ALBERTA SECURITIES COMMISSION

DECISION

Citation: Mandyland Inc., Re, 2013 ABASC 69 **Date: 20130225**

Mandyland Inc., Blue Sky Resorts Inc., Blue Sky Lease Inc.,
Dennis Wayne Uhersky, Margaret Janet Uhersky and Jeremy Peter Davis

Panel:	Kenneth B. Potter, QC Neil W. Murphy Richard A. Shaw, QC
Representation:	Deanna Steblyk and Taryn Montgomery for Commission Staff Phil Lalonde for Mandyland Inc., Blue Sky Resorts Inc., Blue Sky Lease Inc., Margaret Janet Uhersky and Jeremy Peter Davis Mark Klassen for Dennis Wayne Uhersky
Submissions Completed:	25 January 2013
Date of Decision:	25 February 2013

I. INTRODUCTION

[1] In a 15 October 2012 decision (the "Merits Decision", cited as *Re Mandyland Inc.*, 2012 ABASC 436), this panel of the Alberta Securities Commission (the "Commission") considered allegations of contraventions of Alberta securities laws and conduct contrary to the public interest levelled by Commission staff ("Staff") against six respondents (the "Respondents") – Mandyland Inc. ("Mandyland"), Blue Sky Resorts Inc. ("Blue Sky"), Blue Sky Lease Inc. ("BSL"), Dennis Wayne Uhersky ("Dennis"), Margaret Janet Uhersky ("Margaret") and Jeremy Peter Davis ("Davis"). In the Merits Decision, we found that:

- the Respondents illegally traded in and distributed securities of Mandyland, Blue Sky and BSL (the "Blue Sky Companies") in Alberta in breach of sections 75(1)(a) and 110(1) of the *Securities Act*, R.S.A. 2000, c. S-4 (the "Act");

- Dennis, Davis, Mandyland and Blue Sky made prohibited representations in breach of section 92(3)(b);

- all of the Respondents but Margaret variously made misrepresentations to investors in breach of section 92(4.1);

- the Respondents engaged in a course of conduct relating to Blue Sky Companies securities that they knew or reasonably ought to have known perpetrated a fraud on investors in breach of section 93(b);

- Dennis, Margaret and Davis (the "Individual Respondents") authorized, permitted or acquiesced in the breaches of the Blue Sky Companies;

- Dennis engaged in the unfair practice of putting unreasonable pressure on an investor to purchase Mandyland shares in breach of sections 92(3)(d) and 92(5)(a); and

- in so doing, the Respondents acted contrary to the public interest.

[2] The issuance of the Merits Decision concluded the first phase of this proceeding – the hearing into the merits of Staff's allegations (the "Merits Hearing"). In this second phase, we consider what, if any, sanction and costs orders ought to be made against each of the Respondents.

[3] We received written submissions from Staff and from the Respondents.

[4] The Merits Decision – which sets out the factual background and our reasons for our findings on the merits of Staff's allegations, and which defines certain terms that are used in this decision – should be read together with this decision.

[5] For the reasons set out below, we find that it is in the public interest to make sanction orders, and it is appropriate to make costs orders, against the Respondents, summarized as follows:

- each of the Blue Sky Companies:
    - is barred from trading in or purchasing securities and from using exemptions under Alberta securities laws, and all trading in or purchasing of its securities shall cease, until such time, if ever, that the Commission's Executive Director (the "Executive Director") issues a final receipt for a prospectus filed by it; and
    - must pay, jointly and severally with the other Respondents, $160 000 of the costs of the investigation and hearing; and
- each of the Individual Respondents:
    - is barred from trading in or purchasing securities and from using exemptions under Alberta securities laws, permanently;
    - is barred from acting as a director or officer of any issuer, permanently;
    - is barred from acting in a management or consultative capacity in connection with securities market activities, permanently;
    - must disgorge, jointly and severally with the other Individual Respondents, to the Commission $1 716 647.20;
    - must pay an administrative penalty of $150 000; and
    - must pay, jointly and severally with the other Respondents, $160 000 of the costs of the investigation and hearing.

II. PRINCIPLES AND FACTORS APPLICABLE TO SANCTION AND COSTS ORDERS

[6] The Act (under sections 198 and 199) authorizes the Commission to impose a variety of sanction orders when it considers it in the public interest to do so. These sanction orders include cease-trade orders, director-and-officer bans, bans on other types of capital-market activities, orders to pay to the Commission amounts obtained as a result of non-compliance with Alberta securities laws (referred to as disgorgement orders) and orders to pay administrative penalties.

[7] The Act (under section 202) also authorizes the Commission to order a respondent who has been found to have contravened Alberta securities laws or acted contrary to the public interest to pay all or a portion of the costs of or related to the associated hearing or the investigation that led to that hearing, or both.

[8] The general principles and factors applicable to our task of determining what, if any, sanction and costs orders ought to be ordered against each of the Respondents are not in dispute.

[9] The purpose of sanction orders is not to punish a respondent or to remedy harm caused by the respondent, but rather to prevent future harm to, and thereby protect, Alberta investors and the Alberta capital market (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at paras. 39-45). Sanction orders are aimed at achieving specific deterrence (preventing a particular respondent from engaging in the same or similar capital-market misconduct), as well as general deterrence (discouraging others from engaging in similar misconduct) – *Re Cartaway Resources Corp.*, 2004 SCC 26 at paras. 52-62; and *Re Podorieszach*, 2004 ABASC 567 at para. 17.

[10] Several factors may be relevant in determining what, if any, protective and preventive sanction orders are necessary in the public interest in respect of a particular respondent in the circumstances of a particular case, including the factors set out at para. 11 of *Re Lamoureux*, [2002] A.S.C.D. No. 125 (affirmed on other grounds 2002 ABCA 253), as restated at para. 43 of *Re Workum and Hennig*, 2008 ABASC 719 (affirmed 2010 ABCA 405):

- 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.

[11] Costs orders differ from sanction orders. As this Commission stated in *Re Marcotte*, 2011 ABASC 287 (at para. 20):

> A costs order is not a sanction, but rather 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 Commission'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.

III. PARTIES' POSITIONS

A. Staff

[12] Staff emphasized that the capital-market misconduct of the Respondents was "serious and extensive". Having regard to the sanctioning principles and factors, Staff contended that "[s]evere sanctions are warranted in the public interest to deter such conduct in the future".

[13] Staff submitted that the following sanction orders would be appropriate in the public interest:

- as against each of the Blue Sky Companies, a permanent prohibition against trading in securities and using exemptions under Alberta securities laws until such time, if any, as it has filed a prospectus with the Commission and been issued a receipt therefor; and

- as against each of the Individual Respondents:

    - a permanent prohibition against trading in or purchasing securities and using exemptions under Alberta securities laws;

    - a permanent prohibition against becoming or acting as a director or officer (or both) of any issuer;

    - joint and several liability for disgorgement in the amount of $1 716 647.20; and

    - a $150 000 administrative penalty.

[14] Staff also sought an order that the Respondents be jointly and severally liable for $180 000 of the costs of the investigation and hearing.

B. The Respondents

[15] The Respondents made joint submissions on sanction and costs orders (the "Joint Submissions").

[16] Having regard to the findings made in the Merits Decision and the sanctioning factors, the Respondents submitted that the following sanction orders "would be consistent with the public interest, would achieve the necessary specific and general deterrence . . . and would assure that the sanctions are prospective in nature and not punishment for previous conduct":

- 10-year market-access bans against each of the Individual Respondents; and

- a $100 000 administrative penalty imposed "globally" on all of the Respondents.

[17] Contending that they contributed to the efficient conduct and ultimate resolution of this proceeding, the Respondents also submitted that imposing a costs order of $50 000 "globally" on all of the Respondents "would be consistent with the rationale for costs".

IV. ANALYSIS

A. Sanctions

1. Relevant Factors

(a) Seriousness of Misconduct and Recognition of Seriousness

[18] We found in the Merits Decision that all of the Respondents illegally traded in and distributed Blue Sky Companies securities and engaged in a course of conduct that perpetrated a

fraud on investors, that various of the Respondents made prohibited representations and misrepresentations, and that Dennis engaged in the unfair practice of putting unreasonable pressure on an investor to purchase shares.

[19] Each of these breaches of Alberta securities laws was, in itself, serious. None of these breaches was merely "technical"; rather, all were contraventions of key provisions of Alberta securities laws aimed at protecting investors and fostering a fair and efficient capital market. As a result of these breaches, investors made investment decisions without the fundamental protections of a registrant's involvement and a prospectus, and on the basis of misleading or untrue information. Moreover, the Respondents' capital-market misconduct included fraud – the most egregious of securities regulatory misconduct. In short, the Respondents' misconduct was undoubtedly very serious. This calls for significant sanctions against the Respondents.

[20] Staff submitted that the Respondents have shown no remorse for or recognition of their capital-market misconduct, or the harm suffered by Blue Sky Companies investors or the Alberta capital market generally. To this end, Staff contended (among other things) that: the Individual Respondents "blamed others (their 'consultants') and attempted to conceal their actions with deceit"; the Respondents attempted to minimize Dennis's involvement in the business; the Respondents, although they acknowledged in their Merits Hearing submissions that there might well be sufficient evidence to find that they breached sections 75(1)(a), 92(3)(b) and 110 of the Act, characterized such breaches as "technical" and thus downplayed their significance; and the Respondents in their Merits Hearing submissions similarly downplayed the significance of any "misappropriation of investment funds".

[21] The Respondents submitted that they have demonstrated throughout this proceeding that they recognize the seriousness of Staff's allegations, and of the findings made by the Commission, against them. The Individual Respondents pointed to their participation in, including their testimony at, the Merits Hearing as being indicative of this.

[22] Respondents who fully recognize the seriousness of, and truly accept responsibility for, their capital-market misconduct and the harm caused by it may well be less likely in future to engage in the same or similar misconduct.

[23] The Respondents' participation in the first phase of this proceeding, including the Individual Respondents' testimony at the Merits Hearing, was certainly an acknowledgement of the seriousness of the allegations against them. However, this participation – predating our findings in the Merits Decision – is in no way an acknowledgement of the seriousness of the findings made against them.

[24] While we accept that the Respondents' participation in this phase of the proceeding is some acknowledgement of the seriousness of the findings made against them, we discern in the Joint Submissions troubling attempts by them to deflect responsibility for, or excuse, their capital-market misconduct, not unlike similar attempts made by them in the first phase of the proceeding. Thus, we cannot find that the Respondents fully recognize the seriousness of, or truly accept responsibility for, their misconduct or the harm caused by it. This limited

recognition, in our opinion, does not diminish the need for significant sanctions against them; instead, it accentuates the need for meaningful specific deterrence.

(b) The Respondents' Characteristics

[25] None of the Respondents has any prior capital-market experience, and none has been registered in any capacity under the Act or previously sanctioned by the Commission. The Respondents acknowledged in the Joint Submissions that the Individual Respondents have limited educational qualifications, experience and training and "can best be characterized as inexperienced and unsophisticated in matters of business and the capital markets". We concur in this assessment.

[26] The Respondents suggested that this lack of experience and sophistication resulted in their reliance on "financial advisors" and that "[m]any of the mistakes made (no prospectus or exemption, making misleading statements, prohibited representations) were directly attributable to not having secured proper securities and legal advice".

[27] In certain circumstances, this lack of experience and sophistication might be viewed as a mitigating factor. However, the capital-market misconduct of the Respondents renders their lack of experience and sophistication of little import. The Respondents did not need experience, sophistication or knowledge of Alberta securities law to know that it was wrong to make misrepresentations to investors, or that it was wrong to convert to the personal use or benefit of the Individual Respondents and their family, friends and business associates some 58% of the money raised from investors for the Blue Sky Companies' corporate or business purposes. This Commission's statements in *Re Capital Alternatives Inc*., 2007 ABASC 482 (at para. 59) are apropos here:

> . . . This was, above all, a case of fraud and deceit. We do not accept that experience or training in the operation and laws governing the capital market are necessary to teach the difference between dealing honestly and fairly with investors or deceiving them. Given the nature of the misconduct in this case, we consider the . . . Respondents' lack of capital market experience to be a factor of minor importance.

(c) Harm Suffered by Investors and Capital Market

[28] Apart from VS obtaining a mortgage on the Uhersky Residence, none of the investor witnesses has recouped, or received any return on, their Blue Sky Company investments, and there is no evidence that any other investors have recouped, or received any return on, their investments. The Respondents' capital-market misconduct has undoubtedly caused substantial financial harm to Blue Sky Companies investors, about which many of the investor witnesses testified as noted in the Merits Decision.

[29] Capital-market misconduct such as that of the Respondents also damages the reputation and fair and efficient functioning of the Alberta capital market, making it more difficult for law-abiding issuers to raise capital therein. It is clear from the testimony of investor witnesses JG, JRG and RA that the Respondents' misconduct has impaired their confidence in the Alberta capital market and lessened their willingness to invest in it again. Others who come to know of the Respondents' misconduct may also be less willing to invest in our capital market.

[30] This harm done to Blue Sky Companies investors and the Alberta capital market argues for significant sanctions against the Respondents.

(d) Benefits Received from Misconduct

[31] In the Merits Decision, we found that at least $2 936 766.95 was raised through the sale of Blue Sky Companies securities, of which $1 186 609.76 (approximately 40.4%) was used for legitimate business expenses of the Blue Sky Companies and $1 716 647.20 (almost 58.5%) was converted to the personal use or benefit of the Individual Respondents and their family, friends and business associates. The $1 716 647.20 converted to personal use consisted of:

- approximately $426 870 paid or transferred to Margaret for her personal use;
- $455 471.89 paid or transferred to or on behalf of Uhersky family, friends and business associates for their personal use;
- $214 041.48 used to fund renovations to the Uhersky Residence;
- $448 515.55 withdrawn in cash for the personal use or to the personal benefit of the Individual Respondents; and
- $171 748.28 used by the Individual Respondents for personal expenditures.

[32] We also found that some Uhersky family, friends and business associates personally benefited from the use of vehicles provided through BSL and of computers provided by the Blue Sky Companies.

[33] The Individual Respondents and their family, friends and business associates personally benefited extensively from the Respondents' capital-market misconduct.

[34] This factor calls for significant sanctions against the Respondents. It also underscores the need for meaningful specific deterrence, particularly in respect of the Individual Respondents.

(e) Risk of Future Harm – Need for Specific and General Deterrence

[35] Staff submitted that the Respondents pose a significant risk of future harm. Staff contended that the Blue Sky Companies have very little, if any, money left to carry on business, and that their principals – the Individual Respondents – lack "the sophistication, expertise and trustworthiness required to operate the companies within the bounds of the law". Staff also contended that the Individual Respondents "have demonstrated an ability and a willingness to simply shut down an impugned business when it runs into trouble and start up another under a new name".

[36] Staff submitted that there is a need not only for significant specific deterrence but also for general deterrence. Concerning the latter, Staff contended that "it must be readily apparent to similarly-situated individuals that engaging in this type of conduct will be dealt with severely".

[37] The Respondents submitted that the risk of future harm to the Alberta capital market is minimal and, in any event, the specific and general deterrence required can be adequately addressed by market-access bans against the Individual Respondents. To that end, the Respondents noted that, while Davis testified he intends to carry on with the development of the Project if permitted to do so, he also testified he has no intention of accessing the Alberta capital market but rather will seek funding from financial institutions. The Respondents also noted that Margaret testified she no longer wishes to be a director or officer of any corporation involved in such development.

[38] In all the circumstances, we perceive serious risk of future harm to the Alberta capital market and investing public if the Blue Sky Companies are allowed continued unimpeded access to our capital market, and if the Individual Respondents are allowed any future access to our capital market.

[39] Unless they raise substantial capital, the Blue Sky Companies are without the necessary funding to continue with the Project. The evidence is that in the past Davis was unable to raise the necessary funding from financial institutions on satisfactory terms. If these circumstances persist (and we have no reason to think otherwise), there is a real risk that the necessary funding will again be sought in our capital market.

[40] While we note the intentions and wishes of Davis and Margaret concerning their future non-participation in the Alberta capital market, we also note that these do not provide any protection to our capital market if such intentions or wishes change or are not acted on. Concerning Davis's intentions specifically, we reiterate that in the past he was unable to raise the necessary funding from financial institutions, and, if these circumstances persist, there is a real risk that the necessary funding will again be sought in our capital market. Moreover, we are concerned that the Individual Respondents' continuing belief in and enthusiasm for the Project, coupled with their lack of experience and sophistication, may ultimately lead them into the same or similar capital-market misconduct.

[41] We also agree with Staff that the Individual Respondents have shown a willingness to abandon one Project-related company for another when, in their pursuit of the Project, difficulties have arisen. It was decided in September 2007 to allow Mandyland to fall dormant as a means of avoiding liability under a US lawsuit arising from the default by Mandyland on a land purchase for a proposed recreational resort. At the Merits Hearing we also learned that a company was incorporated in Cyprus in 2011 to, according to Davis, "take the [P]roject forward, if we were permitted, when this hearing was done". The director and the shareholder of this company are Uhersky family members not involved in this proceeding. In our opinion, were any of the Individual Respondents to have any involvement – whether as a director, officer, manager or consultant – with this company, or any other company that may be formed for a similar purpose, this would pose a real risk to the Alberta capital market and investing public. To this end, we note that, while the Individual Respondents characterized Dennis as essentially a mentor – in effect, a consultant – he was (we found) involved in several aspects of the Blue Sky Companies' business and was in fact a guiding mind and de facto director of the companies.

[42] This factor argues for significant sanctions against the Respondents that will effect meaningful specific and general deterrence – the Respondents must be prevented from engaging in the same or similar capital-market misconduct, and others must be dissuaded from similarly acting. Indeed, in our opinion, such would be the case on the basis of our fraud finding alone. As this Commission stated in *Re Arbour Energy Inc.*, 2012 ABASC 416 (at para. 80):

> . . . Investment fraud is reprehensible and completely unacceptable capital-market misconduct; instances of fraud in the capital market severely threaten the public's confidence and sense of fairness in the whole of our capital market. A high level of both specific and general deterrence is required against each Respondent on the basis of our fraud findings alone.

(f) Previous Decisions

[43] We were referred by Staff and the Respondents to several decisions of the Commission and other securities regulatory authorities. Due to differences in underlying facts and misconduct, prior decisions are generally of little to no assistance in determining appropriate sanctions. That said, we did find limited guidance in *Re Reeves*, 2011 ABASC 107, *Re Harris operating as Harris Agencies*, 2011 ABASC 138, *Re Sirianni*, 2011 ABASC 616, *Re Shire International Real Estate Investments Ltd.*, 2012 ABASC 79, and *Arbour Energy*.

(g) Mitigating Factors

[44] Staff submitted that, but for the fact that approximately one-third of the money raised from Blue Sky Companies investors was used for legitimate business expenses, there are few, if any, mitigating factors.

[45] The Respondents pointed to the following as mitigating factors:

- At the root of the Respondents' activities was a business venture that they strongly believed was feasible. Such belief was supported by a third-party feasibility study – the Feasibility Analysis.

- Of the money raised from Blue Sky Companies investors, over $1.1 million was found to have been used for legitimate business expenses.

- To the extent that the money raised was used for personal expenses, it must be noted that the Individual Respondents did not draw salaries for the time and effort they dedicated to the Blue Sky Companies, which they, with proper legal and accounting advice, could and would have done.

- They made "mistakes", many of which "(no prospectus or exemption, making misleading statements, prohibited representations) were directly attributable to not having secured proper securities and legal advice".

[46] That the Individual Respondents believed, and continue to believe, in the feasibility of the Project – which belief is supported by the Feasibility Analysis – and used some 40% of the money raised for legitimate business expenses of the Blue Sky Companies distinguishes this

situation from what might be termed "pure scams" involving no underlying legitimate business. However, in all the circumstances, this is of little mitigating effect. It does not excuse the Respondents' serious capital-market misconduct in pursuit of the Project – in particular, their misrepresentations and their fraudulent conversion of some $1.7 million of investor money – nor does it mitigate the harm done by their misconduct. Indeed, as noted, we are concerned that the Individual Respondents' continuing belief in and enthusiasm for the Project may ultimately lead them into the same or similar misconduct.

[47] In attempting to arrange financing for the Project, Davis and, through him, the other Respondents were alerted to the existence of securities regulatory requirements. It was incumbent on the Respondents to learn of, and comply with, any such requirements. That they could possibly have so complied if they had secured proper securities and legal advice does not alter the fact that they did not obtain such advice, for which failing they are responsible. Further, even if reliance on the consultants from whom they did receive advice could be mitigating, it is not because the evidence before us is insufficient to find reasonable reliance on any such advice. Moreover, the Respondents did not need proper securities and legal advice to know that it was wrong to make misrepresentations to investors, or that it was wrong to convert to the personal use or benefit of the Individual Respondents and their family, friends and business associates some 58% of the money raised from investors for the Blue Sky Companies' corporate or business purposes. We do not consider this mitigating in all the circumstances.

[48] That the Individual Respondents could possibly have been paid salaries if they had proper legal and accounting advice does not alter the fact that they did not obtain such advice, for which failing they are responsible. This is of no mitigating effect.

[49] We conclude that this factor does not eliminate or materially alter the need for significant sanctions against the Respondents that will provide meaningful specific and general deterrence.

2. Conclusions on Sanctions

[50] For the foregoing reasons and the reasons set out below, we conclude that broad-ranging market-access bans, disgorgement orders and administrative penalties are required to prevent future harm to, and thereby protect, Alberta investors and the Alberta capital market from the Respondents and like-minded others.

(a) Market-Access Bans

[51] Market-access bans provide both specific deterrence (by prohibiting a respondent from participating in the Alberta capital market in various ways) as well as general deterrence (by cautioning others that they will be deprived of access to the capital market if they engage in similar capital-market misconduct).

[52] The Blue Sky Companies were controlled by the Individual Respondents, who were ultimately responsible for – authorized, permitted or acquiesced in – the companies' capital-market misconduct. The Blue Sky Companies were founded for a legitimate business purpose, they have securityholders, and, by virtue of sanction orders made herein, the Individual Respondents will no longer be their guiding minds. Thus, in our opinion, if a prospectus were to

be filed by and receipted for any such company, there would be no reason to deny such company access to our capital market. However, until such time as a prospectus is filed and receipted for any such company, each should be subject to a broad market-access ban to protect the Alberta capital market and investing public. We accordingly find that, in respect of each of the Blue Sky Companies, it is in the public interest to prohibit all trading in or purchasing of its securities, prohibit it from trading in or purchasing securities, and prohibit its use of all exemptions under Alberta securities laws until such time, if ever, as the Executive Director issues a final receipt for a prospectus filed by it. We note that, while certain of these sanctions were not requested by Staff in their submissions, the Blue Sky Companies had notice via the Notice of Hearing that such sanctions could be imposed and (as confirmed in *Maitland Capital Ltd. v. Alberta (Securities Commission)*, 2009 ABCA 186 at para. 19) we are not limited by Staff's position in deciding the sanctions to be imposed in the public interest.

[53] As noted, we perceive serious risk of future harm to the Alberta capital market and investing public if the Individual Respondents are allowed any future access to our capital market. We therefore consider it to be in the public interest to permanently prohibit them from trading in or purchasing securities, permanently prohibit their use of all exemptions under Alberta securities laws, permanently ban them from acting as directors or officers of any issuer, and permanently ban them from acting in a management or consultative capacity in connection with securities market activities. We note that, while the management-or-consultant bans were not requested by Staff in their submissions, the Individual Respondents had notice via the Notice of Hearing that such sanctions could be imposed, we are not limited by Staff's position in deciding the sanctions to be imposed in the public interest, and the presumption against retrospectivity does not preclude our imposition of such sanctions with a protective purpose (*Alberta Securities Commission v. Brost*, 2008 ABCA 326 at para. 57).

(b) Disgorgement

[54] Section 198(1)(i) of the Act empowers the Commission to make a disgorgement order – an order that a respondent who has not complied with Alberta securities laws pay to the Commission any amounts obtained as a result of the non-compliance.

[55] In *Re Planned Legacies Inc.*, 2011 ABASC 278 (at paras. 71-75), the following principles applicable to disgorgement orders were set out:

- A disgorgement order may be used to achieve both specific and general deterrence by removing from a respondent all money obtained as a result of the respondent's non-compliance with Alberta securities laws, thereby ensuring that the respondent does not financially benefit from the non-compliance and that the respondent and others do not perceive such non-compliance to be profitable.

- The initial burden is on Staff to prove, on a balance of probabilities, the amount obtained by the respondent as a result of the respondent's non-compliance with Alberta securities laws. Once this is done, the burden then shifts to the respondent to disprove the reasonableness of the amount.

- The reference in section 198(1)(i) to "amounts obtained" as a result of the respondent's non-compliance with Alberta securities laws does not mean the profit made but rather means all money obtained as a result of the non-compliance.

[56] Staff sought an order against the Individual Respondents that would require them to disgorge, on a joint and several basis, the $1 716 647.20 which we found was fraudulently converted to the personal use or benefit of the Individual Respondents and their family, friends and business associates. Staff did not seek a disgorgement order against the Blue Sky Companies because, Staff submitted, the companies did not misappropriate any investor money and retained little of it.

[57] The Respondents submitted that it is not appropriate or in the public interest to order disgorgement because some of the money raised was advanced through loan agreements, the lenders have access to legal remedies to recover such amounts advanced, and ordering disgorgement in such circumstances could result in the Respondents having to pay such amounts twice. Thus, any disgorgement order would, the Respondents contended, place them in "double jeopardy" and be an unlawful punitive sanction in substance and effect. Although the Respondents did not specifically object to the amount claimed by Staff, they submitted that where lenders have rights of recovery against the Respondents the amount to be disgorged "cannot be quantified to the requisite standard".

[58] In all the circumstances, including the broad market-access ban we are imposing on each of the Blue Sky Companies, we perceive no useful purpose in imposing a disgorgement order on them.

[59] We are satisfied that Staff met their initial burden of proving that $1 716 647.20 was the amount obtained as a result of the Individual Respondents' non-compliance with Alberta securities laws and the Blue Sky Companies' non-compliance with Alberta securities laws for which the Individual Respondents were ultimately responsible – this is the amount of Blue Sky Companies investor money found in the Merits Decision to have been fraudulently converted to the personal use or benefit of the Individual Respondents and their family, friends and business associates. In our opinion, the Respondents did not then disprove the reasonableness of this amount. We reject the Respondents' submission that the amount subject to disgorgement cannot be quantified to the requisite standard due to the rights of recovery of third-party lenders. Wronged investors may pursue legal remedies against those who have wronged them, but this has not precluded this Commission from granting disgorgement orders. And there is no indication that the third-party lenders to which the Respondents referred, or any other wronged Blue Sky Companies investors, are presently seeking recovery by way of legal action from any of the Respondents or contemplating doing so or, if so, that they will be successful. Further, a disgorgement order is directed at removing from a respondent all money – the gross amount – obtained as a result of the respondent's non-compliance with Alberta securities laws to ensure that the respondent does not financially benefit from the non-compliance. Were we to decline to order disgorgement against the Individual Respondents on the basis that wronged Blue Sky Companies investors might seek and obtain recovery from them or all of the Respondents, this

could result in the Individual Respondents retaining or benefiting from all, or substantially all, of the investor money converted to the personal use or benefit of themselves and their family, friends and business associates, a result completely at odds with the intent of section 198(1)(i) of the Act.

[60] We are satisfied that the Individual Respondents, ultimately responsible for the Blue Sky Companies' capital-market misconduct, acted sufficiently in concert in fraudulently converting Blue Sky Companies investor money to the personal use or benefit of themselves and their family, friends and business associates. In all the circumstances, we conclude that a disgorgement order in the amount of $1 716 647.20 against the Individual Respondents jointly and severally will provide necessary additional specific and general deterrence in the public interest.

(c) Administrative Penalties

[61] In all the circumstances, including the broad market-access ban we are imposing on each of the Blue Sky Companies, we perceive no useful purpose in ordering administrative penalties against them.

[62] As discussed, the Individual Respondents' contraventions of Alberta securities laws were very serious and caused substantial financial harm to Blue Sky Companies investors as well as harm to the Alberta capital market. The Individual Respondents personally benefited extensively from these contraventions. Administrative penalties can achieve specific and general deterrence by imposing a direct financial cost – one amounting, all else considered, to more than a cost of doing business – on respondents for their contraventions of Alberta securities laws. In all the circumstances, including the other sanction orders we are imposing on the Individual Respondents, we consider it to be in the public interest to order an administrative penalty of $150 000 against each of the Individual Respondents.

B. Costs

[63] In seeking an order that the Respondents be jointly and severally liable for $180 000 – approximately 75% – of the costs of the investigation and hearing, Staff tendered a statement of investigation and hearing costs incurred as well as supporting documentation. This statement indicated total costs of $240 013.79, consisting of Staff costs (based on time expended at designated hourly rates) of $195 382.50 and disbursements of $44 631.29. The Respondents, in proposing a costs order of $50 000 "globally" against all of them, did not dispute that the costs claimed were incurred or that they were potentially recoverable pursuant to costs orders.

[64] Having reviewed this statement and the supporting documentation, we are satisfied that the costs claimed are reasonable and are potentially recoverable pursuant to costs orders, but for two exceptions. First, we note that a Staff investigator claimed 30 investigation hours for one day, which claim for $1500 we disregard in its entirety. Second, while Staff did prove most of their allegations, the potentially recoverable costs must also be reduced to account for the investigation and hearing costs associated with those allegations that were not sustained or wholly sustained.

[65] Staff submitted that the costs order sought by them takes into account "any duplication in Staff counsel's time" and reflects any efficiencies the Respondents brought to this proceeding. The Respondents disagreed as to the latter, citing examples of their contributions to the efficient conduct and ultimate resolution of this proceeding, including their presentation at the Merits Hearing of the "extremely useful and helpful" King Analysis.

[66] Notwithstanding the late retention of counsel by all of the Respondents but Dennis, the Merits Hearing did proceed in a timely manner, and the Respondents' presentation at the Merits Hearing of the King Analysis did prove useful. That said, the King Analysis was not without error, and it did not cover the entire Relevant Period. We are also satisfied that the Individual Respondents were not as cooperative as they might have been – indeed, that they engaged in obfuscation – in the course of Staff's investigation.

[67] In all the circumstances, we consider it appropriate that the Respondents be jointly and severally responsible for $160 000 of the costs of the investigation and hearing. To that end, we note that a joint and several costs order is fitting where, as here, the conduct of respondents relevant to an investigation and hearing was sufficiently similar – the Respondents largely mounted a common defence, and they provided the Joint Submissions. We also conclude that all of the Respondents should bear responsibility for such costs, which would otherwise be borne indirectly by law-abiding capital-market participants. We so order under section 202 of the Act.

V. CONCLUSION AND ORDERS

[68] For the foregoing reasons, we find it is in the public interest to make the following sanction orders, and it is appropriate to make the following costs orders:

Mandyland

- under sections 198(1)(a), (b) and (c) of the Act, all trading in or purchasing of securities of Mandyland cease, Mandyland cease trading in or purchasing securities, and all of the exemptions contained in Alberta securities laws do not apply to Mandyland, until such time, if ever, that the Executive Director issues a final receipt for a prospectus filed by Mandyland; and

- under section 202, Mandyland pay, jointly and severally with the other Respondents, $160 000 of the costs of the investigation and hearing;

Blue Sky

- under sections 198(1)(a), (b) and (c), all trading in or purchasing of securities of Blue Sky cease, Blue Sky cease trading in or purchasing securities, and all of the exemptions contained in Alberta securities laws do not apply to Blue Sky, until such time, if ever, that the Executive Director issues a final receipt for a prospectus filed by Blue Sky; and

- under section 202, Blue Sky pay, jointly and severally with the other Respondents, $160 000 of the costs of the investigation and hearing;

BSL

- under sections 198(1)(a), (b) and (c), all trading in or purchasing of securities of BSL cease, BSL cease trading in or purchasing securities, and all of the exemptions contained in Alberta securities laws do not apply to BSL, until such time, if ever, that the Executive Director issues a final receipt for a prospectus filed by BSL; and

- under section 202, BSL pay, jointly and severally with the other Respondents, $160 000 of the costs of the investigation and hearing;

Dennis

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

- under sections 198(1)(d) and (e), Dennis 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, permanently;

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

- under section 198(1)(i), Dennis pay, jointly and severally with the other Individual Respondents, to the Commission $1 716 647.20 obtained as a result of the Individual Respondents' non-compliance with Alberta securities laws and the Blue Sky Companies' non-compliance with Alberta securities laws for which the Individual Respondents were ultimately responsible;

- under section 199, Dennis pay an administrative penalty of $150 000; and

- under section 202, Dennis pay, jointly and severally with the other Respondents, $160 000 of the costs of the investigation and hearing;

Margaret

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

- under sections 198(1)(d) and (e), Margaret resign all positions she holds as a director or officer of any issuer, and she is prohibited from becoming or acting as a director or officer (or both) of any issuer, permanently;

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

- under section 198(1)(i), Margaret pay, jointly and severally with the other Individual Respondents, to the Commission $1 716 647.20 obtained as a result of the Individual Respondents' non-compliance with Alberta securities laws and the Blue Sky Companies' non-compliance with Alberta securities laws for which the Individual Respondents were ultimately responsible;

- under section 199, Margaret pay an administrative penalty of $150 000; and

- under section 202, Margaret pay, jointly and severally with the other Respondents, $160 000 of the costs of the investigation and hearing; and

Davis

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

- under sections 198(1)(d) and (e), Davis 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, permanently;

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

- under section 198(1)(i), Davis pay, jointly and severally with the other Individual Respondents, to the Commission $1 716 647.20 obtained as a result of the Individual Respondents' non-compliance with Alberta securities laws and the Blue Sky Companies' non-compliance with Alberta securities laws for which the Individual Respondents were ultimately responsible;

- under section 199, Davis pay an administrative penalty of $150 000; and

- under section 202, Davis pay, jointly and severally with the other Respondents, $160 000 of the costs of the investigation and hearing.

[69] This proceeding is concluded.

25 February 2013

For the Commission:

"original signed by"
Kenneth B. Potter, QC

"original signed by"
Neil W. Murphy

"original signed by"
Richard A. Shaw, QC