ALBERTA SECURITIES COMMISSION

DECISION

Citation: Shire International Real Estate Investments Ltd., Re, 2012 ABASC 79 Date: 20120305

Shire International Real Estate Investments Ltd., Shire Asset Management Ltd., Hawaii Fund, Bearspaw at 144th Avenue Ltd. and Jeanette Cleone Couch

Panel:	Stephen Murison Karen Prentice, QC Fred Snell, FCA
Submissions:	Tom McCartney for Commission Staff Jeanette Cleone Couch for the Respondents
Date of Hearing:	7 February 2012
Date of Decision:	5 March 2012

I. INTRODUCTION

[1] Jeanette Cleone Couch ("Couch") and four entities of which she was the guiding mind – Shire International Real Estate Investments Ltd. ("Shire"), Shire Asset Management Ltd. ("Shire Management"), Hawaii Fund, and Bearspaw at 144th Avenue Ltd. ("Bearspaw" and, together with Couch, Shire, Shire Management and Hawaii Fund, the "Respondents") – contravened the *Securities Act*, R.S.A. 2000, c. S-4 (the "Act") and acted contrary to the public interest in connection with certain distributions of securities from August 2007 through March 2009. More particularly, as found in the decision of this panel of the Alberta Securities Commission (the "Commission") on the merits of allegations levelled by Commission staff ("Staff") against the Respondents (the "Merits Decision", cited as *Re: Shire International Real Estate Investments Ltd.* 2011 ABASC 608): Couch, Bearspaw and Shire made misrepresentations in two offering memoranda issued by Bearspaw (the "Bearspaw OMs") and falsely certified that they did not contain a misrepresentation; Couch, Hawaii Fund, Shire and Shire Management made misrepresentations in a Hawaii Fund offering memorandum (the "Hawaii OM") and falsely certified that it did not contain a misrepresentation; Couch, Bearspaw and Shire engaged in a course of conduct that perpetrated a fraud on Bearspaw investors; and Couch authorized, permitted or acquiesced in the contraventions of Bearspaw, Shire and Shire Management.

[2] Upon issuance of the Merits Decision, this proceeding entered a second phase ("Phase II") in which we invited submissions from the parties on the issue of what, if any, sanction or costs orders ought to be made, and convened an in-person Phase II hearing session (which the Respondents did not attend). We received written and oral submissions and documentary evidence from Staff, and a written submission from Couch. We understood Couch to be speaking in her submission (the "Couch Submission") for all Respondents.

[3] For the reasons set out in the decision that follows – which should be read in the light of the Merits Decision – we are ordering an array of permanent bans against each Respondent, administrative penalties against Couch, Shire and Shire Management, and payments by each Respondent toward the costs of the investigation and hearing.

II. BACKGROUND: THE MISCONDUCT

[4] We summarize here the misconduct found in the Merits Decision. Although the Respondents, in the Couch Submission, took issue with some of the Merits Decision – without adducing any evidence – our findings there form essential background to our decision below.

[5] Couch, with and through numerous entities (her fellow Respondents among them) that she ran, undertook a variety of real estate projects in Canada and Hawaii. This proceeding centred on three of those projects: two in Hawaii (called "Halama" and "Paradise Ridge"), for which approximately $1.3 million was raised through the sale of securities in Hawaii Fund under the Hawaii OM; and one (the "Bearspaw Land") just outside Calgary, for which approximately $20 million was raised through sales of securities in Bearspaw, largely under the Bearspaw OMs.

[6] Hawaii Fund was described as a private mutual fund trust of which Shire Management was trustee and manager and, with Shire, its promoter. Bearspaw was a corporation of which Couch was sole director, shareholder and president, and Shire its promoter and manager.

Throughout the August 2007 to March 2009 period relevant to this proceeding, Couch was identified as the sole shareholder, director and president of both Shire and Shire Management.

[7] Bearspaw and Hawaii Fund (among other Couch-controlled entities) failed. Investors in Bearspaw and Hawaii Fund have to date apparently received little to nothing on their investments, and prospects for future recovery are uncertain.

[8] In the course of court insolvency proceedings, a "Monitor" was appointed to conduct an investigation. The evidence before us included a report of the Monitor, which provided considerable information and insight into the operation of the various entities investigated. Staff provided additional information, including an analysis of sources and uses of funds.

[9] The Hawaii OM contained numerous misrepresentations – materially misleading or untrue statements or omissions:

- it overstated the price that was to be paid for the Paradise Ridge land, thereby misstating how some of the investors' money was to be spent;
- it asserted untruthfully that a company related to Hawaii Fund owned Paradise Ridge, thereby misleading about a fundamental contingency, as neither Hawaii Fund nor any entity related to it ever did manage to acquire the land;
- it communicated untruthfully that a Couch-controlled entity owned the Halama land when in fact – another fundamental contingency – nobody in the Shire orbit owned or ever did acquire the land; and
- it failed to disclose a "roll-in" arrangement under which investors in a predecessor Couch-controlled investment vehicle were given an entitlement to have those investments redeemed by, or converted into securities of, Hawaii Fund, thus diluting those who invested under the Hawaii OM.

[10] It followed that the certification of the Hawaii OM as containing no misrepresentation was false. Each of Couch (sole guiding mind of all the other Respondents and signatory of the Hawaii OM), Hawaii Fund (whose document it was), Shire and Shire Management (both also signatories of the document, through Couch) bore responsibility for these material flaws, thereby contravening sections 92(4.1) and 221.1 of the Act and acting contrary to the public interest.

[11] Unlike Hawaii Fund, Bearspaw did acquire the land that it was to develop. However, the Bearspaw OMs materially misstated how investors' money was to be spent. The document said that $14 million of the money being raised (approximately equal to the actual sale price) would be spent to buy the Bearspaw Land, and a further $1.4 million would be spent largely on its development. As mentioned, Bearspaw raised from investors ample money for these declared purposes. However, it paid only $1.1 million for the land, the balance of the purchase price being mortgage-financed by the vendor and a third-party lender. Bearspaw later defaulted on these mortgages. Instead of being applied to the land purchase, millions of dollars of Bearspaw investors' money was applied (largely using a Shire bank account) to fund eight sets of real estate projects of other entities controlled by Couch (or, for one of these sets of projects, an entity controlled by members of her family), none having anything to do with the Bearspaw Land.

[12] The Monitor cited a litany of deficiencies in what it called the Shire Group's books and records, which even after a prolonged investigation left "[s]ignificant payments" inadequately explained. Staff, after conducting their own investigation and analysis, asserted that almost $7.6 million of Bearspaw money was "unaccounted for". Although the evidence was not always clear enough for us to make a definitive finding about each of the impugned payments we considered, it was apparent that "Couch directed [Bearspaw money] towards whatever seemed the most pressing or attractive use at the time" (Merits Decision, at para. 172), whether or not it had anything to do with the Bearspaw Land or the purposes disclosed in the Bearspaw OMs.

[13] Couch asserted in the first phase of this proceeding (the "Merits Hearing") that Bearspaw investors had been given fair warning of how their money would be used. She pointed to the following declaration that appeared in the Bearspaw OMs after the mentioned disclosure that $14 million of the proceeds of the offering would be used to buy the Bearspaw Land: "[Bearspaw] intends to spend the net proceeds . . . as stated. [Bearspaw] will reallocate funds only for sound business reasons". She contended that her application of Bearspaw money to other entities and unrelated projects was done for "sound business reasons". We disagreed, on the basis (among others) that investors were entitled to infer that any "sound business reasons" for "reallocat[ing]" their money would have something to do with the business of Bearspaw and the interests of its investors.

[14] We found that the Bearspaw OMs misrepresented how investors' money would be applied and, therefore, that the certification of no misrepresentation in the documents was also a misrepresentation. Each of Couch (sole guiding mind of all the other Respondents and signatory of the Bearspaw OMs), Bearspaw (whose documents they were) and Shire (also a signatory of the documents, through Couch) bore responsibility, thereby contravening section 92(4.1) of the Act and acting contrary to the public interest. We also found that the undisclosed diversions of Bearspaw investors' money deceived and deprived investors, with subjective knowledge on the part of Couch, Bearspaw and Shire – the necessary elements of a course of conduct perpetrating a fraud, contrary to both section 93(b) of the Act and the public interest.

[15] Staff alleged further contraventions by Couch – concealing or withholding information reasonably necessary to an investigation. Although those allegations were not proved, we did note that Couch, in the course of investigative interviews by Staff, made an untrue statement and concealed or withheld certain other information.

III. APPROPRIATE ORDERS

A. Sanctions and Costs Orders: Authority, Purposes and Factors

[16] The Commission is authorized, when it considers it to be in the public interest, to order sanctions ranging from bans on particular types of activity (under section 198 of the Act) to monetary administrative penalties (in cases involving contravention of or noncompliance with Alberta securities laws – section 199). The Commission is empowered also to order the payment of investigation and hearing costs (under section 202). The purposes of sanction and costs orders differ, and therefore so do the factors considered in assessing the appropriateness of such orders.

[17] Sanctions are essentially protective in nature, intended not as punishment but rather with a prospective view to averting future harm to investors and the capital market (*Committee for the*

Equal Treatment of Asbestos Minority Investors v. Ontario (Securities Commission), 2001 SCC 37 at paras. 39-45). Deterrence is key – both "specific" (directed at averting a repetition of misconduct by a particular respondent) and "general" (to deflect others from emulating a respondent's misconduct) – see *Re Cartaway Resources Corp.*, 2004 SCC 26 at paras. 52-62; and *Re Podorieszach*, 2004 ABASC 567 at para. 17.

[18] A variety of factors may, depending on the circumstances, be relevant to the assessment of whether, or what, sanctions are appropriate in a given case (*Re Lamoureux*, [2002] A.S.C.D. No. 125 at para. 11 (affirmed on other grounds 2002 ABCA 253); restated in *Re Workum and Hennig*, 2008 ABASC 719 at para. 43 (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.

[19] The quite different nature and purpose of a costs order were discussed in *Re Marcotte*, 2011 ABASC 287, at para. 20. Such an 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 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.

B. Orders Sought by Staff

[20] Staff in their submissions – citing our findings in the Merits Decision, the seriousness and scale of the misconduct found, and what they termed Couch's "impenitent" attitude and failure to recognize the seriousness of her misconduct, as well as the "instrumental" role of the "corporate respondents" (Staff appeared to include the Hawaii Fund trust in that category) "in raising funds and breaching the Act" – sought significant sanctions against each Respondent:

- a multitude of orders under section 198(1) of the Act that would: require Couch to resign any position she holds as a director or officer of any issuer and permanently bar her from acting in such capacities in future; permanently bar all trading in or purchasing of securities of Bearspaw and Hawaii Fund; and permanently bar all of the Respondents from trading in or purchasing securities, using exemptions under Alberta securities laws, advising in securities or exchange contracts, becoming or acting as a registrant, investment fund or promoter, and acting in a management or consultative capacity in connection with activities in the securities market; and

- administrative penalties under section 199 of the Act – of $1.5 to $2 million against Couch, the same range jointly and severally against Bearspaw and Shire; and $75 000 to $85 000 jointly and severally against Hawaii Fund and Shire Management.

[21] Staff also sought orders under section 201 of the Act for the payment of a total of $173 548.16 of investigation and hearing costs, allocated 75% to Couch, 15% jointly and severally to Bearspaw and Shire, and 10% jointly and severally to Hawaii Fund and Shire Management.

C. Positions of the Respondents

[22] The Couch Submission (which, as mentioned, we infer speaks for all Respondents) did not expressly, if at all, address the issue now before us – namely, what, if any, orders are appropriate against any or all of the Respondents. Rather, the document challenged or criticized Staff's investigation, the evidence presented in the Merits Hearing, and the Merits Decision. It stated that decisions – whether a reference to those made by Staff in their investigation or by this panel in the Merits Decision (or both) was unclear – were "based on incomplete and one-sided details" and "errors and incorrect information".

[23] More specifically, concerning Bearspaw, the Couch Submission suggested that the impugned payments made using Bearspaw money for apparently non-Bearspaw purposes "are monies owed to Shire" for expenses that the latter had supposedly spent for Bearspaw purposes, including development-related work for the Bearspaw Land. It questioned how we could have reached our "opinion" (the Merits Decision, presumably) without Bearspaw financial statements having been in evidence – "There is no evidence that the statements didn't include these facts". It noted that Couch had provided a personal guarantee in connection with one of the mortgages on the Bearspaw Land (this was consistent with evidence in the Merits Hearing), and contested the "claim [that Couch] was deceiving" given that she spoke "with the lender as well as the broker [a mortgage broker, perhaps] about the borrowed funds and the repayment plan".

[24] As to Hawaii Fund, its failure to acquire the Halama land and the allegation (and our finding) that she concealed or withheld related information in an investigative interview, the Couch Submission stated that she had "been nothing but cooperative" in the investigation and allegations to the contrary were mere "fabrication". It stated, "All points under the Hawaii deal can be argued as 'he said, she said'[.] We are all victims under [an] extortion scheme". The Couch Submission attributed this supposed extortion scheme to two individuals who had been registered owners of the Halama land.

[25] Asking why Couch had been "charged with fraud", the Couch Submission named several unrelated entities that she implied had acted fraudulently, but emphatically denied that Couch had done so: she "never set out to '[de]fraud or deceive' anyone and I certainly never had any personal gain from any project. In fact I lost more money than any Investor." Why, it asked, would Couch "intentionally damage other individuals – like my friends and family who invested with me and my company?". The Couch Submission also asserted, "I HAVE NO MONIES".

[26] The Couch Submission concluded with an attempt at justification and a plea or demand:

> I believe that the world economy collapse, the decline of the real estate market, the Class action suit and the cease trade order forced me to make the best "sound business decisions" at the time.
>
> Trusting you will look again at the unfairness of decisions based on incomplete and false information and opinions without facts. I await your response.

[27] We have discussed the Couch Submission at some length. In part, this will demonstrate to the Respondents that they have been heard. We are acutely mindful that the Respondents are unrepresented by legal counsel – in recognition of which they have been given considerable latitude, throughout this proceeding, in their manner of representing themselves and their case. Our observations on the Couch Submission are not a criticism of style or want of formality, or of unfamiliarity with the niceties of litigation practice. The point is not how the Respondents made their case, but rather its substance.

[28] The Couch Submission has not prompted us to revise or reverse the Merits Decision. First, this is not an appeal, for which the Act makes other provision. Second, even were it (hypothetically) appropriate for a hearing panel, in the midst of an enforcement hearing, to reconsider a decision already issued in the same proceeding on the merits of allegations – we need not decide that here – such a novel process would surely be prompted only by very special circumstances. We discern none here. The Respondents tendered no new evidence to support any of their latest assertions. Moreover, the Couch Submission left unaddressed a number of the Merits Decision's specific findings of misrepresentation.

[29] As to our present task of considering the appropriateness of any orders, few (if any) of the specific points enunciated in the Couch Submission were helpful . For example, concerning Hawaii Fund, the asserted "extortion scheme" – even if there were some proof – would not disprove, explain, justify or mitigate the Hawaii OM's misrepresentation that the Halama land was already within the Shire orbit.

[30] Similarly, concerning Bearspaw, we discern nothing helpful or useful in the Couch Submission's criticism of the absence, from the evidence before us, of ledgers and financial statements, or the remark that "there is no evidence that these [financial] statements didn't include . . . facts" that might somehow disprove the evidence and findings concerning the use of Bearspaw money. If Couch or the other Respondents knew of documents that could assuage concerns and disprove allegations, surely they were best placed to have put such documents before the Monitor (we alluded above to its difficulties with the "Shire Group's" recordkeeping), or before Staff in the course of their investigation, or before this panel in the course of the Merits Hearing. That did not happen. Nor has it happened even now; no such documents have been tendered, even at this late stage, in support of the Couch Submission. The evidence (apart from the additional documentation adduced by Staff at the Phase II hearing session) remains what it was, and the Merits Decision speaks for itself. The Respondents' unsupported suggestion that there might be other evidence somewhere does not affect that, nor in any way assist us in our present task.

[31] What we did find more helpful in the Couch Submission was the light it shed on the thinking and attitudes of the Respondents (Couch specifically). In this, the document was illuminating and instructive.

D. Analysis on Sanction

1. Relevant Sanctioning Factors

Seriousness of Misconduct and Resulting Harm

[32] The offering memorandum exemption enables law-abiding market participants to raise capital economically, without a prospectus, by presenting material information, fairly and truthfully, in an alternative form. That alternative form of disclosure – an offering memorandum – is in turn designed to enable prospective investors to base investment decisions on a solid understanding of the investment offered, the underlying business, how invested money will be used, and the risks entailed.

[33] Couch and the other Respondents gave investors, through the Bearspaw and Hawaii OMs, materially misleading and untrue disclosure that misrepresented what the investors were being asked to buy into and how their money would be used. This was a gross misuse of the offering memorandum exemption.

[34] Even worse was the manner in which Bearspaw investors' money was applied, without disclosure, to various non-Bearspaw-related uses – a course of conduct perpetrating a fraud for which Couch, Bearspaw and Shire were all responsible.

[35] A foreseeable consequence of all of this included poorly-informed and misinformed investment decisions, which exposed investors to unanticipated risks – and actual financial losses. Also foreseeable is a broader impairment of confidence, on the part both of Bearspaw and Hawaii Fund investors and others who come to learn of what happened here. A loss of confidence in offering memoranda, or in the fairness and integrity of the Alberta capital market as a whole, can ramify the harm: wary investors may avoid suitable investments, while even legitimate and scrupulously-run businesses may find it difficult to raise capital economically.

[36] In short, the misconduct of all Respondents was very serious. So too was the resulting harm, actual and foreseeable, to investors (identifiable or not) as well as to other capital market participants.

[37] These factors argue for rigorous protective sanctions, providing both general and specific deterrence, against each Respondent.

Recognition by Respondents of the Seriousness of the Misconduct

[38] As noted, we infer that Couch spoke for all Respondents in the Couch Submission. In any event, she having been the guiding mind of each other Respondent, and they having served as her vehicles, it is reasonable for present purposes to treat her state of mind as theirs also.

[39] The essence of the allegations in this proceeding, and of our findings in the Merits Decision, lies not in a contravention of some obscure technical provision of a law familiar only to a specialist, but rather in the violation of basic principles easily understood by any reasonable adult – of honest disclosure to people from whom one wants money and, correspondingly, the appropriate handling of their money once tendered.

[40] The Couch Submission, and the tenor of her conduct in the proceeding as a whole, acknowledged none of that. It demonstrated no appreciation or recognition that Couch or any other Respondent acted improperly, let alone engaged in serious misconduct. To the contrary, Couch portrayed herself – we think it an accurate depiction of her genuine belief – as the primary victim of an aggregation of world economic events and plots or schemes, misbehaviour or mistakes on the part of business associates, Staff or this panel.

[41] Apart from the Couch Submission's unpersuasive quarrels with the evidence and the Merits Decision, it maintained a position consistent with one Couch advanced in the Merits Hearings – a position that we think highly relevant to, and instructive for, our present task. Relating specifically to Bearspaw, this position was that, whatever the Bearspaw OMs may have disclosed about investors' money being applied to buy the Bearspaw Land outright, Couch was entitled instead to divert the money at will to Couch or Couch-family ventures unrelated to Bearspaw, this being an appropriate exercise of sound business judgement.

[42] This proposition would make sense only if one assumes – as we believe Couch did and still does – that the function of the investors in any one of her enterprises (Bearspaw, in this case) was to hand over money (in massive quantities) for her to spend as she saw fit, on whichever of an ambitious array of projects happened to catch her eye and need some funding at any particular time. For example, spending Bearspaw money to buy or build some houses in Calgary for a separate family-controlled company may have been a handy alternative to raising the money elsewhere, and therefore a sound decision from the perspective of Couch when looking to the welfare of her collection of businesses as a whole. However, from the perspective of Bearspaw investors whose money was diverted to ventures they had almost certainly never heard of, while Bearspaw itself eventually defaulted on the Bearspaw Land they had paid for, the "sound business reasons" characterization is absurd. Couch, it is clear, simply did not, and apparently still cannot, make the appropriate distinction between her own business affairs and those of the particular entities into which she invited the investing public.

[43] It may be that she never saw the need for such a distinction. She may – we will return to this topic – have imagined herself capable of running all these ventures successfully enough that they would generate enough money to satisfy everyone – herself, her family, business associates and the investing public. Be that as it may, the plain facts are that (i) she blatantly misled Bearspaw and Hawaii Fund investors, and misapplied money of the former in an undisclosed course of conduct that perpetrated a fraud, and (ii) has not admitted that this happened, let alone that it was improper, and serious misconduct.

[44] Couch seems, even now, to attach no importance to making reliable and truthful disclosure to the investing public. Her and the other Respondents' issuance, execution and false certification of offering memoranda replete with misrepresentations, and her continued unapologetic stance regarding those acts, evince a cavalier disregard for Alberta securities laws and for investors.

[45] Couch, as Staff counsel aptly phrased it, is thoroughly impenitent. For the reasons stated, that impenitent stance can fairly be applied to all of the Respondents.

[46] Their failure or refusal to recognize the seriousness of their misconduct tells us that all of the Respondents present a real and grave risk (if given the opportunity) of repeating their misconduct and thereby exposing new investors and the capital market generally to further harm. This factor argues for rigorous protective sanctions against each Respondent, directed particularly at specific deterrence.

Respondents' Characteristics

[47] The Respondents other than Couch herself were her vehicles, essentially her ciphers – there simply was no guiding mind but hers. Thus, for present purposes, Couch's personal characteristics are relevant to all of the Respondents.

[48] None of the Respondents has ever been registered in any capacity under the Act. In some circumstances, a lack of registration history may be akin to a mitigating consideration in sanction – in the case, for example, of misconduct in something for which registrants (given their role, training and responsibilities) are held to a higher standard than a non-registrant.

[49] Such is not the case here. The Respondents' misconduct did not pertain to obscure legal technicalities, or to matters involving specialized knowledge or unusual responsibilities. The Respondents made misrepresentations – misstating or omitting simple facts – in obviously important documents they were using to persuade investors to invest money. Couch, Bearspaw and Shire also engaged in a course of conduct that perpetrated a fraud on Bearspaw investors, by applying their money in ways not disclosed. Such conduct is obviously wrong; no particular knowledge of or experience with securities laws is needed to discern that.

[50] Couch apparently has no professional designation, although she told Staff in an investigative interview that she had performed accounting functions. This might be a consideration were this a hearing into (for example) impugned financial reporting. It is not. As stated, this proceeding involves basic principles of honesty in disclosure and in handling money.

[51] Couch had worked for a real estate development company not party to this proceeding, before branching out on her own with Shire. It may be inferred that, while with that employer, she saw real estate projects negotiated and implemented. Perhaps she concluded from this that it was a field in which she, too, could prosper on her own, given the necessary funds. If so, she seems to have underestimated some of the business hurdles and risks – among them the challenges of operating multiple real estate development projects simultaneously – and overestimated her own abilities. This, however, neither explains nor excuses obvious improprieties in making misrepresentations to investors and in handling their money.

[52] In contrast to the way she ran her businesses, Couch (and, through her, Bearspaw and Hawaii Fund directly as well as, indirectly, Shire and Shire Management) demonstrated a marked talent at raising money from investors. As mentioned, Bearspaw alone drew in some $20 million. Given the demonstrated disregard for honest disclosure and handling of investor money, this powerful ability to raise money made for a dangerous, ultimately disastrous, combination.

[53] Also troubling was Couch's capacity to mislead or deceive even in the course of an investigation – two instances of which (involving statements by her to Staff in investigative interviews) were noted in the Merits Decision.

[54] On balance – particularly given the nature of the misconduct here – we discern in the characteristics of Couch nothing arguing for moderation in sanction but, rather, a clear danger arguing for significant measures of specific deterrence. Inasmuch as the other Respondents were merely her vehicles, we reach the same conclusion for each of them.

Benefits from Misconduct

[55] The evidence as to the extent to which the Respondents benefited from their misconduct was less than clear.

[56] There can be no doubt that Couch, Shire and Shire Management, as well as Bearspaw and Hawaii Fund themselves, intended to benefit financially from investor funding of the latter two entities' projects. Equally clearly, Couch, at least, also intended to benefit from the use of Bearspaw money to fund various other of her private and family projects, which otherwise would require funding from other sources or a scaling back of Couch's ambitions. If obtaining that investor funding were more easily accomplished with some misleading disclosure, and some undisclosed handling of the money once received, so be it – getting the money was the goal. To the extent that the Respondents received fees or commissions from this, and to the extent that Bearspaw money was spent on non-Bearspaw-related Couch and Couch-family projects, it is reasonable to conclude (as we do) that such Respondents – Couch particularly – enjoyed (directly, indirectly or both) actual financial benefit from the misconduct, even if the evidence does not permit a precise quantification.

[57] In the end, though, the evidence indicates that the failures and insolvency of the various Couch-led enterprises left none of the Respondents ahead financially. Couch (with her husband) gave a personal guarantee in connection with a mortgage debt on the Bearspaw Land, so it is plausible to assume that the eventual default on that debt left her financially exposed. Moreover, as noted in the Merits Decision (at para. 74), the Monitor suggested that, at the end of the day, Couch might have been owed $663 000 or more.

[58] To summarize: all Respondents intended to benefit from their misconduct; there was some actual benefit, to Couch notably; but in the end, none apparently came out ahead, with Couch personally having apparently lost a considerable sum.

[59] On balance, we consider that the intention to benefit, and the actual benefits enjoyed, from the misconduct argue for significant sanctions, directed particularly at general deterrence. That said, in the circumstances (notably, the ultimate losses apparently suffered by the Respondents, Couch in particular) we consider that within a package of sanctions that in the aggregate delivers appropriate deterrence, this factor argues for moderation in any direct monetary element to an extent that would not be the case had Couch or any other Respondent been shown ultimately to have profited significantly.

Mitigation

[60] We discern from the evidence no direct mitigation, in the sense of conduct on the part of any Respondent that limited or ameliorated the harm done to any third party.

[61] That said, there are circumstances that cast a moderating light on some of the misconduct found.

[62] The most compelling of these is our belief that Couch, however cavalier her disregard for truthful disclosure to investors and the appropriate handling of their money, truly did think that she could pull it off – that she really could successfully juggle all the development projects she was involved in, generate profits from them and (after moving money in and around and back again) ultimately deliver a return not only to herself and her numerous enterprises, but also to the Bearspaw and Hawaii Fund investors. This is perhaps what she meant in the Couch Submission statement that she "never set out to [de]fraud or deceive". Consistent with this was the mentioned personal guarantee for a Bearspaw Land mortgage, something unlikely to have been given by someone who foresaw a default, or even perceived a real risk of that.

[63] This does not undo, or excuse, the misconduct. A belief that one can pull it off does not justify deceiving investors, or deceptively using their money. It does, however, distinguish this case from the pure scams occasionally encountered.

[64] This factor does not eliminate the need for sanctions with significant specific and general deterrent effect. However, we consider that it argues for some moderation, at least in respect of direct monetary sanctions, so long as the total package of sanctions delivers the necessary deterrence.

Risk of Future Harm

[65] We discern a real and grave risk of future harm to the Alberta capital market and the investing public, in the absence of rigorous protective sanctions against each Respondent, for reasons already touched upon – the Respondents' marked success at raising large amounts of money from investors without regard for basic truthfulness, coupled with a lack of scrupulousness in handling that money, all much aggravated by a profound failure or refusal to acknowledge their misconduct and recognize its seriousness. This calls particularly for significant measures of specific deterrence.

Prior Decisions

[66] We derive no useful guidance from the outcomes of other cases, the circumstances differing too much from those here to support useful comparisons.

Conclusion on Factors

[67] In the result, our analysis of the relevant sanctioning factors leads us to conclude that significant sanctions – delivering rigorous specific and general deterrence – are required against each Respondent, although there are grounds for some moderation in any direct monetary orders forming part of such sanctions.

2. Appropriate Sanctions

Types of Sanctions Appropriate

[68] In view of the nature of the misconduct and the scale of the associated fund-raising, we are satisfied that protective orders are essential, and that they must include both market-access bans and direct monetary sanctions.

[69] Given what we consider to have been – and to be – a cavalier disregard, on the part of the Respondents, for both Alberta securities laws and the interests of investors, our orders must include an array of market-access bans broad enough to forestall future similar misconduct by them.

[70] That said, we consider that some of the specific bans sought by Staff would go beyond what is called for here, in that they would address and restrict activities that were not involved in the misconduct found – activity as or with a registrant, for example, or the provision of investment advice. The rationale advanced for also banning these types of activity – to the effect, as we understood it, that if a respondent commits one sort of breach they may be assumed capable of committing all others – was speculative and unconvincing[1]. It is appropriate, and sufficient, that our orders address the sorts of activity plausibly associated with the circumstances of this case, namely misconduct by issuers and their managers and promoters, in connection with the raising of capital through distributions of securities. In any event, in respect of the bans on advising (under section 198(1)(e.1) of the Act) sought by Staff against each Respondent, we would not include them in our orders given that they were not mentioned as a possibility in the Notice of Hearing.

[71] Thus, we consider that the following types of orders would be in the public interest: bans on trading in or purchasing securities of Bearspaw and Hawaii Fund; a ban on Couch becoming, acting or continuing to act as a director or officer of any issuer or investment fund manager; and bans on any Respondent trading in or purchasing securities, using exemptions, becoming or acting as an investment fund manager or promoter, and acting in a management or consultative capacity in connection with securities market activities.

[72] As to direct monetary sanctions – administrative penalties – we consider them, prima facie, both an appropriate and a necessary element of a package of sanctions in this case, involving as it does improprieties in the raising of capital with an intention to deliver monetary benefits to those responsible. Consistent with this, Staff (as noted) urged that administrative penalties – some of them large – be ordered against all Respondents.

[73] There are, however, potentially countervailing considerations. One of these relates to Couch's claim to have no money – a claim that the evidence indicates may be true. While she did not explicitly plead that this should be a factor in our assessment of sanction, poverty has been advanced in other cases as a ground for reducing the quantum of an administrative penalty otherwise indicated, or for declining entirely to order one. However, such a proposition – were it

[1] We would, of course, expect in the ordinary course that any hypothetical application for registration by any of the Respondents would be reviewed carefully by those charged with administering the registration regime, with the circumstances and outcomes of this case given whatever consideration is warranted.

intended by the Respondents – is unconvincing, as this Commission stated recently in *Re Aurora*, 2012 ABASC 17 (at para. 84):

> The implicit proposition that administrative penalties should be minimized or forgone in such circumstances is, both generally speaking and in this case, unpersuasive. . . . Tailoring an administrative penalty – reducing it from an otherwise-indicated quantum – in response to a respondent's current financial weakness could, in a case such as this (involving a large and successful illegal capital-raising operation), fatally undermine the required general deterrence.

[74] The second potentially countervailing consideration – more persuasive in the circumstances – relates to the effect that administrative penalties might have on Bearspaw and Hawaii Fund investors. Administrative penalties against those entities would give the Commission a claim on the assets of those entities, much as the aggrieved investors might already have. Collecting such administrative penalties from whatever assets might be available to creditors would, on its face, seem likely to diminish prospects of recovery for the investors – the primary victims in all of this.

[75] Questioned directly on the point, Staff argued that establishing the Commission as a creditor of Bearspaw and Hawaii Fund could benefit the investors, in that (as we understood it) Staff could exercise the rights of a substantial creditor more effectively than the investors themselves and then, if assets become available for distribution to creditors, Staff could somehow waive or decline to enforce the administrative penalties. The authority for, and the practicalities and possibly even the propriety of, such an approach were unclear, and we were not persuaded.

[76] Our sanctioning power is to be exercised in the public interest. There might be circumstances in which that broad interest outweighs the negative implications for investors – perhaps, for example, where the need for general deterrence cannot otherwise be satisfied. Here, though, we consider there to be other means to achieve the necessary deterrence.

[77] Therefore, out of concern for the position of the investors in Bearspaw and Hawaii Fund, and being satisfied that other orders are open to us which, in the aggregate, can deliver the necessary protective effect, we consider administrative penalties against those two entities unnecessary. We do not, however, find the same rationale applicable to the other Respondents.

3. Quantifying Sanctions

[78] The nature of the misconduct – at root, simple deceit – coupled with the impenitence of Couch and the resultant grave risk we perceive of future harm from the Respondents, lead us to conclude that all of the Respondents pose a permanent danger to the investing public. We therefore conclude that, in the public interest, each Respondent must be barred, permanently, from access to the capital market in any of the several capacities plausibly pertinent to the types of activity that were the subject of this proceeding.

[79] A package of permanent bans of that nature constitutes significant sanction, by any measure, and it would in our view go very far to delivering the rigorous specific deterrence required here. Even so, we do not consider that such bans alone would entirely suffice for that

purpose, whereas we think they would fall clearly short of what is it needed by way of general deterrence.

[80] As indicated, we consider that the nature and scale of what transpired also requires administrative penalties (except against Bearspaw and Hawaii Fund), as a message and reminder – to Couch, Shire and Shire Management, first of all, but perhaps even more importantly to observers who might otherwise be tempted to emulate what they did – that misconduct of the sort found here comes with a direct and unwelcome financial sting. To accomplish this, the administrative penalties here must be sizeable – indicative of more than a mere cost of doing business.

[81] That said, administrative penalties here would be but one component of a larger package of sanctions. The other part – permanent market-access bans – is significant enough that the overall requisite protective effect can be achieved even with a moderation in the quantum of administrative penalties, as compared to what might otherwise be called for (as indicated by some of the sanctioning factors). Moreover, given that Shire and Shire Management were but Couch's vehicles, we consider it appropriate that they share joint and several responsibility for such administrative penalty.

[82] We are satisfied, and we find, that an administrative penalty of $750 000 imposed jointly and severally against Couch, Shire and Shire Management will appropriately serve the public interest.

IV. COSTS

[83] Staff tendered a statement of investigation and hearing costs incurred, together with supporting documentation. This statement indicated that Staff costs (based on time expended) totalled $226 455.00, and disbursements (including costs of witnesses, photocopying, deliveries, travel and recording) totalled $47 093.16, for an aggregate of $273 548.16. Staff did not seek order for payment of all of this; they reduced the amount sought on account of Staff costs by $100 000 (roughly 44%), to a total of $173 548.16, in recognition that, for example, some of the costs related to investigative work in respect of entities not named as Respondents, and some work by senior Staff could have been performed at lower cost by more junior Staff. Adjustments on those grounds are, in our view, entirely appropriate – although we are not in a position to assess, from the information before us, whether the $100 000 adjustment was strictly proportionate, conservative, or indeed generous to the Respondents. At the same time, it was unclear to us whether some adjustment to the disbursements might also have been appropriate. Given that, we would further adjust the recorded costs to a total of $140 000.

[84] Contributions to efficiency being particularly germane to costs orders, we considered the Couch Submission contention that Couch (and, by extension, all Respondents) "have been nothing but cooperative", allegations to the contrary being mere "fabrication". We concur, from our observation of Couch in the Merits Hearing, that on the whole she conducted herself there in a cooperative fashion, and we overlook some of the inefficiencies that may inevitably arise when a proceeding involves an unrepresented party. That said, cooperative conduct is expected of everyone in such a process; it falls short of a demonstrated positive contribution to efficiency warranting a reduction in costs. Conversely, the fact that she made untrue and misleading

statements to Staff in the course of the investigation surely indicates the very opposite of cooperation; such conduct tends (to say the least) toward inefficiencies. Further, apart from its doubtful logic, the Couch Submission request that we reconsider the Merits Decision based partly on documents not in evidence (and which, if they exist, would surely best have been presented, long before now, by Couch herself) was in no sense conducive to the efficient conduct of this proceeding.

[85] We therefore discern no reason why the Respondents should not be ordered to pay all of the costs, adjusted as above.

[86] As noted, Staff urged that the adjusted costs be paid by the Respondents in differing proportions, and that some share joint and several responsibility for their portions. We agree in principle with the proposition that Couch, as the guiding mind of the other Respondents and the human focus of this proceeding, should bear by far the largest share of the costs payable – $100 000 – with the balance of $40 000 allocated among the other Respondents. Lacking grounds to distinguish among those four Respondents' respective contributions (or otherwise) to efficiency, we would make an equal allocation of $10 000 to each.

[87] Here too, we considered the effect on investors in Bearspaw and Hawaii Fund, and whether we might decline to order costs against those two entities out of concern about thereby constraining the investors' prospects of recovery. We reached a different conclusion than we did in connection with administrative penalties, for this reason: the investigation and hearing costs were incurred by the Commission, and unless recovered from Respondents they will ultimately be borne by the capital market participants whose fees fund the Commission's operation. Unlike an administrative penalty, an order for costs recovery amounts to a reallocation of an existing burden, not a wholly new one. In the circumstances, and given the comparatively modest amounts involved, we think it appropriate that Bearspaw and Hawaii Fund bear their share of the adjusted costs. That said, we do not think it necessary or appropriate that any of the Respondents share joint and several responsibility for the costs payments of the others.

V. ORDERS

[88] For the reasons given, we make the following orders.

Couch

[89] Against Couch, we order that:

- under sections 198(1)(b) and (c) of the Act, she must cease trading in or purchasing any securities, and all of the exemptions contained in Alberta securities laws do not apply to her, permanently;
- under sections 198(1)(d) and (e), she must resign any position that he currently holds as a director or officer of any issuer or investment fund manager, and she is prohibited from becoming or acting as a director or officer (or both) of any issuer or investment fund manager, permanently;
- under section 198(1)(e.2), she is prohibited from becoming or acting as an investment fund manager or promoter, permanently;

- 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, permanently;
- under section 199, she must pay (jointly and severally with Shire and Shire Management) an administrative penalty of $750 000; and
- under section 202 of the Act, she must pay $100 000 of the costs of the investigation and hearing.

Shire

[90] Against Shire, we order that:

- under sections 198(1)(b) and (c) of the Act, it must cease trading in or purchasing any securities, and all of the exemptions contained in Alberta securities laws do not apply to it, permanently;
- under section 198(1)(e.2), it is prohibited from becoming or acting as an investment fund manager or promoter, permanently;
- under section 198(1)(e.3), it is prohibited from acting in a management or consultative capacity in connection with activities in the securities market, permanently;
- under section 199, it must pay (jointly and severally with Couch and Shire Management) an administrative penalty of $750 000; and
- under section 202 of the Act, it must pay $10 000 of the costs of the investigation and hearing.

Shire Management

[91] Against Shire Management, we order that:

- under sections 198(1)(b) and (c) of the Act, it must cease trading in or purchasing any securities, and all of the exemptions contained in Alberta securities laws do not apply to it, permanently;
- under section 198(1)(e.2), it is prohibited from becoming or acting as an investment fund manager or promoter, permanently;
- under section 198(1)(e.3), it is prohibited from acting in a management or consultative capacity in connection with activities in the securities market, permanently;
- under section 199, it must pay (jointly and severally with Couch and Shire) an administrative penalty of $750 000; and
- under section 202 of the Act, it must pay $10 000 of the costs of the investigation and hearing.

Bearspaw

[92] In respect of Bearspaw, we order that:

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

- under section 198(1)(e.2), it is prohibited from becoming or acting as an investment fund manager or promoter, permanently;
- under section 198(1)(e.3), it is prohibited from acting in a management or consultative capacity in connection with activities in the securities market, permanently; and
- under section 202 of the Act, it must pay $10 000 of the costs of the investigation and hearing.

Hawaii Fund

[93] In respect of Hawaii Fund, we order that:

- under section 198(1)(a) of the Act, all trading in or purchasing of securities of Hawaii Fund must cease, permanently;
- under sections 198(1)(b) and (c), Hawaii Fund must cease trading in or purchasing any securities, and all of the exemptions contained in Alberta securities laws do not apply to it, permanently;
- under section 198(1)(e.2), it is prohibited from becoming or acting as an investment fund manager or promoter, permanently;
- under section 198(1)(e.3), it is prohibited from acting in a management or consultative capacity in connection with activities in the securities market, permanently; and
- under section 202 of the Act, it must pay $10 000 of the costs of the investigation and hearing.

[94] This proceeding is concluded.

5 March 2012

For the Commission:

"original signed by"
Stephen Murison

"original signed by"
Karen Prentice, QC

"original signed by"
Fred Snell, FCA8