling securities. We accept that they lacked that appreciation. However, whatever they thought they were selling or (as Dunn expressed it during the Merits Hearing) "facilitating", that hardly explains or justifies a failure to describe accurately to the Program investors just what they were being asked to put money into.

[23] Each of the Individual Respondents asserted that he had no malicious intent. We accept that too. Even so, the Respondents' misconduct was serious.

[24] Moreover, the Respondents' serious misconduct has resulted in serious harm to the Program investors as well as jeopardy to the integrity of the Alberta capital market generally. The investors have seen no returns on, or of, their invested money. The indications are that recovery of that money will be, at best, a difficult process. Further, others learning of the plight of these investors may lose confidence in our capital market.

[25] In sum, the seriousness of the Respondents' misconduct and the resulting harm argue for significant sanction.

Recognition of Seriousness of Misconduct

[26] Each of the Individual Respondents claimed to recognize the seriousness of his misconduct.

[27] At the same time, some or all of the Individual Respondents seemed to suggest that the problems originated in a legal opinion – an opinion that, according to Dunn's testimony at the Merits Hearing, had not, in fact, been sought or provided.

[28] More troubling to us is that the Individual Respondents appear to consider, even now, that, had they and Delta but realized they were selling securities, they could – and would – simply have put together something called an offering memorandum, and all would have been well. That reflects a flawed (oversimplified, at least) understanding of securities laws and the terms and conditions of registration and prospectus exemptions. More seriously, it indicates to us that the Individual Respondents lack a full appreciation of the disparity between what the Respondents did and what they ought to have done, both in relation to trading and distributions and in relation to investor communications. Preparing a satisfactory offering memorandum – even assuming that alone would have brought the Respondents into compliance with securities laws – would have required much more than simply repackaging the Program Information and Investment Agreements into a document titled "offering memorandum". Proper disclosure to investors would have required the Respondents to have understood, and to have communicated clearly, exactly what they were engaged in: not the sale of T-Bills, but rather the sending of money to Hong Kong for use by Frattinger who would then – in the apparent absence of any documented obligations to the investors or to Delta itself – generate and share with the investors some substantial profits plus (presumably) the return of the money originally invested. Fairly communicated, the enormous risks inherent in the Program might well have dissuaded reasonable investors from participating in the first place.

[29] In the circumstances, we are not persuaded that any of the Individual Respondents (or, through them, Delta) fully appreciates the nature or the seriousness of their misconduct. We are therefore concerned that, absent significant sanction, the Respondents could again make similarly serious errors in the capital market.

[30] That said, we are in no doubt that the Individual Respondents have suffered deeply – reputationally and financially – as a result of their involvement with the Program. This is not the same as appreciating the seriousness of their misconduct, but it is a factor we consider below.

[31] In short, we are not persuaded that the Respondents truly appreciate the seriousness of their misconduct. This factor, in our view, reinforces the need for significant sanction.

Benefit to Respondents

[32] The evidence was that the Respondents did not invest in the Program. At the same time, they clearly intended – and expected – to profit from their roles in the Program, anticipating that Frattinger would send Delta a share of the trading profits he was to generate from the Program investors' money.

[33] We understand that no share of the trading profits – or any other direct benefit from the Program – has been received by Delta or (through Delta) the Individual Respondents. Further, Dunn's and Brzeski's submissions indicated that, "early on", limited personal resources "went into supporting the development" of the Program, which resources they apparently have not recouped.

[34] Moreover, according to the Individual Respondents' submissions, the Individual Respondents face a lawsuit from Program investors, and they have endured opprobrium as well as deep financial pain as a result of their involvement with the Program.

[35] In short, while the Respondents meant to benefit financially from the Program, they did not. The Individual Respondents have in fact suffered significantly in consequence of their involvement, and it is unlikely that they will soon forget this painful episode. This suggests that the Individual Respondents would be less likely to engage in the same or similar capital market misconduct, and hence to argue for some moderation in sanction against them. For Delta, given its unrealized expectation of benefit, this is a neutral factor.

Capital Market History

[36] Both Dunn and Gottselig have histories in the capital market – Dunn having been a registrant in the past and Gottselig having been one at the time of the Program. That ought to have given them, at least, an understanding that those engaged in raising money from investors may be subject to securities laws, and that investors – in anything – ought not to be misinformed about the nature or risks of whatever is being sold. This reinforces the need for significant sanction against them, despite their not having been previously sanctioned by the Commission.

[37] As for Brzeski, he does not appear to have a history in the capital market, and he has not been previously sanctioned by the Commission. We consider that this calls for some moderation in sanction against Brzeski.

Mitigating Factors

[38] Each of the Individual Respondents suggested that his current dire financial circumstances argue for leniency in sanction, and specifically against any administrative penalty.

[39] The Commission has not generally accepted poverty as a mitigating factor. That is because poverty by itself does not preclude, or indicate a diminished risk of, a recurrence of misconduct. Further, an administrative penalty can be an effective deterrent – specific or general – even when a respondent's financial circumstances may make payment of the penalty difficult. We do not find the Individual Respondents' current financial straits to be a mitigating factor, nor a compelling argument against an otherwise-warranted administrative penalty.

[40] Dunn and Brzeski reminded us that Frattinger – under whose control the Program investors' money seems to have ended up – is not a respondent and apparently has not suffered any consequences for his involvement with the Program. That may well be a source of dissatisfaction to some or all of the Individual Respondents, but it does not amount to mitigation.

[41] In short, neither poverty nor Frattinger's non-involvement in this proceeding constitutes a mitigating factor.

Individual Respondents' Re-entry into Capital Market

[42] We accept that the practical likelihood of Dunn seeking to regain access to investors' money in the Alberta capital market is slight, in lesser part due to his age but more significantly owing to the embarrassment he has suffered.

[43] Gottselig suggested something similar in respect of himself. Despite his very recent status as a registered mutual fund securities salesperson, we are prepared to accept that the practical likelihood of his seeking re-entry into the capital market is also limited.

[44] We consider these circumstances to diminish somewhat the risk that Dunn and Gottselig pose to Alberta investors and our capital market, and hence to favour some moderation in sanction against them.

[45] Brzeski did not claim age (he is younger than Dunn and Gottselig) or embarrassment as fatal barriers to his re-entry into the capital market. His submission indicated that he wishes to resume or continue providing business development consulting services. It is unclear precisely what that line of business entails, but it does not obviously preclude engaging in or advising on capital-raising. This indicates to us that, as against Brzeski, significant sanction – commensurate with protecting the investing public – is appropriate.

Specific and General Deterrence

[46] For the reasons given, we consider that this case calls for orders that will provide significant specific deterrence – to avoid future capital market misconduct by any of the Respondents – moderated appropriately (as discussed) to reflect the harm the Individual Respondents themselves have suffered, Brzeski's lack of capital market history and the limited likelihood of Dunn and Gottselig seeking to re-enter the capital market. We consider market-access restrictions essential, but alone insufficient, for this purpose.

[47] This case demonstrated the seeming ease with which the Respondents, through an ill-considered, amateurishly-constructed and illegally-operated scheme, were able to raise US$1 million from Alberta investors. Lest any observer consider emulating that dubious success, we consider it essential that our orders deliver a significant measure of general deterrence. For this purpose also, we consider that market-access restrictions are essential. However, we are convinced that appropriate general deterrence also requires significant monetary orders – administrative penalties. Nothing else would send the same clear message to others that contraventions, as seen here, will come at a direct financial cost.

Conclusion

[48] Having considered the principles and key factors relevant to the issue of sanction in this case, we conclude that substantial market-access bans are warranted against all Respondents, and that, for their contraventions, the Individual Respondents must also face substantial administrative penalties. Having learned that Delta has essentially ceased operation, and in any event being reluctant to impose on the company a financial burden that might diminish yet further the Program investors' prospects of recovering the money they paid under the Investment Agreements, we agree with Staff that monetary orders against the company are unnecessary.

C. Sanctions Ordered

[49] We agree with the nature of the orders that Staff proposed against each of the Respondents: in respect of Delta, bans on trading or purchasing its securities and a ban on its use of exemptions; and against the Individual Respondents, bans on their trading or purchasing securities, using exemptions and acting as directors and officers, coupled with administrative penalties.

[50] We also agree with Staff's approach of distinguishing, among the Individual Respondents, in accordance with their respective degrees of responsibility and their differing capital market histories, such that the most significant orders be made against Dunn, and the least against Brzeski, in roughly the proportions proposed by Staff.

[51] Despite the submissions of the Individual Respondents calling for much reduced sanctions, we also consider that, generally, what Staff proposed is appropriate in the public interest. We do not consider Staff's proposals punitive. To the contrary, we consider that the orders sought would, generally, reflect fairly both the protection and deterrence required in the circumstances and the factors warranting moderation in sanction. The much lesser sanctions suggested by the Individual Respondents would, in our view, fall far short of providing the necessary protective and deterrent effect and, indeed, send a troubling message to others who might otherwise seek to emulate the Respondents' misconduct.

[52] We do consider that certain adjustments to the orders sought by Staff are called for. First, the factors discussed lead us to conclude that an administrative penalty somewhat lower than sought against Brzeski is warranted. Second, we are satisfied that the public interest would not be jeopardized by carve-outs to permit limited (and supervised) personal securities activities by the Individual Respondents. Third, given that the notice of hearing made no mention of Staff seeking trading-and-purchasing bans in respect of exchange contracts (in addition to securities), we decline to so extend such orders.

[53] Accordingly, considering that it is in the public interest to do so, we order that:

Delta

- under sections 198(1)(a) and (c) of the Act, all trading in or purchasing of securities of Delta cease, and all of the exemptions contained in Alberta securities laws do not apply to Delta, permanently;

Dunn

- under sections 198(1)(b) and (c), Dunn cease trading in or purchasing securities, and all of the exemptions contained in Alberta securities laws do not apply to him, until (and including) 4 October 2020, except that this order does not preclude Dunn from trading in or purchasing securities through a registrant (who has first been given a copy of this decision) in:
    - registered retirement savings plans ("RRSPs"), registered retirement income funds ("RRIFs") or registered education savings plans ("RESPs") (as defined in the *Income Tax Act* (Canada)) or locked-in retirement accounts for the benefit of one or more of Dunn, his spouse and his children;
    - one other type of account for Dunn's benefit; or
    - both;
- under sections 198(1)(d) and (e), Dunn resign all positions he holds as a director or officer of any issuer, and he is prohibited from becoming or acting as a director or officer (or both) of any issuer, until (and including) 4 October 2020; and
- under section 199, Dunn pay an administrative penalty of $60 000;

Gottselig

- under sections 198(1)(b) and (c), Gottselig cease trading in or purchasing securities, and all of the exemptions contained in Alberta securities laws do not apply to him, until (and including) 4 October 2015, except that this order does not preclude Gottselig from trading in or purchasing securities through a registrant (who has first been given a copy of this decision) in:
    - RRSPs, RRIFs or RESPs or locked-in retirement accounts for the benefit of one or more of Gottselig, his spouse and his children;
    - one other type of account for Gottselig's benefit; or
    - both;
- under sections 198(1)(d) and (e), Gottselig resign all positions he holds as a director or officer of any issuer, and he is prohibited from becoming or acting as a director or officer (or both) of any issuer, until (and including) 4 October 2015; and
- under section 199, Gottselig pay an administrative penalty of $30 000; and

Brzeski

- under sections 198(1)(b) and (c), Brzeski cease trading in or purchasing securities, and all of the exemptions contained in Alberta securities laws do not apply to him, until (and including) 4 October 2013, except that this order does not preclude Brzeski from receiving securities as remuneration for services rendered in the course of a consulting business not involving advising or dealing in securities, or

from trading in or purchasing those or other securities through a registrant (who has first been given a copy of this decision) in:

- RRSPs, RRIFs or RESPs or locked-in retirement accounts for the benefit of one or more of Brzeski, his spouse and his children;
- one other type of account for Brzeski's benefit; or
- both;

- under sections 198(1)(d) and (e), Brzeski resign all positions he holds as a director or officer of any issuer, and he is prohibited from becoming or acting as a director or officer (or both) of any issuer, until (and including) 4 October 2013; and
- under section 199, Brzeski pay an administrative penalty of $15 000.

V. COSTS

[54] Staff tendered a bill of costs, together with supporting documentation, showing that costs of $20 623.93 had been incurred in the investigation and costs of $15 100.29 in the hearing. These amounts were not disputed. Staff reduced the investigation costs by $150 to account for duplicative legal effort, and proposed allocating the remaining investigation costs equally among the four Respondents, but asked that only the Individual Respondents (not Delta) pay their allocated shares. Staff proposed to reduce the hearing costs by 25% to recognize contributions to hearing efficiency, but to allocate the reduced total equally among only the Individual Respondents, and to have each pay such allocated portion.

[55] The Individual Respondents pointed, first, to what they suggested was – from the outset – a posture of openness and forthrightness in their dealings with Staff and, second, a contribution made to the efficiency of this proceeding by their (and Delta's) statements of admissions (the "Admissions") – factors, they contended, militating against significant (or any) costs orders. They also contended that their current dire financial straits argue against any monetary orders at all, including costs orders.

[56] Costs orders are not sanctions. They are a means of recovering, from a respondent found to have engaged in capital market misconduct, certain costs that would otherwise be borne indirectly by other, law-abiding market participants whose fees fund the Commission's operations. It is generally appropriate that a respondent be required to pay at least a portion of the costs of the investigation and hearing that led to the finding of misconduct against the respondent. In assessing the quantum of a costs order, the extent of the respondent's contribution to the efficient conduct and ultimate resolution of the proceeding is an important consideration.

[57] Poverty is an unconvincing argument against an otherwise-warranted costs order. If a respondent found (through an investigation and hearing) to have engaged in capital market misconduct is not required to pay costs incurred in the investigation and hearing because the respondent's financial circumstances may make payment of a costs order difficult, the burden would be left wholly on the law-abiding market participants on whose fees the Commission relies. Further, a costs order, regardless of a respondent's financial circumstances, is a means by which the Commission promotes procedural efficiency in the conduct of other enforcement proceedings.

[58] We are satisfied that the types of costs claimed are appropriately claimed under section 202 of the Act and the associated *Alberta Securities Commission Rules (General)* (the "Rules") in force at all material times. However, we must reduce the hearing costs by $1700

(rounded upwards) to account for charges in excess of the daily maximum for hearing administration costs prescribed in the Rules.

[59] As to the Respondents' claimed contributions to the efficiency of the investigation and hearing, we consider them at best somewhat exaggerated. Dunn clearly took the leading role among the Respondents in interacting with Staff and, indeed, during the Merits Hearing itself – just as the evidence showed he did with the Program. His behaviour in the course of the investigation – specifically, during his investigative interview (the transcript of which was in evidence), reinforced by some of his remarks during the Merits Hearing – evinced belligerence towards a Staff investigator. That could hardly be said to have enhanced the efficiency of the investigation. In short, we perceive no investigation efficiencies attributable to the Respondents.

[60] Concerning the hearing process, we are prepared to accept, as Staff appeared to concede, that the Admissions resulted in efficiencies and ultimately a somewhat abbreviated Merits Hearing. We agree with Staff's proposal to limit our orders to only 75% of the allowable hearing costs in recognition of the Respondents' contributions to hearing efficiency.

[61] We would, however, recognize that there were four, not three, Respondents involved in the hearing process, and therefore consider it appropriate to allocate both investigation and hearing costs equally among the four Respondents.

[62] For the reasons discussed above in connection with administrative penalties, we agree with Staff that it is unnecessary to order any payment of costs against Delta itself. We therefore consider it appropriate – and we order under section 202 of the Act – that each Individual Respondent pay one-quarter of the investigation and hearing costs (reduced as discussed) – that is, (rounded down) $7600 each.

VI. PROCEEDING CONCLUDED

[63] This proceeding is concluded.

4 October 2010

For the Commission:

"original signed by"
Stephen Murison

"original signed by"
Beverley Brennan, FCA

"original signed by"
Roderick McKay, FCA