Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor 20 Queen Street West Toronto ON M5H 3S8 | CP 55, 19e étage 20, rue queen ouest Toronto ON M5H 3S8

IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

IN THE MATTER OF
YORK RIO RESOURCES INC., BRILLIANTE BRASILCAN RESOURCES CORP., VICTOR YORK, ROBERT RUNIC, GEORGE SCHWARTZ, PETER ROBINSON, ADAM SHERMAN, RYAN DEMCHUK, MATTHEW OLIVER, GORDON VALDE AND SCOTT BASSINGDALE

REASONS AND DECISION
(Section 127 of the Act)

Hearing: **March 21, 22, 23, 24 and 28, 2011**
April 5, 2011
May 2 and 3, 2011
June 6, 8, 9, 10, 13, 14, 15, 16 and 17, 2011
July 20, 21, 22, 26 and 27, 2011
August 3, 9, 11, 12, 19 and 22, 2011
September 21 and 28, 2011
November 1, 2011
December 19 and 21, 2011
December 25 and 27, 2011 (Written Submissions)

Decision: March 25, 2013

Panel: Vern Krishna, QC - Commissioner and Chair of the Panel
Edward P. Kerwin - Commissioner

Appearances: Hugh Craig, Cameron Watson, Carlo Rossi - For Staff of the Commission

Victor York - Self-represented
George Schwartz - Self-represented

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REASONS AND DECISION

I. INTRODUCTION

[1] This proceeding arises out of a Notice of Hearing issued by the Ontario Securities Commission (the "**Commission**") dated March 2, 2010, in relation to a Statement of Allegations, also dated March 2, 2010, filed by Staff of the Commission ("**Staff**") against York Rio Resources Inc. ("**York Rio**"), Brilliante Brasilcan Resources Corp. ("**Brilliante**"), Victor York ("**York**"), Robert Runic ("**Runic**"), George Schwartz ("**Schwartz**"), Peter Robinson ("**Robinson**"), Adam Sherman ("**Sherman**"), Ryan Demchuk ("**Demchuk**"), Matthew Oliver ("**Oliver**"), Gordon Valde ("**Valde**") and Scott Bassingdale ("**Bassingdale**").

[2] On November 5, 2010, the Commission approved a settlement agreement between Staff and Robinson (*Re Robinson* (2010), 33 O.S.C.B. 10434). On June 6, 2011, the Commission approved a settlement agreement between Staff and Sherman (*Re Sherman* (2011), 34 O.S.C.B. 6560). York Rio, Brilliante, York, Runic, Schwartz, Demchuk, Oliver, Valde and Bassingdale are referred to collectively in these reasons, as the "**Respondents**").

A. The Allegations

[3] Staff alleges that York Rio, York, Runic, Schwartz, Demchuk, Oliver, Valde and Bassingdale (together, the "**York Rio Respondents**") engaged in the illegal distribution of York Rio securities that raised approximately $18 million from May 10, 2004 to October 21, 2008 (the "**Material Time**"). Staff alleges that the York Rio Respondents contravened subsections 25(1)(a) and 53(1) and section 126.1(b) of the *Securities* Act, R.S.O. 1990, c. S.5, as amended (the "**Act**"), contrary to the public interest. Staff alleges that York, Runic, Demchuk, Oliver, Valde and Bassingdale contravened subsection 38(3) of the Act, contrary to the public interest. Staff also alleges that York, Runic and Schwartz, being directors and/or officers of York Rio, authorized, permitted or acquiesced in the contraventions of the Act by York Rio or its salespersons, representatives or agents, contrary to section 129.2 of the Act and contrary to the public interest.

[4] Staff alleges that Schwartz, by trading in York Rio securities, breached the Commission's temporary cease trade order made against him on May 1, 2006 in relation to another matter, *Re Euston Capital Corp. and Schwartz* (2006), 29 O.S.C.B. 3920, which was extended from time to time and remained in effect during the latter thirty months of the Material Time ("**Euston**" and the "**Euston Order**"), contrary to subsection 122(1)(c) of the Act and contrary to the public interest.

[5] Staff alleges that Brilliante, York, Runic, Demchuk, Oliver, Valde and Bassingdale (together, the "**Brilliante Respondents**") engaged in the illegal distribution of Brilliante securities that raised approximately $150,000 from January 17, 2007 to October 21, 2008. Staff alleges that the Brilliante Respondents contravened subsections 25(1)(a) and 53(1) and section 126.1(b) of the Act, contrary to the public interest. Staff alleges that Demchuk, Oliver, Valde and Bassingdale contravened subsection 38(3) of the Act, contrary to the public interest. Staff also alleges that York and Runic, being directors and/or officers of Brilliante, authorized, permitted or acquiesced in the contraventions of

the Act by Brilliante or its salespersons, representatives or agents, contrary to section 129.2 of the Act and contrary to the public interest.

B. Temporary Orders

1. Temporary Cease Trade Orders

[6] As stated above, Schwartz was subject to the Euston Order, which, amongst other things, ordered him to cease trading in all securities, during the latter thirty months of the Material Time.

[7] On October 21, 2008, the Commission issued a temporary cease trade order that the trading of Brilliante securities shall cease and that Brilliante, York Rio, and their representatives, including Brian Aidelman ("**Aidelman**"), Jason Georgiadis ("**Georgiadis**"), Richard Taylor ("**Taylor**", later admitted to be an alias for Runic) and York shall not trade in any securities. On November 14, 2008, the order was amended to allow a personal RRSP trading carve-out for York, Aidelman, Georgiadis and Taylor. The order, as amended, was extended from time to time, and on October 15, 2010, it was extended until the completion of the York Rio hearing, subject to any further order by the Commission.

2. Freeze Orders

[8] Approximately $5 million worth of assets has been frozen by orders of the Commission and the British Columbia Securities Commission (the "**BCSC**").

[9] On October 21, 2008, pursuant to subsection 126(1) of the Act, the Commission issued freeze directions to financial institutions in relation to accounts allegedly associated with the proceeds of the sale of York Rio securities (the "**York Rio Proceeds**") and the proceeds of the sale of Brilliante securities (the "**Brilliante Proceeds**") (together, the "**Proceeds**"), including accounts in the name of Brilliante, Munket Capital Holdings Inc. ("**Munket**"), of which York is the sole director and signatory, and 2180353 Ontario Inc. ("**2180353**"), of which Georgiadis, who is York's nephew, is the sole director and signatory, and these freeze directions have been continued by court order, pursuant to subsection 126(5) of the Act, from time to time. On January 21, 2009, the Commission issued a freeze direction in relation to an account in the name of Demchuk's mother, and that freeze direction was continued in respect of a specific amount, which was transferred to a separate account, on March 18, 2009, pending further court order.

[10] On July 7, 2009, pursuant to subsections 126(1) and (4) of the Act, the Commission ordered a Certificate of Direction to be registered on title of a certain property in Aurora that is allegedly associated with Runic's involvement in the sale of York Rio and Brilliante securities (the "**Aurora Property**"), and the Certificate of Direction has been continued from time to time.

[11] In early 2009, the BCSC issued several freeze orders, pursuant to section 151 of the *Securities Act* of British Columbia, relating to approximately $4 million of assets held by Robert Palkowski ("**Palkowski**") and Palkowski & Company Law Corporation ("**Palkowski Law**") and others, in accounts associated with York Rio, Brilliante, York, Runic, Superior Home Building Systems Inc. (formerly known as Anyphone Communications Inc. ("**Superior Home**" or "**Anyphone**"), British Holdings Corporation

("**British Holdings**"), NatWest Holding Company Inc. ("**NatWest**"), Wayne Koch ("**Koch**"), Koch & Associates or Koch, Roberts & Associates, Inc. ("**Koch Inc.**") and other entities which are allegedly associated with the Proceeds.

C. Pre-Hearing Motions

[12] Schwartz and York brought two motions prior to the commencement of the Merits Hearing. In December 2010, they moved for an order staying or adjourning this proceeding (the "**York Rio Proceeding**"), and a proceeding in relation to Uranium308 Resources Inc., Michael Friedman ("**Friedman**"), Schwartz, Robinson and Shafi Khan (the "**Uranium308 Proceeding**"), on the following grounds:

1. they claimed that there is a reasonable apprehension of bias due to (a) the Commission's multifunctional structure and (b) a separate panel of the Commission's approval of settlement agreements with other respondents in these matters, which contain agreed facts; and
2. they claimed that the Commission does not have jurisdiction to make an order against them pursuant to s. 127 of the Act because they are not participants in Ontario's capital markets.

[13] They requested an order:

(a) staying these proceedings; or, in the alternative;

(b) adjourning these matters to be heard before the Canadian Securities Tribunal, once it is in a position to adjudicate these proceedings; or, in the further alternative;

(c) appointing interim non-members to adjudicate these proceedings.

[14] Commissioner Carnwath dismissed the motion with reasons issued on December 15, 2010 (*Re Uranium308 Resources Inc. et al. and York Rio Resources Inc. et al.* (2010), 33 O.S.C.B. 12028) (the "**Stay Motion**" and the "**Stay Decision**").

[15] In February 2011, Schwartz and York moved for an adjournment of the merits hearings in the York Rio Proceeding and the Uranium308 Proceeding in order to allow Schwartz to appeal the Stay Decision to the Divisional Court (the "**Adjournment Motion**"). Commissioner Condon, as she then was, dismissed the Adjournment Motion with reasons issued on March 30, 2011 (*Re Uranium308 Resources Inc. et al. and York Rio Resources Inc. et al.* (2011), 34 O.S.C.B. 4097) (the "**Adjournment Decision**").

[16] On the first day of the Merits Hearing, Schwartz stated that he had abandoned his appeal of the Stay Decision.

[17] However, in his written closing submissions, Schwartz reiterated his motion for a stay of proceedings pending establishment of an independent tribunal, and York adopted his submissions on this point. In our view, the matter is *res judicata*, having been decided by Commissioner Carnwath in the Stay Decision, and we find no further need to address it in these reasons.

D. The Merits Hearing

[18] The Merits Hearing started on March 21, 2011 and continued for 33 days, ending on December 21, 2011. York and Schwartz attended and participated throughout the Merits Hearing. Schwartz was the only Respondent to testify. Oliver appeared on the first day, but stated, through counsel, that he would not participate in the Merits Hearing thereafter. Runic, Demchuk, Valde and Bassingdale did not appear or participate.

[19] Schwartz filed post-hearing written submissions on December 25 and 27, 2011 in relation to the Bias Motion.

E. Failure to attend the Merits Hearing

[20] Throughout the proceeding, Staff provided a number of Affidavits of Service as evidence that they served or attempted to serve each of the Respondents in accordance with the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "**SPPA**") and the Commission's *Rules of Procedure* (2012), 35 O.S.C.B. 10071 (the "**Rules**").

[21] At the commencement of the Merits Hearing, Staff provided the Affidavit of Service of Charlene Rochman ("**Rochman**"), sworn March 21, 2011. At our request, Staff provided an additional Affidavit of Service of Rochman, sworn March 23, 2011. Staff also described its attempts to serve Runic and Bassingdale, as well as Demchuk and Valde, as set out in Affidavits of Service filed previously in the proceeding: Affidavits of Service of Kathleen McMillan, sworn April 9, 2010 and July 21, 2010, and an Affidavit of Service of Rochman, sworn January 6, 2011.

[22] Staff attempted to serve Runic at his parents' address, which was the address given on his driver's licence, which Staff obtained from the Ministry of Transportation, but his parents refused to accept service. Staff made numerous attempts to serve Runic at the Aurora Property, which is associated with him, and where Staff alleges that he resided at the time. Staff located Runic by April 5, 2011 (the sixth day of the Merits Hearing). Staff conducted a compelled examination of Runic, who was assisted by counsel, pursuant to section 13 of the Act, on April 20 and May 4, 2011. Runic was served with notice of the Merits Hearing through counsel, but did not appear or participate.

[23] Staff conducted a compelled examination of Demchuk, pursuant to section 13 of the Act, on December 16, 2008. On March 8, 2010, Staff personally served Demchuk at his workplace, which Demchuk had identified as his address for service, with the Notice of Hearing, the Statement of Allegations, the March 3, 2010 order, and a covering letter giving the date, time and location of the next appearance. Demchuk appeared before the Commission, representing himself, at the second appearance on April 12, 2010. He left his job shortly afterwards, and when Staff attempted to serve him at his parents' address, they were informed that he was travelling. Staff's subsequent attempts to serve him at his parents' address and the email address he had provided during his compelled examination were unsuccessful.

[24] Staff conducted a compelled examination of Valde, pursuant to section 13 of the Act, on January 13, 2009. Staff made several attempts to serve Valde at the address given on his driver's licence, which Staff obtained from the Ministry of Transportation. At his

compelled examination, Valde confirmed this was his home address. Staff's attempts to serve Valde were unsuccessful.

[25] Staff made numerous unsuccessful attempts to serve Bassingdale at the address given on his driver's licence, which Staff obtained from the Ministry of Transportation. Staff was unable to locate Bassingdale for purposes of compelled examination and Bassingdale did not appear or participate in the Merits Hearing.

[26] Having reviewed the Affidavits of Service submitted by Staff, we were satisfied that Staff had made reasonable attempts to serve Runic, Demchuk, Valde and Bassingdale, in accordance with Rule 1.5. We note, as well, that the Notice of Hearing and Statement of Allegations, and all subsequent orders and decisions in this matter, have been posted on the Commission's website. We are prepared to validate service in these circumstances, in accordance with Rule 1.5.3(3).

[27] The Notice of Hearing included the caution that if any party failed to attend the hearing, the hearing would proceed in their absence and they would not be entitled to any further notice of the proceeding. Accordingly, pursuant to section 7 of the SPPA and Rule 7.1, we found that we were authorized to proceed with the hearing without further notice to Runic, Demchuk, Oliver, Valde and Bassingdale.

F. The Search Warrant Motions

[28] On October 21, 2008, Staff conducted a search of offices located at 1315 Finch Avenue, West, Suite 501, Toronto (the "**Finch Location**"), pursuant to a search warrant that was issued under section 158 of the *Provincial Offences* Act, R.S.O. 1990, c. P.33 (the "**POA**") on October 16, 2008 (the "**Search Warrant**").

[29] In motions brought by Schwartz (on March 28, 2011) and York (on April 15, 2011), after the commencement of the Merits Hearing. Schwartz and York argued that the seizure of materials relating to York Rio (the "**York Rio Materials**") was not authorized by the Search Warrant, which authorized a search of the Premises for things and materials related to CD Capital Ltd., operating as Brilliante, York, Aidelman, Georgiadis and Taylor. The Search Warrant identified a long list of "things to be searched for" pertaining to Brilliante at the Premises. It was based on the Information to Obtain a Warrant ("**ITO**") prepared by Staff Investigator Wayne Vanderlaan ("**Vanderlaan**").

[30] The ITO did not identify things and materials pertaining to York Rio as "things to be searched for" at the Premises. Schwartz and York submitted that at the time Vanderlaan swore the ITO, he had reason to believe that things and materials relating to York Rio would be found at the Premises but deliberately omitted this from the ITO. Therefore, Schwartz and York submitted that the seizure of York Rio Materials was illegal, unfair and contrary to the public interest. They requested an order terminating the Merits Hearing or alternatively, excluding the seized York Rio Materials from the evidence (the "**Search Warrant Motions**").

[31] We gave oral rulings and issued orders dismissing the Search Warrant Motions on April 5, 2011 ((2011), 34 O.S.C.B. 4109) (Schwartz) and on May 5, 2011 ((2011), 34 O.S.C.B. 5455) (York), and issued written reasons for our decisions on June 1, 2011 ((2011), 34 O.S.C.B. 6545) (the "**Search Warrant Decision**").

[32] The conduct of the Search Warrant Motions by Schwartz and York resulted in delays in the Merits Hearing.

[33] Although Schwartz brought his Search Warrant Motion some two and a half years after the Search Warrant was executed on October 28, 2008 and a year after Staff provided its initial disclosure, which included the Search Warrant and the ITO, in March 2010, he sought leave to bring the motion without notice, pursuant to Rule 3.8 (the "**Schwartz Motion**"). On March 29, 2011, we were advised that York wished to join the Schwartz Motion, but York withdrew this request the next day (March 30, 2011).

[34] Staff opposed the Schwartz Motion as untimely, amongst other things.

[35] Our ruling is described at paragraph 15 of the Search Warrant Decision, as follows:

> Because Schwartz was self-represented at the hearing, we waived the time limits set out in Rule 3.8, as permitted by Rule 1.6(2) of the Rules. Rather than refusing to hear the Schwartz Motion, as permitted by Rule 3.9 of the Rules, we adjourned the Merits Hearing to allow Schwartz and Staff to file and serve their respective materials pursuant to the Rules. We invited Staff to file and serve, by 5:00 p.m. on March 30, 2011, a Memorandum of Fact and Law addressing the question: "what is the effect (in terms of admissibility of evidence) of not including reference to York Rio in paragraph 1 of the Warrant, which reference was subsequently included in the related detention orders?" (the "**Question**"). We invited Schwartz to file and serve, by 3:30 p.m. on April 1, 2011, a Memorandum of Fact and Law addressing the Question. We set down April 5, 2011 for oral argument on the Question.

[36] On March 30, 2011, Staff filed and served a Memorandum of Fact and Law and a Brief of Authorities, and Schwartz filed and served a Memorandum of Fact and Law on April 1, 2011. On April 5, 2011, Staff and Schwartz gave oral submissions on the Schwartz Motion. York attended at the hearing on April 5, 2011, confirmed that he was not joining the motion and declined an opportunity to speak to it. We gave an oral ruling dismissing the Schwartz Motion on the same day, with reasons to follow.

[37] This was not the end of the matter, for reasons described at paragraphs 18-27 of the Search Warrant Decision. On April 15, 2011, ten days after we issued our order dismissing the Schwartz Motion, York filed and served a Notice of Motion seeking the same remedies as the Schwartz Motion and on very similar grounds (the "**York Motion**"). York provided a Memorandum of Fact and Law and stated that he would rely on Schwartz's motion materials. Staff objected on the basis, amongst other reasons, that the York Motion was untimely and was virtually identical to the Schwartz Motion, which had been dismissed. Our ruling is set out at paragraph 23 of the Search Warrant Motion, as follows:

> The York Motion is untimely, having been brought without advance notice after we had given York several opportunities to join the Schwartz Motion and after we gave our oral ruling in the Schwartz Motion.

However, we decided to consider the York Motion, because York was self-represented at the hearing and in the interests of judicial economy.

[38] When the hearing resumed on May 2, 2011, York stated that he was not prepared to speak to the York Motion. "To ensure that York had an opportunity to prepare for and speak to the York Motion, we agreed to adjourn the York Motion until 10:30 a.m. on May 3, 2011." (Search Warrant Decision, paragraph 24)

[39] On May 3, 2011, York gave brief oral submissions. We gave him an opportunity to give evidence in support of the York Motion, but he declined. Staff relied on its written submissions. We dismissed the York Motion by order issued on May 5, 2011, with reasons to follow. The York Motion added nothing of substance to the Schwartz Motion.

[40] In the Search Warrant Decision, we found that: (i) Schwartz's rights were not engaged by the seizure of the York Rio Materials from the Finch Location and accordingly he lacked standing to bring the Schwartz Motion; (ii) there was no evidence to support the assertions by Schwartz and York that Staff's seizure of the York Rio Materials from the Finch Location was illegal or improper, or that Schwartz and York have been prejudiced or their rights have been infringed as a result of the seizure of the York Rio Materials; and (iii) there was no reason to stay the proceeding or exclude the York Rio Materials from the evidence on the basis of fairness or the public interest. We concluded that it was in the public interest to continue the Merits Hearing and to admit the York Rio Materials into evidence.

G. The Exclusion of Evidence Motion

[41] On June 16, 2011 (day 16 of the Merits Hearing), Schwartz asked that a time and date be scheduled for the hearing of a motion to exclude from the evidence admitted at the Merits Hearing his compelled evidence and any other compelled evidence obtained by Staff in its investigation of him, and an order that the compelled evidence admitted at the Merits Hearing be sealed by the Commission, to ensure it is not disclosed to any police force (the "**Exclusion of Evidence Motion**"). York took no part in the Exclusion of Evidence Motion.

[42] After raising the issue on June 16, 2011, Schwartz did not pursue the Exclusion of Evidence Motion. When the Panel asked about it on July 20, 2011, Schwartz said he could not proceed until he had finished cross-examining Vanderlaan. Vanderlaan's testimony, including cross-examination on whether the investigation was administrative or criminal in nature, was completed on July 27, 2011.

[43] On August 10, 2011, Schwartz filed and served another request that a time and date be scheduled for the hearing of the Motion. At the start of the hearing on August 11, 2011, we scheduled August 22, 2011 for the hearing of the Exclusion of Evidence Motion and directed Schwartz to file his Notice of Motion by Friday, August 12, 2011, in accordance with Rule 3.2. On the morning of August 12, 2011, Schwartz advised that he would not be able to file and serve his Notice of Motion that day, but could do so by Monday, August 15, 2011. As Schwartz and Staff agreed that the requested extension would not require an adjournment of the August 22, 2011 motion hearing, we granted Schwartz's request, in accordance with Rule 1.6(2).

[44] We heard the submissions of Schwartz and Staff on the Exclusion of Evidence Motion on August 22, 2011 and November 1, 2011.

[45] When the Merits Hearing resumed on September 21, 2011, we invited Schwartz and Staff to provide additional written submissions, in respect of the Exclusion of Evidence Motion, on *R. v. Wilder* (2001), 53 O.R. (3d) 519, a decision of the Ontario Court of Appeal ("***Wilder***"), by September 28, 2011 (Schwartz) and September 30, 2011 (Staff). Schwartz filed and served his supplementary submissions in respect of the *Wilder* decision on September 27, 2011. When the Merits Hearing resumed on September 28, 2011, Staff asked for an opportunity to give oral submissions on *Wilder*, and this was scheduled for November 1, 2011. We gave York an opportunity to telephone Schwartz from the hearing room to ask whether he intended to supplement his written submissions with oral argument. Schwartz stated, through York, that he did not wish to do so. The next day (September 29, 2011), Schwartz sent an email to the Panel through the Office of the Secretary and copied to Staff, stating that he had "by error thought the oral submission [*sic*] were to be made this Friday, which is a religious holiday to me. I did not know until a subsequent discussion with Mr. York that they in fact were scheduled for November 1". He asked for "15 or 20 minutes on November 1" to make his oral submissions. The Panel, having considered the matter, granted the request the next day by email from the Office of the Secretary, allowing Schwartz 15 minutes on November 1, 2011 to offer any additional comments that he wished to make and giving Staff a brief opportunity to reply.

[46] We issued an order dismissing the Exclusion of Evidence Motion on November 8, 2011 ((2011), 34 O.S.C.B. 11376), and issued our reasons on December 22, 2011 ((2011), 35 O.S.C.B. 99) (the "**Exclusion of Evidence Decision**"). In the Exclusion of Evidence Decision, we found that: (i) the York Rio Proceeding is an administrative proceeding, not a quasi-criminal or criminal proceeding, and does not involve penal liability; (ii) a respondent's compelled evidence, obtained pursuant to section 13 of the Act, is admissible against him in an administrative proceeding; (iii) a respondent's compelled evidence is not admissible against him in a quasi-criminal or criminal proceeding; and (iv) there was no basis for holding an *in camera* hearing with respect to the reading-in of the compelled evidence or for sealing the compelled evidence.

[47] Schwartz returned to this issue in his written closing submissions, and York incorporated Schwartz's submissions by reference.

[48] We have nothing further to add to the Exclusion of Evidence Decision.

[49] Schwartz's conduct of the Exclusion of Evidence Motion resulted in delays in the Merits Hearing (see paragraphs 16-22 of the Exclusion of Evidence Decision).

H. The Bias Motion

[50] On December 19, 2011, Staff made its brief closing argument, relying mainly on its written submissions, dated November 24, 2011. Commissioner Kerwin asked for amplification of several points, including a breakout of the dollars raised from the respective "boiler rooms" or offices that operated at the five locations identified by Staff as listed in a chart labelled "Boiler Room Timeline" set forth in Staff's written

submissions. Staff counsel provided Supplemental Submissions in response to the Panel's questions on December 21, 2011, the final day of the hearing.

[51] In the interim, Schwartz filed "Amended Submissions on the Merits" by email on December 20, 2011. In three paragraphs in an attachment to an email, Schwartz submitted that Commissioner Kerwin's use of the phrase "boiler rooms" proved actual bias and a predisposition to conclude that the Respondents were engaged in illegal "boiler room" activities, as alleged. Schwartz submitted that the hearing should be dismissed because the Panel had been fatally compromised.

[52] Schwartz did not appear on December 21, 2011 to argue what was essentially a bias motion. York attended, but stated that he was not part of the motion.

[53] Staff submitted that there was no proper motion before the Panel, noting that Schwartz, having brought two motions prior to the commencement of the Merits Hearing and two further motions during the Merits Hearing, should be familiar with the procedure for bringing a motion pursuant to Rule 3.

[54] As we had done on several previous occasions during the Merits Hearing, we were prepared to waive or vary the Commission's procedural rules in order to ensure that Schwartz, who was self-represented, had a full and fair opportunity to be heard. We ruled that Schwartz should file any bias motion by January 5, 2012.

[55] We did not receive a notice of motion, motion record, memorandum of fact and law or brief of authorities, as required by Rule 3. However, on December 25, 2011, Schwartz filed, by email, "Supplemental Submissions on the Merits", in which he provided additional submissions on bias. In reaching our decision on bias, we considered Schwartz's written submissions of December 20 and December 25, 2011, and Staff's oral submissions on December 21, 2011.

[56] The test for reasonable apprehension of bias was recently addressed by the Commission in *Re Norshield* (2009), 32 O.S.C.B. 1249, at paragraphs 53-58, as follows:

> The reasonable apprehension of bias test has been considered by the Supreme Court of Canada on numerous occasions. It is well established that because of the difficulty in determining actual bias, courts and administrative tribunals should concern themselves with the question of whether or not a reasonable apprehension of bias exists, and not whether actual bias exists.
>
> Lord Hewart C.J. famously expressed another reason why the test of a reasonable apprehension of bias is preferred:
>
> > [it] is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.
> >
> > (*R. v. Sussex Justices, Ex parte* McCarthy (1923), [1924] 1 K.B. 256 (K.B.) at p. 259)
>
> The manner in which the test should be applied was set out by Mr. Justice de Grandpré in dissent in *Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 at p. 394 ("*Committee for*

Justice and Liberty"), and has been referenced with approval by the Supreme Court of Canada on numerous occasions:

> … the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information … [The] test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly".

The Supreme Court of Canada had another opportunity to elaborate upon and apply the reasonable apprehension of bias test in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 ("*Newfoundland Telephone*") and *R. v. R.D.S.*, [1997] 3 S.C.R. 484 ("*R.D.S.*"); as well as in other cases.

In *Newfoundland Telephone*, above at para. 22, Mr. Justice Cory stated that procedural fairness:

> … cannot exist if an adjudicator is biased. It is, of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.

Further, Mr. Justice Cory pointed out that the conduct of members of administrative boards which are primarily adjudicative in nature, must be such that there can be no reasonable apprehension of bias with regard to their decision, similar to the standard applicable to the courts (see *Newfoundland Telephone*, above at para. 27).

[57] On appeal, the Divisional Court upheld the Commission decision, applying the well-established test:

> The test to establish bias is well-known. It does not require a finding of actual bias. The issue to be determined is whether the comments made would cause a reasonable person, who is informed of the facts, to conclude that the OSC had pre-judged the conduct of the appellants and that they did not and would not receive an impartial hearing.
>
> (*Xanthoudakis v. Ontario Securities Commission*, 2011 ONSC 4685, at paragraph 26)

[58] We are not satisfied that Commissioner Kerwin's use of the term "boiler rooms" in the context of a request for additional submissions from Staff in respect of offices listed in a chart labelled "Boiler Room timeline" set forth in Staff's written submissions would cause a reasonable person, informed of the circumstances, to conclude that Commissioner Kerwin had pre-judged the Respondents' conduct or that they would not receive an impartial hearing.

[59] Schwartz's submissions are directed, in part, to the "innumerable references to boiler rooms" in Staff's disclosures and submissions. There is no question that Staff characterized the York Rio and Brilliante offices as "boiler rooms" in its opening statement and accompanying slide-deck at the Merits Hearing on the first day, and in written submissions at the close of the hearing. Throughout the Merits Hearing, the term "boiler room" was used repeatedly by Staff counsel and by Vanderlaan in his testimony, and Schwartz and York used the term in their cross-examination of Vanderlaan and other witnesses. However, only the reference by Commissioner Kerwin on December 19, 2012 in requesting a breakout of dollars raised by office location led to an objection by Schwartz.

[60] We are not bound by Staff's submissions or by the characterization of alleged conduct by any party or witness.

[61] It was Staff's written submissions, and in particular a chart labelled "Boiler Room Timeline" at page 8 of Staff's written submissions that formed the immediate context for Commissioner Kerwin's reference to "boiler rooms" in his request for additional Staff submissions, including a breakout of the amounts raised from the five locations identified as office locations on the chart submitted by Staff. Staff's chart identified, for each of the locations associated with York Rio and Brilliante, the period of activity and the individuals associated with the location. What the Panel sought from Staff was a further synthesis of Staff's submissions with respect to the amount, source and use of investor funds raised at each location. In our view, a reasonable observer, informed of the circumstances, could not reasonably conclude that in seeking clarification of Staff's submissions, Commissioner Kerwin or the Panel had pre-judged the case or determined the outcome. Throughout the Merits Hearing, the Panel made it abundantly clear that this matter would be decided based on the evidence and submissions provided by the parties.

II. THE RESPONDENTS

A. The Individual Respondents

[62] Each of York, Runic, Schwartz, Demchuk, Oliver, Valde and Bassingdale (the "**Individual Respondents**") is, or was, during the Material Time, a resident of Ontario.

[63] Staff filed certified statements, pursuant to section 139 of the Act ("**Section 139 Certificates**"), with respect to the registration status of the Individual Respondents. Based on Staff's Section 139 Certificates, which were uncontroverted, we find that none of the Individual Respondents has ever been registered with the Commission in any capacity.

[64] For the reasons given below, we find that Runic used the names "Richard Turner" ("**Turner**"), "Taylor" and "John Taylor" in relation to his involvement with York Rio and Brilliante, Demchuk used the name "Simon McKay" ("**McKay**") when selling York

Rio securities and "Andrew Sutton" ("**Sutton**") when selling Brilliante securities, Oliver used the name "Mark Roberts" ("**Roberts**") when selling York Rio securities and "Bill Hastings" ("**Hastings**") when selling Brilliante securities, Valde used the name "Doug Bennett" "**Bennett**") when selling York Rio securities and "Don Wade" ("**Wade**") when selling Brilliante securities, and Bassingdale used the name "Gavin Myles" ("**Myles**") when selling York Rio securities and "Brent Gordon" ("**Gordon**") when selling Brilliante securities.

B. The Corporate Respondents

[65] Staff filed Corporation Profile Reports obtained from the Ontario Ministry of Consumer and Business Services, which indicate that York Rio was incorporated in Ontario on May 10, 2004, and that York was listed as its President and sole director. We heard evidence that York was the co-founder of York Rio, along with Richard Jbeily ("**Jbeily**"), who was Chair of York Rio until September 2005, when he and York parted ways.

[66] Staff filed Corporation Profile Reports indicate that Brilliante was incorporated in Ontario on January 19, 2007, and that Aidelman was listed as its sole director. We heard evidence that Aidelman is the former son-in-law of York and was named as the President of Brilliante.

[67] Staff filed Section 139 Certificates indicating that neither York Rio nor Brilliante has ever been a registrant, reporting issuer or filer of a preliminary prospectus or prospectus. We accept this evidence, which was uncontroverted.

III. THE ISSUES

[68] The issues before us are as follows:

A. York Rio

1. Did York Rio, York, Runic, Schwartz, Demchuk, Oliver, Valde and Bassingdale trade in York Rio securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest?
2. Did York Rio, York, Runic, Schwartz, Demchuk, Oliver, Valde and Bassingdale distribute York Rio securities without filing a prospectus or a preliminary prospectus with the Commission and obtaining receipts for them from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest?
3. Did York, Runic, Demchuk, Oliver, Valde and Bassingdale make prohibited representations that York Rio securities would be listed on a stock exchange, contrary to subsection 38(3) of the Act and contrary to the public interest?
4. Did York Rio, York, Runic, Schwartz, Demchuk, Oliver, Valde and Bassingdale engage in a course of conduct relating to securities that they knew or reasonably ought to have known would perpetrate a fraud on York Rio investors, contrary to section 126.1(b) of the Act and contrary to the public interest?

5. Did York, Runic and Schwartz, being directors and/or officers of York Rio, authorize, permit or acquiesce in the contraventions of subsections 25(1)(a) and 53(1), subsection 38(3), and section 126.1(b) of the Act by York Rio, contrary to section 129.2 of the Act and contrary to the public interest?

6. Did Schwartz trade in York Rio securities while he was prohibited from trading in securities by order of the Commission, contrary to subsection 122(1)(c) of the Act and contrary to the public interest?

B. Brilliante

1. Did Brilliante, York, Runic, Demchuk, Oliver, Valde and Bassingdale trade in Brilliante securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest?

2. Did Brilliante, York, Runic, Demchuk, Oliver, Valde and Bassingdale distribute Brilliante securities without filing a prospectus or a preliminary prospectus with the Commission and obtaining receipts for them from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest?

3. Did Demchuk, Oliver, Valde and Bassingdale make prohibited representations that Brilliante securities would be listed on a stock exchange, contrary to subsection 38(3) of the Act and contrary to the public interest?

4. Did Brilliante, York, Runic, Demchuk, Oliver, Valde and Bassingdale engage in a course of conduct relating to securities that they knew or reasonably ought to have known would perpetrate a fraud on Brilliante investors, contrary to section 126.1(b) of the Act and contrary to the public interest?

5. Did York and Runic, being directors and/or officers of Brilliante, authorize, permit or acquiesce in the contraventions of subsections 25(1)(a) and 53(1), subsection 38(3), and section 126.1(b) of the Act by Brilliante, contrary to section 129.2 of the Act and contrary to the public interest?

IV. SUMMARY OF FINDINGS

A. York Rio

[69] For the reasons given, we find that:

1. York Rio, York, Runic, Schwartz, Demchuk, Oliver, Valde and Bassingdale traded in York Rio securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest;

2. York Rio, York, Runic, Schwartz, Demchuk, Oliver, Valde and Bassingdale distributed York Rio securities without filing a prospectus or a preliminary prospectus with the Commission and obtaining a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest;

3. York, Demchuk, Oliver and Valde made prohibited representations contrary to subsection 38(3) of the Act and contrary to the public interest;

4. York Rio, York, Runic, Schwartz, Demchuk, Oliver, Valde and Bassingdale engaged or participated in a course of conduct relating to securities that they knew or reasonably ought to have known would perpetrate a fraud on York Rio investors, contrary to section 126.1(b) of the Act and contrary to the public interest;

5. York, Runic and Schwartz, being directors and/or officers of York Rio, authorized permitted or acquiesced in the contraventions of subsections 25(1)(a) and 53(1), subsection 38(3), and section 126.1(b) of the Act by York Rio, contrary to section 129.2 of the Act and contrary to the public interest; and

6. Schwartz traded in York Rio securities while prohibited from trading in securities by order of the Commission, contrary to subsection 122(1)(c) of the Act and contrary to the public interest.

B. Brilliante

[70] For the reasons given, we find that:

1. Brilliante, York, Runic, Demchuk, Valde and Bassingdale traded in Brilliante securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest;

2. Brilliante, York, Runic, Demchuk, Valde and Bassingdale distributed Brilliante securities without filing a prospectus or a preliminary prospectus with the Commission and obtaining a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest;

3. Valde and Bassingdale made prohibited representations that Brilliante securities would be listed on a stock exchange, contrary to subsection 38(3) of the Act and contrary to the public interest;

4. Brilliante, York, Runic, Demchuk, Valde and Bassingdale engaged or participated in a course of conduct relating to securities that they knew or reasonably ought to have known would perpetrate a fraud on Brilliante investors, contrary to section 126.1(b) of the Act and contrary to the public interest; and

5. York and Runic, being directors and/or officers of Brilliante, authorized, permitted or acquiesced in the contraventions of subsections 25(1)(a) and 53(1), subsection 38(3), and section 126.1(b) of the Act by Brilliante, contrary to section 129.2 of the Act and contrary to the public interest.

V. THE LAW

A. The Commission's Mandate

[71] The Commission's mandate is found in section 1.1 of the Act, which states that the purposes of the Act are to provide protection to investors from unfair, improper or

fraudulent practices; and to foster fair and efficient capital markets and confidence in capital markets.

[72] Section 2.1 of the Act states that in pursuing the purposes of the Act, the Commission shall have regard to the following fundamental principles:

> . . . .
>
> 2. The primary means for achieving the purposes of the Act are:
>
> > i. requirements for timely, accurate and efficient disclosure of information;
> >
> > ii. restrictions on fraudulent and unfair market practices and procedures; and
> >
> > iii. requirements for the maintenance of high standards of fairness and business conduct to ensure honest and responsible conduct by market participants.

B. The Standard of Proof

[73] Staff must prove its allegations on the balance of probabilities (*Re Sunwide Finance Inc.* (2009), 32 O.S.C.B. 4671, ("***Re Sunwide***") at paragraphs 26 to 28, applying *F. H. v. McDougall*, [2008] S.C.J. No. 54 (S.C.C.) ("***F.H. v. McDougall***")). This is the civil standard of proof. The Panel must scrutinize the evidence with care and be satisfied whether it is more likely than not that the allegations occurred (*F.H. v. McDougall*, above, at paragraph 49).

C. Evidence

1. Hearsay Evidence

[74] We accept that hearsay evidence is admissible in administrative proceedings before the Commission, pursuant to subsection 15(1) of the SPPA, which states:

> Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
>
> (a) any oral testimony; and
>
> (b) any document or other thing,
>
> relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

[75] The Commission's approach to hearsay evidence was summarized in *Re Sunwide* in the following statement:

> Although hearsay evidence is admissible under the SPPA, the weight to be accorded to such evidence must be determined by the panel. Care must be taken to avoid placing undue reliance on uncorroborated evidence that lacks sufficient indicia of reliability (*Starson v. Swayze*, [2003] 1 S.C.R. 722 at para. 115).

(*Re Sunwide*, above, at paragraph 22)

2. Transcripts of Compelled Examination

[76] Through Vanderlaan, Staff introduced into evidence the transcripts of compelled examination of all of the Individual Respondents, except for Bassingdale, who could not be located. In *Re Boock* (2010), 33 O.S.C.B. 1589, at paragraphs 108-109, the Commission held that a transcript of a respondent's compelled examination, obtained pursuant to section 13 of the Act, is admissible against that respondent as part of Staff's case, subject to the Panel's discretion as to the weight to be given that evidence. In this case, we have considered, as part of Staff's case, the transcripts of the compelled examinations of York, Runic, Demchuk, Oliver and Valde, none of whom testified at the Merits Hearing.

[77] Staff did not, however, attempt to rely on the compelled examination of any Individual Respondent, which is hearsay evidence, to support its allegations against any other Individual Respondent. We accept that it would be inappropriate to do so, particularly in this case, given the conflicting evidence we received from the various Individual Respondents about the roles played by other Individual Respondents, and the inherent unreliability of such statements. Accordingly, we have relied on admissions made by each of the Individual Respondents in their compelled examinations, but we have disregarded their testimony that is inculpatory of other Individual Respondents.

[78] With respect to Schwartz, who testified at the Merits Hearing, we have considered only his testimony at the Merits Hearing.

3. Credibility

[79] In cross-examination, York and Schwartz challenged the credibility of a number of Staff's witnesses. For example, they challenged Jbeily's testimony about steps purportedly taken by York Rio to acquire an interest in a company that held mining rights in Brazil. Schwartz challenged the testimony of Friedman and Robinson about his role in the trades of York Rio securities, and gave contrary evidence when he testified. York challenged the testimony of Aidelman, Ungaro and McDonald about his role in the trades of Brilliante securities.

[80] We also heard evidence about the current and former friendships, working relationships and family connections between various Individual Respondents and non-Respondent witnesses. For example, Aidelman is York's former son-in-law, Georgiadis is his nephew, Ungaro is York's friend and McDonald is Ungaro's daughter.

[81] When weighing the conflicting testimony of the witnesses in this case, we have considered whether the evidence is in harmony with the preponderance of probabilities disclosed by the facts and circumstances in this case.

4. The B.C. Witnesses

[82] At the outset of the Merits Hearing, we issued an order under section 152 of the Act authorizing Staff to apply to the Ontario Superior Court of Justice for an order appointing the Panel to take the evidence outside of Ontario of Koch and Palkowski (together, the "**B.C. Witnesses**") for use in the Merits Hearing, and providing for the issuance of a letter of request directed to the British Columbia Supreme Court (the "**B.C.**

Court") requesting the issuance of such process as is necessary to compel the B.C. Witnesses to attend before the Panel to give testimony on oath or otherwise and to produce documents and things relevant to the subject matter of this proceeding. As a result of the adjournment of the Merits Hearing, another section 152 order was issued on May 10, 2011. Koch and Palkowski challenged the summonses that were issued by the B.C. Court, and ultimately, Staff chose not to pursue the matter.

D. The Registration Requirement: Subsection 25(1)a) of the Act

[83] Staff alleges that each of the Respondents traded in securities without registration in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest.

1. The Registration Requirement

[84] At the Material Time, subsection 25(1)(a) of the Act stated:

> **25(1) –** No person or company shall,
>
> (a) trade in a security or act as an underwriter unless the person or company is registered as a dealer, or is registered as a salesperson or as a partner or as an officer of a registered dealer and is acting on behalf of the dealer

[85] As stated in *Re Limelight Entertainment Inc.* (2008), 31 O.S.C.B. 1727 ("***Re Limelight***"):

> The requirement that an individual be registered in order to trade in securities is an essential element of the regulatory framework with the purpose of achieving the regulatory objectives of the Act. Registration serves an important gate-keeping mechanism ensuring that only properly qualified and suitable individuals are permitted to be registrants and to trade with or on behalf of the public. Through the registration process, the Commission attempts to ensure that those who trade in securities meet the applicable proficiency requirements, are of good character, satisfy the appropriate ethical standards and comply with the Act.
>
> (*Re Limelight*, above, at paragraph 135)

2. Trades and Acts in Furtherance of Trades

[86] The terms "trade" and "trading" are broadly defined in subsection 1(1) of the Act, and include, in clauses (a) and (e) of the definition, "any sale or disposition of a security for valuable consideration" and "any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the foregoing".

[87] The Commission has adopted a contextual approach to determining whether a respondent engaged in acts in furtherance of a trade. Ultimately, the question is whether a respondent's conduct has "a sufficiently proximate connection to an actual trade":

> There is no bright line separating acts, solicitations and conduct indirectly in furtherance of a trade from acts, solicitations and conduct not in furtherance of a trade. Whether a particular act is in furtherance of an actual trade is a question of fact that must be answered in the

circumstances of each case. A useful guide is whether the activity in question had a sufficiently proximate connection to an actual trade.

(*Re Costello* (2003), 26 O.S.C.B. 1617, at paragraph 47)

[88] The Commission's approach was reaffirmed in *Re Limelight*:

In determining whether a person or company has engaged or participated in acts in furtherance of a trade, the Commission has taken "a contextual approach" that examines "the totality of the conduct and the setting in which the acts have occurred." The primary consideration is, however, the effect of the acts on investors and potential investors. The Commission considered this issue in *Re Momentas Corporation* (2006), 29 O.S.C.B. 7408 ["***Re Momentas***"], at paras. 77-80, noting that "acts directly or indirectly in furtherance of a trade" include (i) providing promotional materials, agreements for signature and share certificates to investors, and (ii) accepting money; a completed sale is not necessary. In our view, depositing an investor cheque in a bank account is an act in furtherance of a trade.

(*Re Limelight*, above, at paragraph 131. See also, for example, *Re Sabourin* (2009), 32 O.S.C.B. 2707 ("***Re Sabourin***") at paragraphs 54-63)

[89] In *Re Momentas*, the Commission reviewed the jurisprudence and set out the following examples of conduct found to constitute acts in furtherance of trades:

a. providing potential investors with subscription agreements to execute;

b. distributing promotional materials concerning potential investments;

c. issuing and signing share certificates;

d. preparing and disseminating materials describing investment programs;

e. preparing and disseminating forms of agreements for signature by investors;

f. conducting information sessions with groups of investors; and

g. meeting with individual investors.

(*Re Momentas*, above, at paragraph 80)

[90] Receiving consideration for the sale of securities has also been found to constitute an act in furtherance of trades (*Re Momentas*, above, at paragraphs 87-88; *Re Lett* (2004), 27 O.S.C.B. 3215 ("***Re Lett***"), at paragraph 85; *Re Limelight*, above, at paragraphs 131 and 133).

[91] Setting up a website that offers securities to investors has been found to constitute an act in furtherance of a trade (*Re First Federal Capital (Canada) Corp.* (2004), 27 O.S.C.B. 1603, at paragraph 45). Where a website is designed to excite the reader about the company's prospects, the material on the website is considered an advertisement or solicitation for investors to purchase the company's shares. Accordingly, a person who provides that content is engaging in an act in furtherance of a trade (*Re American Technology Exploration Corp.,* (1998) L.N.B.C.S.C. 1 (B.C.S.C.)).

[92] Solicitation or direct contact with investors is not required (*Re Lett*, above, at paragraphs 48-51 and 64; *Re Allen* (2005), 28 O.S.C.B. 8541, at paragraph 85).

E. The Prospectus Requirement: Subsection 53(1) of the Act

[93] Staff alleges that each of the Respondents distributed securities without a prospectus, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest.

[94] "Distribution" is defined in subsection 1(1) of the Act to mean, amongst other things, "a trade in securities of an issuer that have not been previously issued."

[95] At the start of the Material Time in May 2004, subsection 53(1) of the Act read as follows:

> No person or company shall trade in a security on his, her or its own account or on behalf of any other person or company where such trade would be a distribution of such security, unless a preliminary prospectus and a prospectus have been filed and receipts therefor obtained from the Director.

[96] Effective December 20, 2006, subsection 53(1) of the Act was amended to read:

> No person or company shall trade in a security on his, her or its own account or on behalf of any other person or company where such trade would be a distribution of such security, unless a preliminary prospectus and a prospectus have been filed and receipts have been issued for them by the Director.
>
> (S.O. 2006, c. 33, Sch. Z.5, s. 2)

[97] The amended provision remains in effect. The amendment makes no difference to our analysis and conclusions.

[98] As the Commission held in *Re Limelight*, the prospectus requirement is fundamental to the protection of the investing public:

> The requirement to comply with section 53 of the Securities Act is important because a prospectus ensures that prospective investors have full, true and plain disclosure of information to properly assess the risks of an investment and make an informed investment decision. The prospectus requirements of the Act play a significant role in the overall scheme of investor protection. As stated by the court in *Jones v. F.H. Deacon Hodgson Inc.* (1986), 9 O.S.C.B. 5579 (H.C.) (at page 5590), "there can be no question but that the filing of a prospectus and its acceptance by the Commission is fundamental to the protection of the investing public who are contemplating purchase of the shares."
>
> (*Re Limelight*, above, at paragraph 139)

F. The Accredited Investor Exemption

[99] Once Staff has established that a respondent traded without registration and distributed securities without a prospectus, the onus shifts to the respondent to establish

the availability of an exemption from the registration and prospectus requirements (see, for example, *Re Lydia Diamond Exploration of Canada Ltd.* (2003), 26 O.S.C.B. 2511, at paragraphs 83-84; *Re Limelight*, above, at paragraph 142; and *Re Al-tar* (2010), 33 O.S.C.B. 5535 ("***Re Al-tar***")).

[100] In this case, securities of York Rio and Brilliante were purportedly traded only to accredited investors, and York and Schwartz rely on the accredited investor exemption in their submissions.

1. Registration and Prospectus Exemptions

[101] Throughout the Material Time, Ontario securities law provided an exemption from the registration and prospectus requirements for trades and distributions to accredited investors.

[102] In May 2004, the accredited investor exemption was set out in section 2.3 of *OSC Rule 45-501 – Exempt Distributions* ("**OSC Rule 45-501**"). Clauses (m), (n) and (t) of the definition of "accredited investor" in s. 1.1 of OSC Rule 45-501 included three categories that are relevant to this matter:

> . . .
>
> (m) an individual who beneficially owns, or who together with a spouse beneficially own, financial assets having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds \$1,000,000; ("**Net Financial Assets**" and the "**Net Financial Assets Test**");
>
> (n) an individual whose net income before taxes exceeded \$200,000 in each of the two most recent years or whose net income before taxes combined with that of a spouse exceeded \$300,000 in each of those years and who, in either case, has a reasonable expectation of exceeding the same net income level in the current year; ("**Net Income**" and the "**Net Income Test**");
>
> . . .
>
> (t) a company, limited liability company, limited partnership, limited liability partnership, trust or estate, other than a mutual fund or non-redeemable investment fund, that had net assets of at least \$5,000,000 as reflected in its most recently prepared financial statements; ("**Net Business Assets**" and the "**Net Business Assets Test**")
>
> . . .

[103] On September 14, 2005, these provisions were replaced by substantially similar provisions in *National Instrument 45-106, Prospectus and Registration Exemptions* ("**NI 45-106**"), and a new net assets test was added to the accredited investor definition. The relevant provisions (clauses (j), (k), (l) and (m)), which remained unchanged through October 2008, are as follows:

> . . .

(j) an individual who, either alone or with a spouse, beneficially owns financial assets having an aggregate realizable value that before taxes, but net of any related liabilities, exceeds $1,000,000;

(k) an individual whose net income before taxes exceeded $200,000 in each of the 2 most recent calendar years or whose net income before taxes combined with that of a spouse exceeded $300,000 in each of the 2 most recent calendar years and who, in either case, reasonably expects to exceed that net income level in the current calendar year;

(l) an individual who, either alone or with a spouse, has net assets of at least $5,000,000; ("**Net Assets**" and the "**Net Assets Test**");

. . .

(m) a person, other than an individual or investment fund, that has net assets of at least $5,000,000 as shown on its most recently prepared financial statements;

2. The Net Financial Assets Test

[104] "Financial assets" in OSC Rule 45-501 was defined as follows:

"financial assets" means cash, securities, or any contract of insurance or deposit or evidence thereof that is not a security for the purposes of the Act;

[105] The definition is substantially similar in NI 45-106, which defines "financial assets" to mean:

(a) cash,

(b) securities, or

(c) a contract of insurance, a deposit or an evidence of a deposit that is not a security for the purposes of securities legislation.

[106] Schwartz submits that the Net Financial Assets Test includes the value of real property. He relies on clause (b) of the definition of "security" in the Act, which says that "security" includes "any document constituting evidence of title to or interest in the capital, assets, property, profits, earnings or royalties of any person or company". He submits that a document evidencing ownership of real or personal property is a "document constituting evidence of title to or interest in the . . . property . . . of any person or company" and is therefore a security.

[107] The Net Assets Test, which was added in NI 45-106, is not limited to financial assets and is set at a much higher level than the Net Financial Assets Test – $5 million rather than $1 million – because the Net Assets Test requires consideration of all of the investor's total assets minus the investor's total liabilities, such that the calculation of total assets would include the value of an investor's principal residence, and the calculation of total liabilities would include the amount of any liability (such as a mortgage) in respect of the investor's principal residence. In contrast, the Net Financial Assets Test is intended to measure an investor's net assets that are generally liquid or relatively easy to liquidate, and to exclude the value of real property that is a principal

residence. It is a well-established principle of statutory interpretation that “the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament” (R. Sullivan, *Sullivan on the Construction of Statutes*, 5th ed. (Markham: LexisNexis, 2008), at pp. 1-21; *Re Rizzo & Rizzo Shoes*, [1998] 1 S.C.R. 27, at paragraph 21; *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, at paragraph 26). In the context of the two qualifying tests for accredited investor status (the Net Assets Test and the Net Financial Assets Test) an investor’s principal residence is not within the definition of “financial assets” set out in OSC Rule 45-501 and NI 45-106.

3. The Seller’s Responsibility for Compliance

[108] The York Rio and Brilliante subscription agreements required the investor to certify that he or she was an accredited investor. We heard from eight York Rio investors during the Merits Hearing (the “**Investor Witnesses**”), and Schwartz cross-examined each of them about whether they understood that York Rio or Brilliante would be relying on their accredited investor certification. He submits that the Investor Witnesses “were vague, confused, imprecise, dismissive and generally unconcerned with what they may have said in their initial qualifying contacts or what they certified to the Respondents”, and that they did not take seriously the certification provision of the subscription agreements but treated it as “boilerplate verbiage” they had seen in other legal documents.

[109] We do not accept this submission, which inappropriately attempts to put the burden of compliance on the investor. At the opening of the Material Time, section 3.1 of the Companion Policy to OSC Rule 45-501 (“**OSC Rule 45-501CP**”) described the seller’s due diligence obligations as follows:

> It is the seller's responsibility to ensure that its trades in securities are made in compliance with applicable securities laws. In the case of a seller's reliance upon exemptions from the prospectus and registration requirements, the Commission expects that the seller will exercise reasonable diligence for the purposes of determining the availability of the exemption used in any particular circumstances. The Commission will normally be satisfied that a seller has exercised reasonable diligence in relying upon a particular exemption if the seller has obtained statutory declarations or written certifications from the purchasers, unless the seller has knowledge that any facts set out in the declarations or certifications are incorrect.

[110] Reasonable diligence demands that the seller conduct a serious factual inquiry in good faith before accepting a prospective subscription, which includes a duty to look behind the boilerplate language of a subscription agreement, and to make reasonable inquiries to determine whether a prospective investor qualifies as an accredited investor under the Net Income Test, Net Financial Assets Test or Net Assets Test, the Net Business Assets Test, or other relevant categories.

[111] For the reasons given below, we find that several of the Investor Witnesses were never asked about their financial circumstances, and others were misinformed about the accredited investor exemption prior to receiving the subscription agreement.

4. Market Intermediary

[112] The accredited investor exemption from the registration requirement is not available to a market intermediary (OSC Rule 45-501, section 3.4; NI 45-106, section 2.43(1)(b)).

[113] "Market intermediary" is defined in subsection 204(1) of O. Reg. 1015, R.R.O. 1990, as amended ("**Regulation 1015**") to include "a person or company that engages or holds himself, herself or itself out as engaging in Ontario in the business of trading in securities as principal or agent, other than trading in securities purchased by the person or company for his, her or its own account for investment only and not with a view to resale or distribution, . . . "

[114] In *Re Momentas*, the Commission held that an issuer may be a market intermediary, if a "significant part" of its business is selling its own securities, even if the issuer is involved in more than one business (*Re Momentas*, above, at paragraphs 56-57). In determining the "business purpose" of the issuer, the Commission considered the source of its revenue, the composition of its workforce, and the nature of its expenditures (*Re Momentas*, above, at paragraphs 57-63). The Commission stated: "a key consideration for us is the degree to which management's activities and the proceeds of the offering were allocated to the raising of capital as opposed to being invested in the company's stated business activities" (*Re Momentas*, above, at paragraph 54).

[115] In *Re Lett*, the Commission held that the respondents were market intermediaries because "a substantial part" of their time was spent on the high yield program, and investors deposited and the respondents accepted monies for the purpose of the high yield program (*Re Lett*, above, at paragraph 68; see also *Re Allen*, above, at paragraphs 78-83).

[116] For the reasons given below, we find that York Rio and Brilliante were market intermediaries and therefore the accredited investor exemption from the registration requirement was not available with respect to the sale of York Rio or Brilliante securities.

5. Exempt Distribution Reports

[117] An issuer that relies on a prospectus exemption, including the accredited investor exemption, is required to file a Report of Exempt Distribution in Form 45-106F1 ("**Exempt Distribution Report**") in the jurisdiction where the distribution occurs no later than 10 days after the distribution (OSC Rule 45-501, s. 7.5, NI 45-106, s. 6.1).

G. Prohibited Representations: Subsection 38(3) of the Act

[118] Staff alleges that York, Runic, Demchuk, Oliver, Valde and Bassingdale contravened subsection 38(3) of the Act in respect of York Rio securities, contrary to the public interest, and that Demchuk, Oliver, Valde and Bassingdale contravened subsection 38(3) of the Act in respect of Brilliante securities, contrary to the public interest.

[119] At the Material Time, subsection 38(3) of the Act stated:

> Subject to the regulations, no person or company, with the intention of effecting a trade in a security, shall, except with the written permission of the Director, make any representation, written or oral, that such security will be listed on any stock exchange or quoted on any quotation and trade reporting system, or that application has been or will be made to list such

security upon any stock exchange or quote such security on any quotation and trade reporting system, unless,

> (a) application has been made to list or quote the securities being traded, and securities of the same issuer are currently listed on any stock exchange or quoted on any quotation and trade reporting system; or
>
> (b) the stock exchange or quotation and trade reporting system has granted approval to the listing or quoting of the securities, conditional or otherwise, or has consented to, or indicated that it does not object to, the representation.

[120] As there was no suggestion in this case that either of the exemptions set out in clauses (a) and (b) of subsection 38(3) is applicable, the issue is whether a Respondent, "with the intention of effecting a trade in a security", made "any representation, written or oral, that such security will be listed on any stock exchange listed on any stock exchange or quoted on any quotation and trade reporting system, or that application has been or will be made to list such security upon any stock exchange or quote such security on any quotation and trade reporting system".

H. Fraud: Section 126.1(b) of the Act

[121] Staff alleges that each of the Respondents engaged or participated in securities fraud, contrary to section 126.1(b) of the Act and contrary to the public interest.

[122] Section 126.1(b) of the Act is as follows:

> A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities or derivatives of securities that the person or company knows or reasonably ought to know,
>
> . . .
>
> (b) perpetrates a fraud on any person or company.

[123] Section 126.1(b) was proclaimed into law on December 31, 2005, and therefore does not apply to conduct during the first 20 months of the Material Time (from May 2004 to December 2005). Accordingly, our reasons concerning Staff's fraud allegations against the Respondents pertain only to the period from January 1, 2006 to October 21, 2008.

[124] Section 126.1(b) of the Act was first considered by the Commission in *Re Al-tar*, above, and the Commission set out the following statement of the law at paragraphs 214-221 of that decision:

> Fraud is "one of the most egregious securities regulatory violations" and is both "an affront to the individual investors directly targeted" and something that "decreases confidence in the fairness and efficiency of the entire capital market system" (*Re Capital Alternatives Inc.* (2007), A.B.A.S.C. 79 at para. 308 citing D. Johnston & K. D. Rockwell,

Canadian Securities Regulation, 4th ed., Markham: LexisNexis, 2007 at 420).

The term fraud is not defined in the Act. Due to the recent introduction of the fraud provision in the Act, there are no decisions from the Commission interpreting this provision. However, we can draw out guidance and principles from criminal and administrative law jurisprudence and decisions from other securities commissions.

The British Columbia Court of Appeal addressed the application of the substantially identical fraud provision in the British Columbia *Securities Act,* R.S.B.C. 1996, c. 418, as amended (the "BC Act") in *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7 ("*Anderson*"). The Supreme Court of Canada denied leave to appeal the *Anderson* decision ([2004] S.C.C.A. No. 81).

In *Anderson*, the British Columbia Court of Appeal reviewed the legal test for fraud and relied on *R. v. Théroux*, [1993] 2 S.C.R. 5 ("*Théroux*"). In *Théroux*, Justice McLachlin (as she then was) summarized the elements of fraud as follows at paragraph 27:

> . . . the *actus reus* of the offence of fraud will be established by proof of:
>
> 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and
> 2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.
>
> Correspondingly, the *mens rea* of fraud is established by proof of:
>
> 1. subjective knowledge of the prohibited act; and
> 2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).

Section 126.1 of the Act has the identical operative language as the fraud provision in the British Columbia Act. In interpreting the fraud provision in the British Columbia Act and with respect to the mental element, the British Columbia Court of Appeal in *Anderson* stated at paragraph 26 that:

> …[the fraud provision of the BC Act] does not dispense with proof of fraud, including proof of a guilty mind. . . . Section 57(b) simply widens the prohibition against participation in transactions to include participants who know or ought to know that a fraud is being perpetrated *by others*, as well as those who participate in perpetrating the fraud. It does not eliminate proof of fraud, including proof

> of subjective knowledge of the facts constituting the dishonest act, by someone involved in the transactions. [emphasis in original]

The British Columbia Court of Appeal in *Anderson* further explained at paragraph 29 that:

> Fraud is a very serious allegation which carries a stigma and requires a high standard of proof. While proof in a civil or regulatory case does not have to meet the criminal law standard of proof beyond a reasonable doubt, it does require evidence that is clear and convincing proof of the elements of fraud, including the mental element.

The British Columbia Court of Appeal approach to the legal test in the context of securities fraud as set out in *Anderson* was adopted in *Re Capital Alternatives Inc.*, 2007 ABASC 79, which was affirmed in *Alberta (Securities Commission) v. Brost,* [2008] A.J. No. 1071 (C.A.).

For a corporation, it is sufficient to show that its directing minds knew or reasonably ought to have known that the corporation perpetrated a fraud to prove a breach of section 126.1(b) of the Act.

[125] The Commission has adopted substantially the same analysis in a number of subsequent decisions which were provided by Staff, including *Re Lehman Cohort* (2010), 33 O.S.C.B. 7041 ("***Re Lehman Cohort***"), at paragraphs 86-100; *Re Global Partners* (2010), 33 O.S.C.B. 7783 ("***Re Global Partners***"), at paragraphs 238-245; and *Re Borealis International Inc.* (2011), 34 O.S.C.B. 777 ("***Re Borealis***"), at paragraphs 65-67.

I. Directors and Officers: Section 129.2 of the Act

[126] Staff alleges that York, Runic and Schwartz, being directors and/or officers of York Rio, authorized, permitted or acquiesced in the contraventions of the Act by York Rio, contrary to section 129.2 of the Act and contrary to the public interest, and that York and Runic, being directors and/or officers of Brilliante, authorized, permitted or acquiesced in the contraventions of the Act by Brilliante, contrary to section 129.2 of the Act and contrary to the public interest.

[127] Section 129.2 of the Act states:

> For the purposes of this Act, if a company or a person other than an individual has not complied with Ontario securities law, a director or officer of the company or person who authorized, permitted or acquiesced in the non-compliance shall be deemed to also have not complied with Ontario securities law, whether or not any proceeding has been commenced against the company or person under Ontario securities law or any order had been made against the company or person under section 127.

[128] For an individual respondent to be deemed non-compliant under section 129.2, Staff must establish (i) that the individual respondent was a "director or officer" of a

company or person other than an individual, (ii) that the company or person other than an individual has not complied with Ontario securities law, and (iii) that the individual respondent “authorized, permitted or acquiesced in” the non-compliance.

[129] “Director” is defined in subsection 1(1) of the Act to mean “a director of a company or an individual performing a similar function or occupying a similar position for any person”.

[130] “Officer”, with respect to an issuer or registrant, is defined in subsection 1(1) of the Act to mean:

> (a) a chair or vice-chair of the board of directors, a chief executive officer, a chief operating officer, a chief financial officer, a president, a vice-president, a secretary, an assistant secretary, a treasurer, an assistant treasurer and a general manager,
>
> (b) every individual who is designated as an officer under a by-law or similar authority of the registrant or issuer, and
>
> (c) every individual who performs functions similar to those normally performed by an individual referred to in clause (a) or (b).

[131] The leading decision on the meaning of “authorized, permitted or acquiesced in” is *Momentas*:

> Although these terms have been interpreted to include some form of knowledge or intention, the threshold for liability under section 122 and 129.2 is a low one, as merely acquiescing [in] the conduct or activity in question will satisfy the requirement of liability. The degree of knowledge of intention found in each of the terms "authorize", "permit" and "acquiesce" varies significantly. "Acquiesce" means to agree or consent quietly without protest. "Permit" means to allow, consent, tolerate, give permission, particularly in writing. "Authorize" means to give official approval or permission, to give power or authority or to give justification.
>
> (*Re Momentas*, above, at paragraph 118)

J. Breach of Euston Order: Subsection 122(1)(c) of the Act

[132] Subsection 122(1)(c) of the Act makes it an offence to contravene Ontario securities law. Subsection 1(1) of the Act defines “Ontario securities law” to mean the Act, the regulations, and, “in respect of a person or company, a decision of the Commission or a Director to which the person or company is subject”. The Euston Order was a decision of the Commission to which Schwartz was subject, and Staff alleges that Schwartz contravened Ontario securities law, contrary to subsection 122(1)(c) of the Act and contrary to the public interest, by trading York Rio securities while the Euston Order prohibited him from doing so.

VI. THE EVIDENCE

A. Staff's Evidence

1. Overview

[133] Staff called 20 witnesses at the Merits Hearing: two Staff investigators; two former respondents in this matter who settled (Robinson and Sherman); eight individuals who were not respondents but had knowledge of York Rio or Brilliante (Aidelman, Jeffrey Brown ("**Brown**"), Friedman, Georgiadis, Bernadine Hoyme ("**Hoyme**"), Jbeily, McDonald and Ungaro; and the eight Investor Witnesses.

2. Staff Investigators

[134] We heard evidence from two Staff investigators: Vanderlaan, a senior investigator with the Commission, who was the primary investigator assigned to the York Rio and Brilliante investigations, and Albert Ciorma ("**Ciorma**"), a Certified Management Accountant, who prepared account profiles and summaries showing the source and use of funds that flowed through York Rio and Brilliante.

[135] Vanderlaan testified that his primary focus, since he started with the Commission in August 2007, has been "boiler room" investigations. He testified that a boiler room "is a group of people that get together to establish some sort of an office where they will usually conduct telephone solicitations to sell people stock on the phone, and in the vast majority of cases there's nothing behind the stock in that there are no assets, and there's assurances made to the investor about certain aspects of the business of the company that's being sold but in fact there is no business and the money is merely taken from the investor and put right in the pockets of the people who are selling the investment". Vanderlaan testified that the characteristics of a boiler room include initial cold-calls by "qualifiers", whose job is to solicit initial interest, which will be followed up with a brochure sent to the prospective investor, and a follow-up call from a salesperson based on the information provided by the qualifier. After the investor's initial investment, a "loader" may contact the investor to attempt to solicit an additional and higher investment. Other characteristics of boiler rooms include the use of aliases, sales scripts and virtual offices, the use of couriers to collect investor cheques, and websites that include pirated content. Investments offered by boiler rooms are often characterized as private placements offered to accredited investors, but without complying with the criteria for accredited investor status.

[136] Vanderlaan's testimony extended over nine days of the Merits Hearing. He testified about the early stages of the investigation; the search of the Finch Location and the materials seized; the Corporation Profile Reports, Section 139 Certificates and Exempt Distribution Reports in relation to York Rio and Brilliante; the York Rio and Brilliante websites and emails; the locations from which York Rio and Brilliante securities were sold; the sales scripts; and accredited investor information provided to investors. In addition, Staff introduced the compelled examinations through Vanderlaan.

[137] Vanderlaan and Ciorma also testified about non-respondent companies that were associated with the Respondents; the flow of funds from York Rio and Brilliante investors to the Respondents and associated individuals and companies; and the use of the Proceeds.

(a) *The early stages of the investigation*

[138] On March 22, 2011, the second day of the Merits Hearing, Vanderlaan began his testimony by describing the early stages of the investigation, the execution of the Search Warrant at the Finch Location on October 21, 2008 and the material seized during the Search. His evidence was then interrupted to accommodate the scheduling of other Staff witnesses on March 23 and 24, 2011. Vanderlaan did not resume his testimony until June 9, 2011.

[139] In the meantime, Schwartz and York brought the Search Warrant Motions, which we dismissed in oral rulings on April 5 (Schwartz) and May 5 (York), with written reasons issued on June 1, 2011. A detailed summary of Vanderlaan's testimony about the early stages of the investigation was included in the Search Warrant Decision, at paragraphs 54 and 55.

[140] As a result of his early investigation, Vanderlaan formed the view that a "boiler room" was operating out of the Finch Location.

(b) *The search of the Finch Location and the materials seized*

[141] Vanderlaan testified that Staff seized about ten boxes of materials as a result of the search of the Finch Location on October 21, 2008, including a computer and emails taken from it. Vanderlaan's testimony about the things seized is included in the Search Warrant Decision, at paragraphs 56-59.

[142] Vanderlaan testified that documents relating to York Rio and Brilliante were seized, including: newsletters, corporate profiles, company information sheets and business plans for York Rio and Brilliante; lead lists; lead cards; handwritten client information notes; multiple scripts for use by qualifiers and salespersons; tip sheets for qualifiers; questionnaires relating to accredited investor status, entitled "Accreditation Information", most of which give incorrect information; subscription agreements; print-outs of emails between investors and Respondents, including York, and York Rio and Brilliante salespersons; sales order logs; and file folders containing names that were later determined to be aliases for York Rio and Brilliante salespersons.

[143] As a result of the search and review of the materials seized, Vanderlaan formed the view that both York Rio and Brilliante securities were being sold from the Finch Location, and that York Rio, which had been running since 2004, was now being shut down and that the focus of securities sales was being transferred to Brilliante in 2008.

(c) *Corporation Profile Reports, Section 139 Certificates and Exempt Distribution Reports*

(i) York Rio

[144] Vanderlaan testified that the Corporation Profile Report for York Rio indicates that York Rio was incorporated in Ontario on May 10, 2004, and that York was listed as its President and sole director. On October 28, 2008, one week after the execution of the Search Warrant, a Change Notice was registered, giving the name of another person as director. Vanderlaan testified that he visited the address given for the new director and learned that no one by that name had ever lived there. A prior report, produced on July 18, 2008, listed York as the director. The registered office address for York Rio was

determined to be the residential address of York's mother, and the mailing address reported for York Rio (a suite at 965 Bay Street, Toronto ("**965 Bay**")) was York's former residential address. In summary, York was the sole reported director and officer of York Rio during the Material Time.

[145] Vanderlaan testified that Staff's Section 139 Certificates for York Rio indicate that York Rio has never been registered with the Commission in any capacity, has never been a reporting issuer as defined by the Act, and has never filed or obtained a receipt for a preliminary prospectus or prospectus.

[146] Vanderlaan testified that York Rio filed three Exempt Distribution Reports in Ontario, dated September 21, 2005, January 25, 2006 and April 25, 2006, which were certified to be true by York, who signed as President of York Rio. They indicate that York Rio, which is not a reporting issuer, distributed a total of approximately 1.7 million common shares, purporting to rely on the accredited investor exemption, and raised a total of approximately $2.7 million from investors in Yukon, British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Nova Scotia and the United States. In each report, under "Commissions & finder's fees", the notation is "N/A".

[147] At about the same time, York Rio also filed Exempt Distribution Reports with securities regulators in British Columbia, Alberta, Saskatchewan and Manitoba, in each case purporting to rely on the accredited investor exemption. For example, the September 21, 2005 Exempt Distribution Report which was filed in Ontario was also filed with the Alberta Securities Commission ("**ASC**"); this was the first of the Exempt Distribution Reports that York Rio filed with the ASC. Each of the Exempt Distribution Reports indicates that common shares of York Rio were distributed to Alberta purchasers under the accredited investor exemption, and is signed and certified by York as President of York Rio. As stated above, under "Commissions & finder's fees", the notation is "N/A". Similarly completed Exempt Distribution Reports were filed with the ASC until June 20, 2008.

[148] York Rio took a different approach to the "Commissions & finder's fees" question from July to September 2008.

[149] In the Exempt Distribution Reports filed from July 7, 2008 to October 15, 2008, under "Commissions & finder's fees", the typed notation "N/A" is crossed out and replaced with various handwritten notes – "Consulting fees (72%) [illegible] Anyphone Communication, 5140 Yonge Street, Toronto, ON" (July 7, 2008), "Consulting fees paid directly by cheque to Anyphone Communications, 5140 Yonge Street, Toronto Ont." (July 31, 2008), "Only consulting fees paid by cheque to Anyphone Communications, 5140 Yonge Street, Toronto" (August 13, 2008 to September 14, 2008, "only consulting fees paid, no commission" (October 3, 2008), and "consulting fees only" (October 15, 2008).

[150] A similar pattern is found in York Rio's Exempt Distribution Reports filed with the BCSC. In the Exempt Distribution Reports filed from January 1, 2007 to June 20, 2008, "N/A" is typed in the "Commissions & finder's fees" field. In the Exempt Distribution Reports filed from August 13, 2008 to September 15, 2008, it is replaced by a handwritten note stating that consulting fees only were paid to Anyphone Communications.

(ii) Brilliante

[151] Vanderlaan testified that the Corporation Profile Report for Brilliante indicates that Brilliante was incorporated in Ontario on January 19, 2007, with Aidelman listed as its sole director.

[152] Vanderlaan also testified that Staff's Section 139 Certificates for Brilliante indicate that it has never been a registrant with the Commission in any capacity, has never been a reporting issuer as defined by the Act, and has never filed a prospectus or preliminary prospectus with the Commission or received a receipt for a prospectus from the Director.

(d) The York Rio and Brilliante Websites and Emails

[153] Vanderlaan testified that his investigation of Brilliante began in the summer of 2008, after he was contacted by a Brilliante investor who forwarded an email from Brilliante that linked to the Brilliante website – www.brillianteresources.com. The Brilliante website identified Aidelman as the President of Brilliante.

[154] Vanderlaan testified that much of the content of the Brilliante website was copied from Wikipedia and from a government of Brazil website about a different mine. Staff alleges that the Brilliante website included a number of misrepresentations, including the following:

- "We are a junior open pit uranium mine, that has the claim to a mining right of a 24,000 hectare site."
- "The existing investment of $5,000,000 USD by the corporation was used to acquire the physical property, secure the exploration rights and bring Brilliante to its present day status."
- Aidelman is listed as President and is represented to have a "Batchelor [sic] of Commerce, background in sedimentary geology at University of Utah, and has had extensive background and knowledge in Australia at the Alligator Rivers Region uranium mining sites."

[155] Vanderlaan's investigation, beginning with his review of the Brilliante website, indicated that Brilliante and York Rio were linked:

- The Brilliante website was registered to McDonald, who was identified as the Vice-President of York Rio on the York Rio website.
- Both websites were registered to 965 Bay, which was the same address that was given as the corporate mailing address on York Rio's Corporation Profile Report.
- The geologist named on the Brilliante website, Daniel Pasin ("**Pasin**"), was also named as the geologist for York Rio on the York Rio website.
- The Brilliante website listed an address of 20 Bay Street, 11th Floor, Toronto ("**20 Bay**"), which is a virtual office operated by Rostie Group Business Centres ("**Rostie**"). The account application form, which was obtained from Rostie, indicated that the account was in the name of Brilliante and Aidelman and that

McDonald had opened it by email. Aidelman was listed as having an email address associated with York ("**York's Email Address**"). Vanderlaan learned later that York had initially opened the file, but the name on the file had later been changed to Aidelman. The billing address Rostie had for Brilliante was a suite at 44 Charles Street West, Toronto ("**44 Charles**"), which was York's more recent residential address.

- A March 22, 2007 email was sent from York's Email Address to an email address associated with York Rio – investorrelations@yrresources.com. York's Email Address was also listed on the Rostie documents relating to Brilliante.

- A March 26, 2007 email from York's Email Address to an email address associated with McDonald ("**McDonald's Email Address**") had the subject line, "start putting everything together for the Brilliante company so we can have it on the web", and its text stated "I'd like to have this put together as soon as is practical given your schedule and the need for the website to be in place for potential investors. Thanks, Victor York."

- Emails received by Brilliante investors were traced to the Finch Location, which was leased to Georgiadis, who listed "Richard Taylor" as his partner on the lease application, dated June 24, 2008. Vanderlaan later determined that Georgiadis was York's nephew and "Richard Taylor" was an alias used by Runic. The lease application listed the business as a call centre.

[156] Vanderlaan testified that he was aware of York Rio and believed that Brilliante was created as a natural progression of the York Rio activities and that York Rio was being shut down and Brilliante was been activated in the late summer of 2008.

[157] The York Rio website – www.yorkrio.com and www.yrresources.com – identified York as the President of York Rio, Ungaro as Vice President Sales and Marketing and McDonald as Vice President Research and Development. Pasin is identified as York Rio's geological engineer, and Jorge Valente ("**Valente**") is identified as York Rio's geologist.

[158] Vanderlaan testified that the York Rio website included a number of claims which Staff alleges are misrepresentations, including that:

- York Rio had already started the mining and production of diamonds in Brazil;

- "[i]n July 2004, York-Rio purchased 90% ownership of Nova Mineração Limitada, which owns the mineral rights to the claim . . . and further obtained an "Exploration License";

- the claim is stated to be located on the Rio Paranaiba, which borders the states of Goias and Minas Gerais in Brazil; and

- photographs on the website include photographs of dredging on the Rio Paranaiba, and a close-up of someone's hands holding a raw diamond.

(e) The York Rio and Brilliante Business Plans

[159] Vanderlaan testified about copies of the York Rio and Brilliante business plans that were seized from the Finch Location (the "**York Rio Business Plan**" and the "**Brilliante Business Plan**").

[160] The York Rio Business Plan lists York as President, Ungaro as Vice President Sales and Marketing, McDonald as Vice President Research and Development, Pasin as Geological Engineer and Valente as Geologist; William Farrage ("**Farrage**") is named as providing accounting services. The York Rio Business Plan includes the following statements:

- We have purchased a Brazilian mineral company (Nova Mineração Limitada) that has the claim to an alluvial mining right of a 727 hectare (1795 acre) site.
- The existing investment of US$600,000 by the corporation was used to acquire the physical property, secure the exploration rights and bring York-Rio to its present day status.

[161] The Brilliante Business Plan lists Aidelman as President, Theodore G. George as Executive Vice President Exploration and Corporate Development and Pasin as Geological Engineer; Farrage is named as providing accounting services. Contacts listed are 20 Bay (the Rostie address) and investorrelations@brillianteresources.com (email). The Brilliante Business Plan includes the following statements:

- We are a junior open pit uranium mine, that has the claim to a mining right of a 8,500 hectare (21,000 acre) site.
- The existing investment of US $875,000 by the corporation was used to acquire the physical property, secure the exploration rights and bring Brilliante to its present day status.

[162] Vanderlaan testified that he had examined the net income projections figures contained in the York Rio Business Plan and the Brilliante Business Plan and observed that they are "exactly identical" (Hearing Transcript, June 9, 2011, p. 72, ll. 10-11). According to the York Rio and Brilliante Business Plans, both issuers are projected to earn net income of US $12,615,140 (year 1), US $13,097,500 (year 2), US $16,870,200 (year 3) and US $16,808,200 (year 4). The total projected expenditures for York Rio and Brilliante are US $345,500.

(f) The sales scripts

[163] Vanderlaan testified about various sales scripts seized from the Finch Location. One handwritten Brilliante script contained in a notebook found at the Finch Location stated: "Hello, my name is Pamela Riley and I'm calling from Brilliante Resources. We spoke back in 2006 regarding an investment opportunity by the name Blue Pearl Mining. Back then we were at $0.60/share, but in 2007, Thompson Creek Metals, the same people who brought you Blue Pearl, went up to $25/share on the TSX." Vanderlaan testified that Blue Pearl Mining, which later became Thompson Creek Metals Company Inc. ("**Thompson Creek**"), were real companies that did do well, and their names were often used to drive boiler room sales. Similar representations about Blue Pearl and Thompson

Creek, and about Aurelian Resources, were found in various scripts relating to Brilliante that were seized from the Finch Location.

[164] York Rio scripts followed a similar pattern. One script stated: "I don't know if you remember, it's been about two years since we last spoke. Back then I brought you an investment opportunity called 'Aurelian Resources Inc.' It's a Canadian mining firm. I brought you that as a private offering back in March of 2005 at $2.75 per share. This went on to open on the TSX Venture in Dec. 2005 and is currently trading in around the $30 range. . . . I am more confident with 'York Rio Resources' than I was with 'Aurelian Resources'." Another similar York Rio script claimed that Aurelian Resources Inc. ("**Aurelian**") had been offered to the prospective investor at $2.75, and "hit a high of $43 . . ., which is considered a blockbuster in terms of profit".

[165] Another York Rio script, called "The Close (Own Paper)" states:

- "I am a venture capitalist. I look at about 40-60 proposals every year from companies all over the globe and Canada . . . ";
- "I make my money when the companies make money, because I don't receive a salary. I only get shares as payment for my services"

[166] Similar claims were made in a Brilliante script.

[167] A York Rio script entitled "Cancer Pitch" states that a long-term client needs to sell his York Rio options because his wife, to whom he has been married for 39 years, has breast cancer and he is taking her to Germany for treatment; the prospective investor is then offered 800,000 York Rio shares at $0.375 per share.

[168] Another York Rio script, entitled "Load A, Call 1", which was apparently used to sell additional York Rio shares to existing investors, states "Mine stripping began 3 weeks ago and presently we are extracting anywhere from 1 carat to 69 carat diamonds right out of the ground. These diamonds are going directly to the wholesalers." The same script states that York Rio is being courted by three different companies in respect of a buyout.

(g) Accredited investor information provided to investors

[169] Although the York Rio subscription agreements seized from the Finch Location and provided by the Investor Witnesses set out the Net Financial Assets Test and the Net Income Test correctly, investors were misled by qualifiers and salespersons who misrepresented the qualifying tests for accredited investor status.

[170] For example, the documents seized from the Finch Location included multiple copies of a questionnaire entitled "Accreditation Information", which was apparently intended to be used by qualifiers and salespersons who spoke to investors by phone. The questionnaire misstated the Net Financial Assets Test by representing that an investor could qualify based on combined net worth (with a spouse) of $1 million, "meaning your home, automobiles, everything!". Similar misrepresentations are found in several scripts seized from the Finch Location.

[171] The Net Financial Assets Test for accredited investor status requires the investor to have, alone or with a spouse, net assets of $1 million or more, excluding the investor's principal residence, amongst other things. The Net Assets Test, which includes an

investor's principal residence, requires net worth of at least $5 million, alone or with a spouse.

[172] Copies of the Brilliante subscription agreement seized from the Finch Location require the prospective investor to complete a Representation Letter for Accredited Investors, appended to the subscription agreement, which certifies that the investor is an accredited investor under NI 45-106. The Representation Letter states the Net Income Test and the Net Financial Assets Test correctly, but also incorrectly sets out an additional qualifying test for accredited investor status: "The Subscriber, either alone or with a spouse, has net assets of at least $200,000".

(h) The flow of funds

[173] Vanderlaan and Ciorma testified about the investigation into the flow of funds into and out of the York Rio and Brilliante bank accounts and the accounts associated with the Respondents. Their evidence was based on the Corporation Profile Reports for York Rio and Brilliante and other companies associated with the flow of funds, banking records obtained by summons, and the compelled examinations of various witnesses.

[174] Ciorma created account profiles, indicating the account holders and signatories for each of the various bank accounts through which investor funds flowed in this matter ("**Account Profiles'**), and a financial analysis of each of those accounts, showing the source and use of funds ("**Account Summaries**"), based on bank statements that he and Vanderlaan obtained from the various financial institutions. A Flow of Funds Chart was created based on Ciorma's Account Summaries.

3. Witnesses Called by Staff

(a) Jbeily

[175] Jbeily and York were the co-founders of York Rio. Until late August or early September 2005, Jbeily was Chairman of York Rio. York remained President and CEO throughout the Material Time. Jbeily testified about the creation of York Rio, the attempt to secure property and mining rights in Brazil, and his expulsion from the company in September 2005. On cross-examination of Jbeily, York and Schwartz challenged his testimony that York Rio had never completed the purchase of the mining claim.

(b) Ungaro

[176] Ungaro did not have an office at any of the York Rio locations, but performed administrative functions for York Rio and Brilliante, at York's direction, from her home, including receiving the signed subscription agreements and investor cheques, sending out letters to investors, sending information to Capital Transfer Agency, and keeping records for York Rio. She testified that York reimbursed her for her work by giving her cash, paying some of her expenses and taking her and McDonald on vacation.

(c) McDonald

[177] McDonald testified that she was involved in putting together the York Rio website and materials, based on instructions and content that were provided, initially by York and Jbeily, then, after Jbeily's ouster, by York and Runic. She also prepared the Brilliante website and materials, based on content that was provided by Aidelman and

York. She testified that York reimbursed her for her work by giving her cash and cheques, paying some of her expenses and taking her and Ungaro on four trips.

(d) Brown

[178] In 2003, Brown began working with McDonald to develop the York Rio website. He testified about his communications with McDonald, the instructions he received from York, including providing usernames and passwords for investors to gain access to the York Rio Investors' Lounge. He also testified that he was paid by personal cheque from York. Brown also testified that he worked with McDonald to develop the Brilliante website, on McDonald's instructions, in 2008.

(e) Robinson

[179] Robinson, a former respondent, was registered with the Commission from 1989 to 1992 when he worked for Gordon-Daly Grenadier Securities, a broker-dealer. His registration ceased two years after leaving the firm and he has not been registered with the Commission or any other securities regulator since then.

[180] In November 2010, the Commission approved settlement agreements between Robinson and Staff in relation to York Rio and in relation to *Re Global Energy Group, Ltd.* (2010), 33 O.S.C.B. 10427, *Re Uranium 308 Resources Inc.* (2010), 33 O.S.C.B. 10441, and *Re Robinson and Platinum International Investments Inc.* (2010), 33 O.S.C.B. 10450.

[181] Robinson testified that he began selling York Rio securities from the Eglinton Location in around November 2005, and he continued to work as a York Rio salesperson when the office moved to the Sheppard Location in late 2005 or early 2006. He testified that he stopped selling York Rio securities in June of 2007.

[182] Robinson testified about the sales operation at the Eglinton and Sheppard Locations, and about the roles played by York, Runic and Schwartz. On cross-examination, Schwartz challenged Robinson on his testimony that Schwartz "probably" ran the sales operation at the Eglinton and Sheppard Locations.

(f) Friedman

[183] Friedman, who has never been registered with the Commission or any other securities regulator, testified that he began working with York Rio in an administrative role near the end of 2005 at the Eglinton Location, and continued to do so when the sales operation moved to the Sheppard Location in the summer of 2006.

[184] On September 30, 2010, Friedman entered into a settlement agreement with Staff in relation to his involvement in another matter, *Re Uranium308* (2010) 33, O.S.C.B. 9481.

[185] Friedman testified about the sales operation at the Eglinton and Sheppard Locations and about the roles played by York, Runic, and especially Schwartz, who ran the sales operation, according to Friedman. Schwartz disputed Friedman's testimony on this point.

(g) Aidelman

[186] Aidelman, who has never been registered with the Commission or any other securities regulator, testified that although he is registered as the sole director of Brilliante, his role was minimal, and that York was in charge of the incorporation and operation of Brilliante and controlled the Brilliante Account. York challenged his testimony.

(h) Georgiadis

[187] Georgiadis, who has never been registered with the Commission or any other securities regulator, testified that York introduced him to Runic. Georgiadis worked with Runic at the Yonge Location starting in June 2007. He played an administrative role that included giving investor cheques to York and receiving cheques from York to be given to Runic. In July 2008, he incorporated 2180353, which was used to flow York Rio investor funds from the York Companies (defined at paragraph 303 below) through to the Runic Companies (defined at paragraph 307 below). He testified that the sales operation moved from the Yonge Location to the Finch Location over the long weekend at the beginning of August 2008. When the sale of Brilliante securities began at the Finch Location in the summer of 2008, Georgiadis continued to play the same role as he had in the sale of York Rio securities. He testified about the sales operation at the Yonge and Finch Locations and about the roles played by Runic and York.

(i) Sherman

[188] Sherman, a former respondent, has never been registered with the Commission or any other securities regulator. He testified that in June or July of 2007, he was hired by Runic to sell York Rio securities at the Yonge Location, and he continued to do so at the Finch Location until the execution of the Search Warrant in October 2008. Sherman sold additional York Rio securities to existing York Rio investors, and received a commission of up to 10% of the proceeds of the sale. He used the alias "Jason Sebrook" ("**Sebrook**").

[189] In June 2011, just before he testified at the Merits Hearing, the Commission approved a settlement agreement between Sherman and Staff.

[190] Sherman testified about the sales operation at the Yonge and Finch Locations, and about the roles played by Runic and York.

(j) Hoyme

[191] Hoyme testified that Runic hired her to perform administrative tasks, including acting as the receptionist at the Yonge Location in July 2007, and she continued to do that work at the Finch Location until the execution of the search warrant on October 21, 2008. She testified about the sales operation at the Yonge and Finch Locations, about the transition from York Rio to Brilliante, and about the roles played by Runic and Georgiadis.

4. The Investor Witnesses

(a) Investor One

[192] In March 2008, Investor One, a resident of Alberta, purchased 13,334 York Rio securities, at $0.75 per share, for a total cost of $10,000. He was contacted by York Rio

salespersons who identified themselves as "Maryanne Marler", "Tom Parker" ("**Parker**"), "Jack Baker" ("**Baker**"), "Sebrook" (Sherman), and "Ron Reid" ("**Reid**"). After the Temporary Order was issued, Investor One contacted York.

[193] Investor One is a management consultant specializing in information technology. He has an undergraduate commerce degree. He has never been registered to sell securities or other financial products, and describes himself as a moderately knowledgeable investor. He testified that he has earned a gross income of more than $200,000 a year for nine or ten years. His income, combined with his wife's income, would exceed $300,000 gross, but potentially not net. He and his wife have a diversified portfolio, including stocks and land investments (REITs) exceeding $1 million.

[194] We find that Investor One was probably an accredited investor.

(b) Investor Two

[195] Investor Two, a resident of British Columbia, purchased 50,000 York Rio securities, at $0.55 per share, for a total cost of $27,500, in April 2008, and purchased another 320,000 York Rio shares, this time at $0.375 per share, for a total cost of $120,000 in June 2008. He testified that it was a York Rio salesperson who identified himself as "Mark Roberts" (Oliver) who solicited these sales. In July 2008, "Roberts" called again, this time offering additional shares at $0.25 per share. Investor Two testified that he asked to speak to York because what "Roberts" was telling him seemed "unusual". Investor Two testified that York resolved his concerns, and accordingly, he purchased another 400,000 York Rio securities, at $0.25 per share, for a total cost of $100,000. Investor Two invested a total of approximately $247,500 in York Rio.

[196] Investor Two acknowledged that he signed the York Rio subscription agreement, stating that he was an accredited investor. However, he testified that he was not familiar with the term "accredited investor" in 2008 and "Roberts" never asked him about his income or assets. He testified that in 2008, he owned his house, which was worth approximately $600,000, and financial assets of approximately $400,000, including the approximately $250,000 he invested in York Rio securities. His income at the time, and for the previous five years, was approximately $50,000-$75,000 range.

[197] We find that Investor Two was not an accredited investor.

(c) Investor Three

[198] Investor Three, an investor in Manitoba, testified that he and his company, XYZ Co., invested approximately $800,000-$850,000 in York Rio. Investor Three was contacted initially by Robinson and another salesperson in late 2004, but "Sebrook" (Sherman) also called him to solicit sales of York Rio securities in September 2008. Investor Three met York, along with Robinson, at a Toronto restaurant to discuss potential investment in the company, and Investor Three later spoke to York on the phone.

[199] Investor Three has a background in civil engineering, and he has never been registered to sell securities. He is self-employed through XYZ Co. In 2005, when Investor Three first invested in York Rio, XYZ Co. was worth about $2 million. We find that XYZ Co. was not an accredited investor. We were given no evidence about Investor Three's net income, net financial assets or net assets.

[200] We did not receive sufficient evidence to determine whether Investor Three was an accredited investor.

(d) Investor Four

[201] Investor Four, an investor in Saskatchewan, purchased 33,334 York Rio securities in June 2007, at $0.75 per share, for a total cost of $25,000. A York Rio salesperson who identified himself as "Kevin Crawford" solicited this sale. In July 2007, "Sebrook" (Sherman) contacted Investor Four, who bought another 50,000 York Rio securities at $0.39 per share, for a total cost of $19,500. "Sebrook" called Investor Four again in February 2008, and offered him shares at $0.39 per share. Investor Four purchased an additional 25,000 York Rio securities for a total cost of $9,750, bringing Investor Four's total investment to $54,250. In the fall of 2008, after being contacted by the Commission, Investor Four spoke to York by telephone.

[202] Investor Four is self-employed, and has never been registered to sell securities. He testified that at the time of his investments in York Rio, he did not qualify as an accredited investor under the Net Financial Assets Test, the Net Income Test or the Net Assets Test. He testified that he was asked if he was an accredited investor, but was told that he would qualify if he earned $60,000 a year, which he did.

[203] We find that Investor Four was not an accredited investor.

(e) Investor Five

[204] Investor Five, an investor in Alberta, made three purchases of York Rio securities for a total cost of $55,000. In November 2007, after being contacted by "Baker", Investor Five purchased 13,334 York Rio securities, at $0.75 per share, for a total cost of $10,000. In February 2008, "Roberts" (Oliver) contacted Investor Five and persuaded him to invest another $25,000, purchasing 45,455 shares at $0.55 per share. In September 2008, "Roberts" called Investor Five again, and, as a result, Investor Five purchased another 80,000 York Rio securities, at $0.25 per share, for a total cost of $20,000.

[205] Investor Five acknowledged that he had signed the York Rio subscription agreement, indicating that he was an accredited investor. When questioned by Staff as to whether "Roberts" or "Baker" had asked him if his financial assets, excluding real property, exceeded $1 million, and whether his net income, before taxes, exceeded $200,000, a year, Investor Five answered "yes" and testified that he answered both questions in the affirmative.

[206] We find that Investor Five was probably an accredited investor, based on his evidence.

(f) Investor Six

[207] Investor Six, an investor in Ontario, invested $10,000 in York Rio, at $1.50 per share, through Jack Shkoury ("**Shkoury**"), who identified himself as York Rio's President, International Sales. Investor Six phoned York to explain her concerns about the share certificate she received, which listed three of her family members as owners, rather than beneficiaries, of the shares.

[208] Investor Six is a nurse, earning less than $200,000 per year, and in 2005, her husband, who has now retired, was working as a municipal parking enforcement officer.

Investor Six and her husband also earned rental income of approximately $12,000 per year in 2005. Investor Six testified that her net annual income, considered together with her husband's net annual income, fell short of $300,000.

[209] Turning to the Net Financial Assets Test, Investor Six testified that she and her husband owned their family home, which was worth about $750,000, as well as a rental property worth about $225,000 and a cottage worth about $275,000. In response to questions asked by Schwartz in cross-examination, Investor Six agreed that she and her husband owned real property that was likely worth $1 million, net of debts. But Schwartz's questions incorrectly assumed that Net Financial Assets include an investor's principal residence. We find that Investor Six does not satisfy the Net Financial Assets Test.

[210] Investor Six testified that she did not read the York Rio subscription agreement word for word because "even if you go sign a mortgage at the bank, they say, you sign here, you sign there. That's what I did." (Hearing Transcript, July 21, 2011, p. 35, ll. 8-10). She testified that Shkoury never explained what an accredited investor is, no one pointed out the Certification of Investor Accreditation to her, and she paid no attention to it.

[211] We find that Investor Six was not an accredited investor.

(g) Investor Seven

[212] In May 2007, Investor Seven, an investor in Alberta, purchased 13,334 York Rio securities, at $0.75 per share, for a total cost of $10,000, through a York Rio salesperson who identified himself as "Bennett" (Valde). About a month later, "Bennett" called Investor Seven and told him that he was moving on, but "Sebrook" would be calling him in the future. In June 2007, Investor Seven was contacted by "Sebrook", and purchased another 6,667 shares of York Rio, at $0.55 per share, for a total cost of $3,666.85. Investor Seven made his third and final investment in York Rio in March 2008, again at "Sebrook's" solicitation, purchasing 60,000 York Rio securities, at $0.25 per share, for a total cost of $15,000, bringing Investor Seven's total investment in York Rio to approximately $29,000.

[213] Investor Seven testified that neither "Bennett" nor "Sebrook" asked him about his personal financial circumstances. He completed a two year technical course at college, and currently works as an air field coordinator and quality control manager for an oil company. He testified that in 2007, his average annual income was from $200,000-$400,000. In 2006, he was still an employee and earned approximately $110,000, and he probably earned about $100,000 in 2005. He and his wife separated in 2003 and divorced in 2006. His Net Financial Assets in 2005-2006 came to approximately $20,000 cash plus $150,000 in an RRSP, and his net worth, including his principal residence, came to approximately $600,000. We note that although Investor Seven's income exceeded $200,000 in 2007, his income did not reach that threshold in the two most recent calendar years, and therefore did not qualify as an accredited investor under the Net Income Test.

[214] At Investor Seven's request, as indicated on the York Rio subscription agreements, the York Rio shares he purchased were registered in the name of a numbered company that he owns with his mother. He testified that he started the company in the fall

of 2005, his mother is the main shareholder, and he is a part shareholder and the manager of the company. Investor Seven estimated that the company had a net worth of $150,000 in 2007.

[215] We find that the numbered company was not an accredited investor under paragraph (m) of the definition of "accredited investor" when the York Rio securities were purchased.

[216] We find that neither Investor Seven nor the numbered company he owns with his mother qualified as an accredited investor at the time of the purchase of York Rio securities.

(h) Investor Eight

[217] Investor Eight, an investor in Ontario, bought 10,000 York Rio securities, at US $1.50 per share, for a total cost of CDN $18,607.50, through Shkoury.

[218] Investor Eight testified that he was never asked about his income or assets before he purchased York Rio securities.

[219] Investor Eight testified that he is self-employed and has no designations or experience in the financial markets. He described his level of investment knowledge in 2005 as "just learning". In 2005, his Net Income was approximately $30,000-$35,000 and he owned Net Financial Assets of approximately $40,000.

[220] On cross-examination, Schwartz questioned Investor Eight as to whether his mother, who is named as the principal on the York Rio subscription agreement he signed, was an accredited investor. Investor Eight explained that he added his mother's name because he was still living at home. We accept his testimony that his mother is not an accredited investor.

[221] We find that Investor Eight was not an accredited investor.

(i) Summary of the Investor Witnesses' Evidence

[222] For the reasons given above, we find that at least five of the Investor Witnesses (Investors Two, Four, Six, Seven and Eight) were not accredited investors, four of the Investor Witnesses (Investors Two, Six, Seven and Eight) were not asked about their financial circumstances, and at least one of the Investor Witnesses (Investor Four) was misled about the qualifications for accredited investor status.

[223] The Investor Witnesses gave similar descriptions of the York Rio sales process. With the exception of Investor Six, who met Shkoury at a real estate open house, and Investor Eight, who met Shkoury through a colleague, each of the Investor Witnesses was contacted by a York Rio salesperson who made a number of representations in order to solicit a sale of York Rio securities. Additional sales were solicited in follow-up calls, often by a different salesperson. The salespersons' representations included prohibited representations that York Rio securities would be listed on a stock exchange and fraudulent misrepresentations about York Rio's purported mining operation. For example:

- In the summer of 2007, "Parker" told Investor One that the York Rio mine was in production, and had been pulling 1-69 carat diamonds out of the ground

for over three weeks, and that the plan was for York Rio to go public within months. "Parker" also told Investor One that York Rio had already raised $49 million, and planned to raise another $15 million in private financing before going public. Investor One did not invest at that time, but testified that he "took the bait" when "Baker" called him in February 2008 and made "a hard sell sales pitch explaining that it was now or never, that they were about to take York Rio public and now is my opportunity to make some money". In mid-June 2008, "Sebrook" told Investor One that York Rio was in negotiations for sale to a European company, that the negotiations were 85% complete, that the merged company was likely soon to be listed on the Frankfurt Exchange, and that he was busy lining up market makers to ensure there would be an increase in the share price. In September 2008, "Reid" told Investor One that the first deal had fallen through, but there was now a different "imminent" deal with a European company.

- Investor Three testified that he was told – by Robinson, Sebrook, another salesperson and York – that York Rio would be going public, initially in New York, but later this changed to Frankfurt. He was told that there were talks about a buyout by another company, but when that fell through, York Rio was on its way to going public again. Investor Three also testified that he was encouraged to make additional investments by the representation on the York Rio website that the company had acquired more land, was already mining diamonds and was about to pay a dividend.

- When "Sebrook" offered Investor Four additional shares at $0.39 per share, he explained that the reason the price had been reduced from the $0.75 per share that Investor Four had initially paid was that a shareholder in Calgary had bought these shares at $0.39 per share and needed to sell them because he was going through a divorce. Investor Four was also told that the mine was already producing diamonds, that millions of dollars of diamonds had already been sold, and that the money raised was being used to buy equipment and continue mining operations. Investor Four was told that York Rio would be going public in late 2008 or early 2009. Initially, he was told it would be listed on the Toronto Stock Exchange, then NASDAQ, and finally the Frankfurt Stock Exchange. He was told that the securities would be "double digit Euro" when the company went public, and that York Rio was talking to a private company about a buyout before going public. He was also told that once York Rio went public, he would have an opportunity to invest in Brilliante, a uranium mine, which was going to be their next investment.

- Investor Six testified that Shkoury told her York Rio was probably going to open on the New York Stock Exchange and that there was a German company that was interested in buying it.

- Investor Seven testified that in May 2007, he was told, among other things, that York Rio wanted to go public on the Frankfurt exchange and start at €1.50 per share. In February 2008, "Sebrook" told him that York Rio was very close to being listed on the Frankfurt exchange, and there would be a takeover bid for no less than €3 per share. "Sebrook" told him that they were selling the shares at

$0.25 per share at that time because they wanted to sell the last million shares before going public. He also told Investor Seven that he and York were very excited about the next development, a "uranium play". On October 3, 2008, "Sebrook" called Investor Seven to tell him that York Rio had been halted because of a private takeover with a huge diamond mine in the Brazil property, that the deal would be finalized in January of the new year. After hearing that York Rio had been cease traded, Investor Seven called "Sebrook", who told him not to worry about it because the investigation concerned Brilliante, another company York Rio shared office space with.

- Shkoury told Investor Eight that York Rio was a start-up mining company that was in the process of getting permits to mine diamonds in Brazil, and that the company intended to get listed on NASDAQ.

[224] Each of the Investor Witnesses testified that after completing the subscription agreement, they would arrange to have it couriered to York Rio, along with their investment cheque, as instructed by a York Rio salesperson. Each of the Investor Witnesses received a York Rio share certificate and welcome letter, both signed by York, as well as instructions for gaining access to the Investors Lounge portal on the York Rio website.

[225] Some of the Investor Witnesses received additional letters signed by York – for example:

- A letter dated November 1, 2004 referred to "[o]ur goal to have a NASDAQ listed stock".

- A letter with the heading "Exciting News" announced a 4:1 share split effective May 11, 2006.

- A letter, dated August 1, 2007, started out by saying "We have very good news! In the last newsletter, we indicated that York-Rio would be applying for a listing on the Frankfurt stock exchange" and describing steps the company had purportedly taken to move forward. The letter enclosed a US share certificate for the same number of shares purchased by the investor, which would replace the no longer valid Canadian certificate, and would be 'the only certificate recognized once we receive the listing at the Frankfurt exchange."

[226] None of the Investor Witnesses was made aware that 70% of the money raised by the sale of York Rio shares went to sales commissions. For example:

- Investor Two testified that no one explained the commission structure to him, and he would not have invested if he had known that 70% of all proceeds went to commission as that would not have seemed a reasonable use of the money.

- Robinson told Investor Three that he was being paid in York Rio shares, and made no mention of commission payments. "Sebrook" told him he was being paid in York Rio shares and was not receiving commission. Investor Three testified that he would never have invested if he had known that approximately 70% of the money raised was going to commissions.

- Investor Four testified that he asked several times how the salespeople were being paid, and whether they were on commission, and he was told that they were being paid in York Rio shares only and were not paid on commission. He testified that it would have made "a big difference" to him if he had known the salespeople were paid on commission.

- Investor Five testified that neither "Roberts" nor "Baker" told him they were paid a 20% commission, and if they had, he "would have thought more about" his investment, because it would mean they were selling the security "because they were putting money in their own pocket", not "because it was a good stock".

[227] None of the Investor Witnesses received any return on their investment or any repayment of their purchase price.

B. The Respondents' Evidence

1. Overview

[228] Schwartz was the only Individual Respondent to testify at the Merits Hearing. York called two witnesses: Farrage, who was York Rio's accountant or bookkeeper, and Kenneth Helowka ("**Helowka**"), an employee at 965 Bay, York's former residence.

2. Schwartz

[229] Schwartz testified over four days of the Merits Hearing, including a lengthy cross-examination by Staff. He testified about the role he and others played at the Eglinton and Sheppard Locations, claiming that he and Debrebud did not trade or engage in acts in furtherance of trades in York Rio securities, but acted only in the role of a "paymaster" on an "outsourced" or independent contractor basis. He also testified about the source and use of funds that flowed through the Debrebud Account.

[230] Schwartz's evidence is discussed in detail at paragraphs 483-496 below.

3. Farrage

[231] Farrage testified about York Rio's corporate income tax return for the year ended July 31, 2005 (the "**2005 Tax Return**"), which he prepared, and about his work with York Rio in subsequent years. He also testified about Jbeily's role in York Rio, stating, for example, that Jbeily refused to provide supporting documentation for payments he authorized for travel expenses. Farrage's characterization of Jbeily's role conflicted with Jbeily's evidence and tended to support the position of York and Schwartz about the ouster of Jbeily from York Rio. We find, however, that Farrage's evidence did not support the position of York and Schwartz that York Rio was a legitimate mining start-up.

4. Helowka

[232] Helowka testified about information he provided to Vanderlaan relating to York's residency at 965 Bay. York submits that Helowka's testimony refutes a statement Vanderlaan made in his diary as to the reason for the termination of York's tenancy.

[233] This has no bearing on the issues before us and therefore we find Helowka's testimony to be irrelevant.

VII. THE INVESTMENT SCHEMES

A. The Business of York Rio and Brilliante

1. The Positions of the Parties

[234] Staff alleges that although the York Rio Respondents promoted York Rio by representing that its business purpose was to operate a diamond mine in Brazil, there was no mine, there were no diamonds, and York Rio had never acquired mining rights. Staff relied on Jbeily's evidence about the steps taken by York Rio to purchase 90% of Nova Mineração Limitada ("**Nova**") in 2004 and 2005 (the "**Nova Transaction**"), on York's admissions during his compelled examination, on documentary evidence, including the two agreements entered into by York Rio and Nova in July 2004 and March 2005, and on evidence that only a minimal percentage of the York Rio Proceeds was spent on purported mining purposes.

[235] York and Schwartz attempted to undermine Jbeily's credibility, and alleged that Jbeily misappropriated $100,000 that was to be used towards the Nova Transaction. However, they were unable to rebut his testimony that York Rio had never completed the Nova Transaction.

[236] Staff alleges that although the Brilliante Respondents promoted Brilliante by representing that its business purpose was to operate a uranium mine in Brazil, there was no mine, and Brilliante was intended to facilitate the continued sale of worthless securities as the sale of York Rio securities was wound down in mid-2008. We heard no evidence to rebut the evidence relied on by Staff.

2. The Evidence

(a) Jbeily

[237] Jbeily began his evidence by testifying about his involvement in his family's diamond mining interests in Brazil through Dourados Mineracao ("**Dourados**"), a Brazilian company incorporated by his uncle, Francois Khouri ("**Khouri**"), and Khouri's wife, Elaine Prado Cury ("**Cury**"). Jbeily was the sole directing mind of Brinton Mining Group Inc. ("**Brinton**"), a company he incorporated in Ontario and Nevada, which owned 98 percent of Dourados**.** According to Jbeily, this structure was necessary because Brazilian law does not allow a foreign entity to own mineral rights, though it does allow a joint venture.

[238] Dourados was involved in dredging on the Rio Paranaiba in Brazil, but wanted to move away from dredging and find land to make a claim to the Brazilian government for mineral rights. Jbeily and Khouri located suitable land in the Rio Preto region and made a claim. Jbeily explained that the process for obtaining government approval for a mining claim is a lengthy process in Brazil, involving many permits from various authorities. One requirement made by the Brazilian government was that a survey be done by an approved geologist selected from a list. Jbeily testified that he chose Valente from that list because he trusted his integrity as a geologist.

[239] Jbeily testified that early open pit exploration at the Rio Preto site between 2001 and 2003 produced some samples with indications of diamonds and some diamonds. By 2004, the infrastructure was already in place, including a power source, and Brinton had

obtained a preliminary and temporary licence. But Jbeily needed more financing to obtain the remaining licences and buy equipment.

[240] Jbeily testified that in 2004, he was introduced to York by Dikram Khatcherian ("**Khatcherian**"), who was involved in marketing investments in precious gemstones. Jbeily and York discussed the financing of Brinton. York suggested taking Brinton public, but Jbeily wanted to keep Brinton private or work on a joint venture.

[241] Jbeily told York about a neighbouring claim in the Rio Paranaiba region (straddling the boundary between the Brazilian states of Goias and Minas Gerais) that was for sale for US $300,000. Jbeily proposed that a new company be created to develop that claim, as Brinton had done with the Rio Preto claim, with the idea that eventually Brinton and York Rio could merge. York agreed, and they incorporated York Rio in May 2004, with Jbeily as Chair and York as President and CEO. York's role was to raise capital; Jbeily's was to run the Brazilian operation.

[242] Jbeily and York were each to own 50% of York Rio, York would hold half of his 50% in trust for Shkoury, his friend, and Jbeily would hold half of his 50% in trust for Khatcherian. Jbeily testified that they were issued 10 million shares each. He did not pay any consideration for his shares and believes that York did not put any money in either.

[243] Jbeily testified that the Langstaff Location was chosen for York Rio's office because he lived nearby. York Rio's accountant would be Farrage, who was well known to York and had an office near the Langstaff Location.

[244] Jbeily testified that he and York agreed that the York Rio bank account would be held at a branch of the Scotiabank downtown, where York was known, and he and York were to be the signatories on the account. He recalled that the only money in the account at the start-up was approximately $20,000 from Shkoury. Jbeily testified that he and York agreed that York Rio would purchase 90% of a new Brazilian company, Nova, which would be controlled by Khouri and Cury, its directors.

[245] Jbeily testified that in June or July of 2004, he went to Brazil with a cheque from Khatcherian for $100,000, payable to Khouri, and he told Khouri that York Rio was committed to buying 90% of Nova for $300,000.

[246] While in Brazil, Jbeily signed a contract dated July 22, 2004 on behalf of York Rio. Khouri and Cury signed on behalf of Nova. Titled "Private Contract of Commitment for the Purchase and Sale of Mineral Assets", the contract stated that York Rio had paid US $225,000 towards the US $300,000 purchase price, and would pay the remaining US $75,000 to complete the purchase within 40 days (the "**July 2004 Contract**").

[247] On March 21, 2005, another contract was signed by the same parties (the "**March 2005 Contract**"). Jbeily testified that the March 2005 Contract was entered into because the July 2004 Contract had not been fulfilled. Jbeily testified that the purpose of the March 2005 Contract was to incorporate Nova and commit to injecting capital into it by December 31, 2005, as required by Brazilian law. Jbeily testified that the remaining payment owing under the March 2005 Contract was never paid.

[248] In the summer of 2005, Jbeily found that he had been locked out of the York Rio Account on which he and York were signatories. He approached Farrage about York Rio's finances, but Farrage said he had been instructed by York not to speak to him. He

got the same response when he approached the transfer agent for a shareholder list. Jbeily wrote to the bank demanding that they stop processing cheques or funds transfers without both signatures. According to Jbeily, York paid an angry visit to him.

[249] Jbeily wrote to York on August 8, 2005, asking that a meeting be held on September 6, 2005 to discuss why the purchase of the claim had not been completed, why a lot of shares were being sold without notice to Jbeily, and why he had been denied access to the bank account, the accountant and the transfer agent.

[250] When Jbeily went to the Langstaff Location on September 6, 2005, he found the doors locked. York opened the door, told him to collect his things, and presented him with a lawyer's letter. This was the last time Jbeily was at the Langstaff Location.

[251] Jbeily contacted his own lawyer, who responded by letter, requesting a meeting to attempt to resolve the issues. This was turned down by York's lawyer, who also advised that Jbeily's name had been removed from York Rio's Corporation Profile Report.

[252] Jbeily testified that to his knowledge, York Rio had no assets in September 2005, when he was locked out of the company. Jbeily has never received documents authorizing the issuance of shares and has never received shareholder lists. He did not recall seeing York Rio's financial statements for the year ending July 31, 2004, or the letter dated September 2, 2005.

(b) Farrage

[253] Farrage, who was York's witness, has an ICIA (Industrial Commercial Institutional Accounting) designation, which he testified is a British designation similar to a Certified General Accountant ("**CGA**"). On cross-examination, he conceded that he is not a CGA, a Certified Management Accountant or a Chartered Accountant.

[254] Farrage has known York since they met at the Canada Revenue Agency ("**CRA**") in 1992 or 1993. He testified that he was a CRA auditor for 10 years, then left to establish his own firm, Olive Tree Accounting, which was incorporated in August 1996. The Olive Tree office was almost next door to the York Rio office at the Langstaff Location. Farrage testified that he has been York Rio's accountant since York Rio was incorporated in May 2004 and continues to have the retainer.

[255] Through Farrage, York introduced York Rio's 2005 Tax Return, which was certified as accurate by York, in his capacity as director of York Rio, on July 17, 2008. Farrage testified he prepared the 2005 Tax Return in its entirety, and that it was filed electronically. The 2005 Tax Return indicates that York Rio reported no revenue, no profit and no taxable income in 2004 or 2005.

[256] On September 21, 2011, when Farrage gave his evidence in chief, he testified that he did not have the original Notice of Assessment from CRA. We stated that this would be required if the 2005 Tax Return were to be given any weight, and directed that it be provided by September 28, 2011. We also ruled that Staff's cross-examination of Farrage would be adjourned until November 1, 2011, to allow Farrage to obtain the Notice of Assessment from the CRA and allow Staff time to review it. The Notice of Assessment was not produced by September 28, 2011, and had still not been produced on November 1, 2011, when Farrage returned for cross-examination. We ruled that the Notice of

Assessment must be produced by November 18, 2011. It was not produced by then or at any other time.

[257] Turning to the Balance Sheet Information (Schedule 100) on the 2005 Tax Return, Farrage testified that the entry for $479,707 under “Mining Rights”, on the asset side of the balance sheet, represented the fund transfers to Brazil to purchase the mining rights from Jbeily’s uncle (Khouri). He could not explain the difference between that figure and the entry for mining rights in the prior year ($68,366), though he said that he understood that at least $300,000 had been sent to Brazil to complete the Nova Transaction, and other amounts may have been given to Jbeily. Farrage testified that he prepared the balance sheet based on the books and records and income statements of York Rio. He also testified that he and York met with Jbeily in order to confirm that the transfers were made, but Jbeily did not provide supporting documents, apart from the July 2004 Contract. Farrage testified that he had seen cancelled cheques or bank drafts adding up to US $225,000, the down payment specified in the July 2004 Contract, and had seen bank drafts to support the balance sheet item of $479,707, but he no longer has these documents because they were provided to Staff through his former counsel.

[258] Farrage also testified that Jbeily refused to provide documentation for travel and other expenses which he instructed Farrage to enter as business expenses, or for his substantial withdrawals from the company, and that he instructed Farrage to make payments that were not, in Farrage’s view, commensurate with services provided.

[259] Farrage has continued to be York Rio’s accountant since 2005, when Jbeily left the company, but he testified that York Rio has not filed any income tax returns after 2005, and the receipts he received from York between 2005 and 2008 mainly related to York Rio’s legal expenses. In 2008, York Rio filed an incomplete income tax return in order to receive a GST rebate, but Farrage was not asked to prepare unaudited financial statements or income tax returns between 2005 and 2008. Farrage testified that there was no change in York Rio’s share capital reported after 2005 because he was receiving no further documentation. In fact, York Rio has never had any revenue, apart from the gain on foreign exchange. The information from the 2005 balance sheet was simply rolled over in subsequent tax years because he did not have enough documentation to verify how the company was being run, and there was not much activity to report.

[260] The 2005 Tax Return indicates that, as of the July 31, 2005 fiscal year end, York held 100% of York Rio’s common shares, and there were no preferred shares; there is no reference to Jbeily owning any shares. Farrage testified that he was not aware that anyone else owned any York Rio shares at that time.

[261] Farrage testified that he was not aware that York Rio had received over $16 million from August 24, 2005 to May 19, 2009 and had never seen receipts for the approximately $2.5 million paid by York Rio during the same period for York’s Visa payments (including three payments for travel expenses of approximately $20,000 for a trip to Nassau, Bahamas), York’s vehicle expenses (totalling approximately $344,000), payments of approximately $17,000 to Ungaro, approximately $166,000 of personal care expenses, approximately $18,000 for pet care and approximately $171,000 paid to various stores.

[262] Farrage could not recall whether he saw any documentation to support the $1,245,623 entry for common shares on the Schedule 100 of the 2005 Tax Return (Nov. 1:65). Nor could he explain why the 2005 Tax Return indicates that York Rio owned mining rights of only $68,366 prior to the end of the 2004 tax year (July 31, 2004), when the July 2004 Contract indicates the cost of the mining rights was US $300,000, US $225,000 having already been paid, and US $75,000 due to be paid by August 24, 2004. Farrage could not explain why the 2005 Tax Return does not reference assets of mining rights worth US $225,000 in 2005, he could not explain the reported $479,707 in mining rights in 2005, and he acknowledged that he was not aware whether the transaction had been completed.

(c) York

[263] York did not testify at the Merits Hearing. In his compelled examination and in his written submissions at the Merits Hearing, he claimed that Jbeily had misappropriated some of the money that was intended for the acquisition of Nova. However, York also claimed that the purchase of Nova was completed. York was unable to provide a coherent or credible account as to the status of the Nova Transaction.

[264] We place significant weight on York's admission, during his compelled examination, that York Rio had never acquired the 90% interest in Nova and that he had known this by September 2005:

> Q. Was the 90 percent, percentage in this company, was it fully paid for by York Rio?
>
> A. On paper, yeah.
>
> Q. But in reality you're saying [Jbeily] kept some money and didn't fully pay for it, is that what you're saying?
>
> A. Yeah.
>
> Q. Okay. So in effect this 90 percent interest was never really acquired by York Rio?
>
> A. Well, in reality, yes, that would be correct.
>
> Q. When did you come to that realization?
>
> A. Between the early spring of 2005 and – the early spring of 2005 and Labour Day 2005.
>
> (Transcript of compelled examination of York, January 15, 2009, pp. 83-84)

[265] In his compelled examination, York admitted that, despite representations and photographs on the York Rio website showing dredge-mining on the Rio Paranaiba, York Rio was not involved in dredging and the site depicted was Brinton's claim, not the site that York Rio planned to mine.

[266] York claims that the 30% of investor funds that remained after the payment of Schwartz's consulting fee was sufficient to fund York Rio's exploratory and development work. However, in his compelled examination, he admitted that York Rio was not a revenue-producing company, never had a working mine, never obtained the required

approvals from the Brazilian government, and did not obtain core samples or a survey. He admitted that he was unaware of the whereabouts of any mining licences or geologists' reports, or any other documents that would support his testimony about steps taken by York Rio to develop a mine in Brazil, and could not say how much money was sent to Brazil to develop the mine.

3. Discussion

[267] Farrage was not an impartial witness. His concern about Jbeily's travel expenses and other payments Jbeily may have received, contrasted with his inability to recall or explain the basis for certain entries in the 2005 Tax Return, his testimony that he was not provided with documentation for subsequent years, and his lack of awareness of York Rio's approximately $18 million in share subscriptions or of millions of dollars of payments to or for the benefit of York or his friends and family during and after the 2005 tax year. We did not find Farrage to be a credible witness.

[268] However, we are also not persuaded by Jbeily's characterization of his role in the creation of York Rio and his testimony about the reasons for his ouster from the company.

[269] For example, Jbeily testified that he was unaware of funds being raised from the general public while he was involved with York Rio, and testified that he never received the July 5, 2004 letter from a lawyer enclosing a draft subscription agreement for his review; the letter was directed to his attention at his home address, but he testified he did not recognize the fax number. Jbeily provided no written or other evidence to corroborate his testimony that he objected to the sale of York Rio securities to the general public.

[270] Similarly, Jbeily identified pages from the York Rio website, dated Feb. 13, 2008, which included claims that in July 2004, York-Rio purchased 90% ownership of Nova, and that York-Rio had secured its first project. He testified that in July 2004, what York Rio had was an agreement to purchase 90% of Nova, which had a claim. On cross-examination by Schwartz, Jbeily testified that he had brought this issue to York's attention many times while these claims were on the website. Again, Jbeily could not corroborate his testimony with any written or other evidence that he raised these issues during the period when he was Chairman of York Rio.

[271] Nor does Jbeily recall a September 2, 2005 letter to him from York's lawyer, which included particulars of (alleged) misappropriation of York Rio assets and demanded that Jbeily immediately resign as a director of York Rio and repay misappropriated expenses, or the letters subsequently exchanged from September to December 2005 between York's lawyer and Jbeily's lawyer. We do not believe that Jbeily did not recall this exchange of correspondence.

[272] We find that Jbeily's testimony as a whole reflected a selective inability to recall communications that may raise questions about his own conduct. This undermined his credibility as a witness in this matter. However, the main point of Jbeily's testimony was that York Rio never completed the purchase of the 90% interest in Nova which would have secured the mining rights. Although York and Schwartz vigorously disputed Jbeily's evidence on this point, it was not rebutted by Farrage or by any other credible evidence.

[273] In our view, compelling evidence that York Rio had not completed the Nova Transaction comes from the July 2004 Contract, which states that York Rio had paid US $225,000 and that the remaining payment of US $75,000 remained due, from the March 2005 contract, which states that an amount remained to be paid, and from York's admission in his compelled examination that he knew by Labour Day of 2005 that York Rio had not completed the Nova Transaction.

[274] For the reasons given below, we accept Staff's evidence that York Rio raised approximately $1.8 million from May 1, 2004 to August 31, 2005, and raised another approximately $16 million from September 1, 2005 to October 21, 2008 (a total of approximately $18 million during the Material Time). Of the approximately $16 million raised by the sale of York Rio securities after September 1, 2005, approximately $2.75 million went to Debrebud, approximately $9.2 million went to Runic and the Runic Companies, and approximately $4.1 million went to York and the York Companies, leaving only a small amount for York Rio's purported mining operations. We find that only a minimal amount – at most 2.7% of the York Rio Proceeds and likely much less – was spent on mining-related expenses. We find there is ample evidence that almost all of York Rio's activities related to the sale of its own securities, and that very little, if any, activity was directed towards York Rio's purported mining purposes.

4. Findings and Conclusions

[275] We find that there is no evidence that York Rio had any viable business assets or any legitimate business operations, and therefore York Rio securities had no value. York Rio, whose sole business was to issue its own worthless securities, was a complete sham.

[276] We find that Brilliante was even more clearly a complete sham. Although Brilliante purported to have a uranium claim in Brazil, and claimed to have invested US $875,000 in the mine, these claims were false. In fact, Brilliante had no mining assets and its only activity was the sale of its own securities. There is no evidence that it had any viable business assets or any legitimate business operations, and there is a great deal of evidence that the Brilliante share issue was designed solely to raise more capital in the fall of 2008 when the York Rio operation reached the point where it began to attract or might be likely to attract regulatory attention.

B. The York Rio and Brilliante Sales Locations

[277] We heard evidence that York Rio securities were sold from five locations during the Material Time:

- 2900 Langstaff Road, in Woodbridge Ontario (the "**Langstaff Location**") from April 2004 to September 2005;
- 181 Eglinton Avenue East in Toronto, Ontario (the "**Eglinton Location**") from the spring of 2005 to the summer of 2006;
- 500 Sheppard Avenue East, in North York, Ontario (the "**Sheppard Location**") from the summer of 2006 to the summer of 2007;
- Yonge and Cummer, in North York, Ontario (the "**Yonge Location**") from January 2007 to July 2008; and

- the Finch Location from August 2008 to October 21, 2008.

[278] We also heard evidence that Brilliante securities were sold from the Finch Location from August 2008 to October 21, 2008.

[279] Staff characterizes York Rio and Brilliante as "boiler room" operations, and relies on *Re Manning,* in which the Commission accepted the following definition of a "boiler room" contained in U.S. jurisprudence:

> "Boiler Room" activity consists essentially of offering to customers securities of certain issuers in large volume by means of an intensive selling campaign through numerous salesmen by telephone or direct mail, without regard to the suitability to the needs of the customer, in such a manner as to induce a hasty decision to buy the security being offered without disclosure of the material facts about the issuer.
>
> *Re E.A. Manning Ltd.* (1995), 18 O.S.C.B. 5317, at page 26, appeal dismissed [1996] O.J. No. 3414 (Ont. Div. Ct.) ("***Re Manning***")

[280] In *Re Manning,* the boiler room operation consisted of a three-level sales force: qualifiers, openers and loaders. Qualifiers cold-called members of the public who were identified using the Yellow Pages of the telephone book, and, using a prepared script, asked the prospect whether he would like to receive the "Manning Letter", a promotional document. If the prospect agreed, the "lead" would be passed on to an "opener", who would attempt to make an initial sale of securities from inventory, using high pressure sales tactics and without any regard to the needs or circumstances of the prospect. After the initial sale, "loaders" made additional calls to persuade investors to buy as many securities as possible and to convince them not to resell the securities already purchased. (*Re Manning*, above, at pages 22-25).

[281] We heard evidence that York Rio and Brilliante securities were sold using a very similar process, which we find was a "boiler room" operation, characterized by the following:

- neither York Rio nor Brilliante had any viable business assets or any legitimate business operations, and their securities were worthless;
- the sole business of York Rio and Brilliante was the sale of their own securities;
- at each location, the sales process followed the pattern described in *Re Manning*, involving qualifiers, openers (or salespersons) and loaders;
- the administrative assistant and all qualifiers, salespersons and loaders (apart from Robinson), used an alias when communicating with investors by phone or email, and, if involved in the sale of both York Rio and Brilliante securities, most used two different aliases;
- qualifiers cold-called members of the public who were named in contact lists used to sell other securities (for example, Robinson testified that the Euston contact lists were also used to sell York Rio securities) or found in business directories and other resources;

- using a prepared script, the qualifiers attempted to elicit interest in receiving information about York Rio or Brilliante;

- the sales scripts contained many falsehoods and misrepresentations that were intended to effect a sale of securities, including statements that the caller had been involved in the successful IPO of a well-known legitimate mining company and that York Rio was already producing diamonds of 1 to 69 carats;

- if a prospect expressed interest, promotional material would be mailed out, or the prospect would be referred to the York Rio or Brilliante website, where the York Rio Summary Business Plan or Brilliante Summary Business Plan, as well as newsletter updates and other information would be found;

- the York Rio website and the Brilliante website contained many falsehoods and misrepresentations that were intended to effect a sale of securities, including statements that York Rio had purchased 90% ownership of Nova, which owns the mining rights, and had already started the mining and production of diamonds in Brazil and that Brilliante had a mining claim to a 24,000 hectare site and had already invested US $5 million to acquire the property, secure the exploration rights and bring Brilliante to its current status;

- a prospect's contact information would be passed on to the person in charge of the office, who would distribute the lead to a salesperson;

- the salesperson would make repeated calls to the prospect, using a prepared script, to effect a sale of securities;

- scripts contained multiple misrepresentations intended to effect a sale of securities, including statements that York Rio and Brilliante had operating mines, that the salesperson had previously been involved in a successful public offering of a well-known legitimate mining company; and that York Rio was in negotiations with a European mining company that was publicly listed or would be publicly listed on the Frankfurt Exchange, or that York Rio intended to become publicly listed on the Frankfurt Exchange;

- if a prospect expressed interest in buying securities, the salesperson or loader would ask the administrative assistant to send a subscription agreement to the investor, by courier, for the investor's signature, with the investor's contact information and the amount to be invested already filled in;

- the signed subscription agreement and the investor's cheque would be picked up by courier and delivered to a nearby postal box, and from there it would be picked up and delivered to the person in charge of the sales office; and

- the investor's contact information would then be passed on to a "loader", who would call the investor in order to effect additional sales, and several investor witnesses testified that they made subsequent purchases.

[282] The process for selling York Rio and Brilliante securities was similar to the sales process described in *Re Manning*, including the following characteristics:

- use of aliases by York Rio salespersons;

- high pressure sales tactics, including telling prospective investors, for example, that they were being offered York Rio sales at a discounted price because an existing York Rio investor is forced to sell or other special circumstances;

- use of sales scripts that included misrepresentations about York Rio's assets, the status of diamond production, and the qualifications and experience of salespersons and other persons who were represented as having a role in the company;

- misrepresenting the test for qualification as an accredited investor when communicating with prospective investors;

- failure to disclose to prospective investors that the salesperson was compensated by a commission of 20%, and in some cases, a misrepresentation that the salesperson was compensated only in securities of York Rio;

- filing incomplete and misleading Exempt Distribution Reports that relied on the accredited investor exemption, when it was not available, and failed to disclose the 70% fees paid to Schwartz and Runic; and

- prohibited representations about a pending initial public offering and potential merger.

[283] We find that the sale of York Rio securities from the Eglinton, Sheppard, Yonge and Finch Locations, and the sale of Brilliante securities from the Finch Location, bore all the characteristics of a "boiler room" operation.

C. Reliance on the Accredited Investor Exemption

1. Qualification as an Accredited Investor

[284] Once Staff established that York Rio and Brilliante securities were traded without registration and distributed without a prospectus, the evidentiary onus shifted to the Respondents to establish that a registration and prospectus exemption was available in respect of all of the trades of York Rio and Brilliante securities.

[285] We find that at least five of the eight Investor Witnesses, who invested in York Rio securities, were not accredited investors. The York Rio Respondents did not establish that York Rio securities were sold only to accredited investors.

[286] We received no evidence that any of the Brilliante investors was an accredited investor, and accordingly, the Brilliante Respondents also failed to satisfy the onus of establishing the availability of the exemption.

2. The Seller's Responsibility for Compliance

[287] Although the York Rio subscription agreement presented to the Investor Witnesses set out the Net Financial Assets Test and the Net Income Test correctly, at least four of the Investor Witnesses were not asked about their financial circumstances. Several of the Respondents testified that they believed the Net Financial Assets Test included the value of an investor's principal residence; and Schwartz mistakenly continued to assert, throughout the Merits Hearing, that an investor with net assets of $1

million, including their principal residence, was an accredited investor under the Net Financial Assets Test. Similar representations are found in scripts that were seized from the Finch Location. At least one of the Investor Witnesses was told, incorrectly, that an annual income of $60,000 would qualify him as an accredited investor. We find that the qualifying tests for accredited investor status were misrepresented to prospective York Rio investors.

[288] We are also not satisfied that the York Rio Respondents exercised reasonable diligence to ensure that York Rio securities were sold only to accredited investors. Indeed, Schwartz and York cross-examined the Investor Witnesses in an attempt to put the responsibility on them for their losses. In his testimony, Schwartz said, of the investors, "they're the ones who embezzled us because they should not have bought those securities in the first place". Ontario securities law puts the responsibility for compliance on the seller. It is no defence for the Respondents to argue, in effect, "you shouldn't have trusted us." We consider the disregard shown by the Respondents, especially Schwartz and York, for their obligations to investors to be a significant aggravating factor in the hearing of this case.

[289] The Brilliante Respondents presented no evidence that Brilliante securities were sold only to accredited investors or that they exercised reasonable diligence to ensure that Brilliante securities were sold only to accredited investors, and copies of the Brilliante subscription agreement seized from the Finch Location misrepresented the accredited investor test.

3. Market Intermediary

[290] Schwartz submits that York Rio was not a market intermediary and was in the business of mining, not in the business of dealing in securities. (Although Schwartz framed his submissions on this point in relation to the "business trigger test", which was introduced by amendments that took effect in September 2009, after the Material Time, we have considered his submissions in relation to the registration requirements as they existed at the Material Time.)

[291] For the reasons given below, we find that York Rio, through its employees, representatives and agents, was in the business of selling worthless securities in order to raise money for the personal use of the York Rio Respondents and other individuals associated with York Rio. We heard no reliable evidence that York Rio engaged in the mining activity for which it purported to be soliciting investments, and we find that only a minimal amount of the York Rio Proceeds – at most, 2.7%, and likely much less – was used for purported mining purposes. We find that the individuals and companies associated with York Rio were almost exclusively engaged in the business of selling securities. We find that York Rio was a market intermediary and therefore the accredited investor exemption from the registration requirement was not available in relation to the sales of York Rio securities.

[292] Although Schwartz's submissions were focussed entirely on York Rio, we also find, for the same reasons, that Brilliante was a market intermediary which cannot rely on the accredited investor exemption from the registration requirement.

D. Directing Minds

[293] York does not dispute that he was the President and CEO of York Rio and a director of York Rio throughout the Material Time. For the reasons given below, we find that York orchestrated the sale of York Rio securities and authorized the contraventions of the Act by York Rio. We also find, for the reasons given below, that York, not Aidelman, was the directing mind of Brilliante, orchestrated the sale of Brilliante securities, and authorized the contraventions of the Act by Brilliante throughout the Material Time.

[294] Schwartz does not dispute that his company, Debrebud, entered into an agreement with York in March 2005 to provide services for York Rio at the Eglinton Location and the Sheppard Location, in return for 70% of the York Rio Proceeds. His position is that Debrebud was a "paymaster" or "outsourced" agent for York Rio and that neither he nor Debrebud engaged in trades or acts in furtherance of trades. For the reasons given below, we find that Schwartz acted in the capacity of a director or officer of York Rio and engaged in trades or acts in furtherance of trades of York Rio securities from March 2005 to mid-2007.

[295] In January 2007, York entered into an agreement with Runic, who had worked with Schwartz at the Sheppard Location, that Runic would open a new office for the sale of York Rio securities, in return for at least 70% of the York Rio Proceeds. In the summer of 2007, York shifted all sales of York Rio securities from the Sheppard Location to the Yonge Location, controlled by Runic. In August 2008, the sales operation, run by Runic, moved from the Yonge Location to the Finch Location. The sale of York Rio securities continued at the Finch Location until the execution of the Search Warrant at the Finch Location on October 21, 2008.

[296] For the reasons given below, we find that Runic acted in the capacity of a director or officer of York Rio and engaged in trades or acts in furtherance of trades of York Rio securities at the Yonge Location and the Finch Location, and that he acted in the capacity of a director or officer of Brilliante and engaged in trades or acts in furtherance of trades of Brilliante securities at the Finch Location.

E. The Flow of Funds

[297] We accept Staff's evidence about the use of the funds received from York Rio and Brilliante investors.

1. The York Rio and Brilliante Proceeds

[298] From May 10, 2004 to August 2005, York Rio had a Canadian dollar account and a US dollar account at a branch of the Bank of Nova Scotia (the "**York Rio Scotiabank Accounts**"). York and Jbeily were the signing officers. The Account Summaries indicate that $700,140.32 and US $860,275.86 (approximately CDN $1.8 million) was received from investors and deposited into the York Rio Scotiabank Accounts from May 2004 to August, 2005.

[299] The York Rio Scotiabank Accounts were closed or inactive after September 1, 2005, when Jbeily was ousted from the company. York then opened new Canadian dollar and US dollar accounts for York Rio at a branch of TD Canada Trust (the "**York Rio Accounts**"). York and Ungaro were the signing officers. The Account Summaries

indicate that $15,931,378.33 and US $431,750.00 was received from investors and deposited into the York Rio Accounts from late August 2005 to May 2009.

[300] York Rio raised approximately $1.8 million from May 2004 to August 2005 and approximately $16 million from September 2005 to October 2008. In total, approximately $18 million was raised from York Rio investors during the Material Time.

[301] The York Rio Proceeds were transferred from the York Rio Accounts and flowed through a number of other accounts controlled by York, Schwartz and Runic during the Material Time. Almost all of the money raised from York Rio investors was used by the York Rio Respondents for their own personal benefit or the benefit of family and friends, and very little was spent on York Rio's purported mining purpose.

[302] All of the $160,000 raised from Brilliante investors in September and October 2008 was deposited into the Brilliante Account. Of this amount, $114,500 (approximately 72%) was transferred to two companies controlled by York. We received no evidence that any money was spent on Brilliante's purported mining purpose.

2. Companies Associated with the Flow of Funds

[303] Vanderlaan and Ciorma testified that, in addition to York Rio, York also controlled the following non-respondent companies and bank accounts during the Material Time (the "**York Companies**"), and York did not dispute this evidence:

- Big Brother and the Holding Company Inc. ("**Big Brother**") was incorporated on July 4, 2007. York was its sole director and the sole signatory on its bank account (the "**Big Brother Account**");
- Dude Productions Inc. ("**Dude**") was incorporated on September 29, 2008. York was its President and sole director, and the sole signatory on its bank account (the "**Dude Account**");
- Evason Productions Inc. ("**Evason**") was incorporated on August 31, 2006. York was its sole director and the sole signatory on its bank account (the "**Evason Account**"); and
- Munket Capital Holdings Inc. ("**Munket**") was incorporated on September 22, 2005. York was its sole director and the sole signatory on its bank account (the "**Munket Account**").

[304] Schwartz did not dispute Staff's evidence that he was the President of Debrebud Capital Corporation ("**Debrebud**") and the sole signatory on its bank account (the "**Debrebud Account**"). Debrebud was incorporated on September 22, 1999 and cancelled on June 7, 2008.

[305] Vanderlaan and Ciorma testified, and, in his compelled examination, Runic admitted, that he was the President and sole director of Superior Home, a British Columbia company that was incorporated on November 27, 1997 as Anyphone. Runic and the late Dorothy Siegel ("**Siegel**"), a friend of Runic's, were listed as signatories on the Superior Home bank account (the "**Superior Home Account**").

[306] Vanderlaan and Ciorma also testified that Runic instructed Koch to incorporate the following companies in British Columbia, which were controlled by Runic at the Material Time:

- 0795624 B.C. Ltd., which was incorporated on June 27, 2007, with Koch as its sole director **(“0795624”);**
- Blue Star Consulting (0796249 B.C. Ltd.) **(“Blue Star”)**, was incorporated on February 1, 2008. Koch was its sole director, and Koch and Siegel were the signing officers on its bank account (the “**Blue Star Account**”); and
- British Holdings was incorporated on September 26, 2008. Koch was its sole director, and Koch and Runic were the signatories on its bank account, which was opened on October 7, 2008 (the “**British Holdings Account**”).

[307] Runic also admitted, in his compelled examination, that he asked Koch to incorporate NatWest for him, as well as 0795624, Blue Star and British Holdings, and that he controlled all these companies, as well as Superior Home (the “**Runic Companies**”)

[308] Vanderlaan and Ciorma testified that Georgiadis incorporated two companies in Ontario that were associated with the flow of York Rio and Brilliante funds in September and October 2008:

- 2180353 was incorporated on July 28, 2008. Georgiadis was its sole director and the sole signatory on its bank account (the “**2180353 Account**”); and
- Vision Productions Inc. (“**Vision**”) was incorporated on August 29, 2008. Georgiadis was its sole director and the sole signatory on its bank account (the “**Vision Account**”) (together, the “**Georgiadis Companies**” and the “**Georgiadis Accounts**”).

[309] Staff alleges that York controlled the Georgiadis Accounts.

3. The Flow of Funds during the Schwartz Period

[310] From May 4, 2005 to August 2, 2007 (the “**Schwartz Period**”):

- The York Rio Proceeds were deposited into the York Rio Accounts, which were controlled by York.
- York authorized payment from the York Rio Accounts of $2,750,748.59 (70% of the York Rio Proceeds) to Debrebud, which was controlled by Schwartz.
- The money received by Debrebud was used to pay the salaries and commissions of York Rio qualifiers and salespersons, including $470,781.58 to Superior Home, which was Runic’s company. Payments from the Debrebud Account to or for the benefit of Schwartz and his family totalled approximately $889,000.

4. The Flow of Funds during the Runic Period

[311] From January 2007 to October 2008 (the “**Runic Period**”):

- The York Rio Proceeds were deposited into the York Rio Accounts.

- In a number of transactions, York authorized transfers of some of the York Rio Proceeds from the York Rio Accounts to the accounts of each of the other York Companies.

- York authorized transfers from the York Companies of 70% of the York Rio Proceeds to Superior Home. From the York Rio Proceeds, Superior Home received approximately $9,224,325.53, including approximately $470,781.58 from Debrebud and approximately $8,753,543.95 from York Rio and the York Companies.

- Runic authorized the transfer from the Superior Home Account of approximately $3.8 million to the Palkowski Account, and another $2.687 million to the Koch Account.

- Runic instructed Koch to transfer approximately $535,000 from the Koch Account to the trust account of a law firm in Richmond Hill in order to purchase the Aurora Property for Siegel. A lien for $525,000 was placed on the home by 0795624, which was controlled by Runic. Staff obtained a freeze order in relation to the Aurora Property on July 7, 2009.

- Approximately $2 million went to unexplained cash withdrawals, approximately $680,000 was used to pay salaries and commissions for York Rio qualifiers and salespersons, approximately $72,000 was spent on rent, and approximately $22,000 was paid to Runic by cheque.

[312] Runic admitted, with respect to NatWest and British Holdings, that "any monies that were deposited there were monies that were owed to me in respect to commissions that were paid out on behalf of York Rio and/or Brilliante that Jason had owed me from that Finch office and down the road they were to be used for other ventures." (Transcript of compelled examination, May 4, 2011, p. 441, lines 16-22).

[313] With respect to Brilliante, in September and October 2008:

- The $160,000 raised from Brilliante investors was deposited into the Brilliante Account, which was controlled by York, though Aidelman was nominally the President of the company and co-signatory on the account.

- York authorized the transfer of $114,500 (approximately 72% of the Brilliante Proceeds) from the Brilliante Account to the Munket Account ($95,750.00) and the Dude Account ($18,750.00), which he controlled.

- York authorized the further transfer of funds from the Munket Account to the 2180353 Account, which Georgiadis controlled, and the further transfer of funds from the Dude Account to the Vision Account, which Georgiadis controlled. The Brilliante Proceeds and the York Rio Proceeds were commingled in the Munket and Dude Accounts and the Georgiadis Accounts.

- From the 2180353 Account, funds were transferred to the British Holdings Account, and from the Vision Account, funds were transferred to the NatWest Account, both of which were controlled by Runic through Koch.

5. Summary: Disposition of the York Rio Proceeds and the Brilliante Proceeds

[314] Approximately $18 million was raised as a result of the sale of York Rio securities and $160,000 was raised as a result of the sale of Brilliante securities during the Material Time.

[315] During the Schwartz Period, Debrebud received approximately $2.75 million (70% of the York Rio Proceeds). From this amount, Debrebud paid salaries to qualifiers and administrative staff and commissions for salespersons. "Openers" received 20% of the proceeds of an initial sale. The 20% commission for an additional sale to an existing York Rio investor was split between the opener who made the initial sale and the loader who made the subsequent sale. Approximately $889,000 was disbursed from the Debrebud Account to or for the benefit of Schwartz and his family. Another approximately $500,000 went for unexplained payments and cash withdrawals.

[316] During the Runic Period, the York Rio Proceeds were first deposited into the York Rio Account, then approximately 70% was flowed through the accounts of the York Companies (Big Brother, Dude, Evason and Munket), to the Superior Home Account (controlled by Runic). York authorized these transactions.

[317] The sale of Brilliante securities from the Finch Location raised a total of $160,000 from nine investors from September 11, 2008 to October 8, 2008. The Brilliante Proceeds were deposited into the Brilliante Account, and approximately 72% was flowed through the Dude Account and the Munket Account (controlled by York) to the 2180353 Account and the Vision Account (controlled by Georgiadis), and then to the Superior Home Account (controlled by Runic).

[318] Runic and the Runic Companies received approximately $9.2 million during the Runic Period, including approximately $470,781.58 received from the Debrebud Account and approximately $8,753,543.95 received from York Rio and the York Companies (approximately 70% of the York Rio Proceeds during the Runic Period and approximately 72% of the Brilliante Proceeds). From that amount, Runic authorized the transfer of approximately $3.8 million to Palkowski Law and approximately $2.7 million to Koch & Associates. Approximately $2 million went to unexplained cash withdrawals, approximately $680,000 was used to pay salaries and commissions for York Rio sales staff, approximately $72,000 was spent on rent, and approximately $22,000 was paid to Runic by cheque.

[319] Approximately $4.1 million of the York Rio Proceeds and the Brilliante Proceeds was retained by York and used for his personal benefit or the benefit of his friends and family.

[320] In summary, almost all of the approximately $18 million raised from York Rio and Brilliante investors was appropriated by the Respondents for their personal use. Only a minimal amount went to York Rio's purported mining activity – at most, approximately 2.7% of the York Rio Proceeds, and likely much less. There is no evidence that any of the Brilliante Proceeds was spent on purported mining expenses.

VIII. THE ROLE OF THE RESPONDENTS

A. York Rio

1. The Allegations

[321] Staff alleges that York Rio:

- traded in its securities without registration, where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest;
- distributed its securities, without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest; and
- engaged or participated in acts, practices or courses of conduct relating to securities that it knew or reasonably ought to have known perpetrated a fraud on York Rio investors, contrary to section 126.1(b) of the Act and contrary to the public interest.

2. The Evidence

[322] We heard evidence that York Rio, which has never been registered with the Commission, traded in its own securities, through its employees, representatives or agents, contrary to subsection 25(1)(a) of the Act, and that York Rio distributed its securities, which had never before been issued, without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest. The main points are as follows.

(a) Section 139 Certificates

[323] Vanderlaan testified that Staff's Section 139 Certificates for York Rio indicate that York Rio has never been registered with the Commission in any capacity, has never been a reporting issuer as defined by the Act, and has never filed a preliminary prospectus or prospectus with the Commission or received a receipt from the Director.

[324] Vanderlaan testified that York Rio filed a number of Exempt Distribution Reports in Ontario and other provinces in which it reported trades of its own previously unissued securities to named investors, purportedly relying on the accredited investor exemption.

(b) Staff Investigators

[325] Vanderlaan and Ciorma testified that approximately $18 million was raised from the sale of York Rio securities to investors.

[326] Vanderlaan testified about the contents of the York Rio website, the York Rio Business Plan, and the sales scripts that were used by York Rio qualifiers and salespersons.

[327] Vanderlaan testified that the documents seized from the Finch Location included a document entitled "Accreditation Information", which was a questionnaire to be used when qualifying York Rio investors, which misstated the Net Financial Assets Test,

representing that an investor could qualify based on "combined net worth (with a spouse) of $1 million or more, "meaning your home, automobiles and everything", and that other documents found at the Finch Location contained similar misrepresentations.

(c) Compelled Examinations

[328] In their compelled examinations, Runic, Demchuk, Oliver and Valde admitted that they sold York Rio securities. Runic admitted that he sold York Rio securities from the Sheppard, Yonge and Finch Locations, and his admission was corroborated by Vanderlaan, Ciorma, Robinson, Sherman, Friedman, Georgiadis, and Hoyme. Demchuk admitted that he sold York Rio securities from the Yonge and Finch Locations, and his admission was corroborated by the testimony of Vanderlaan, Ciorma, Georgiadis and Hoyme. Oliver admitted that he sold York Rio securities from the Yonge and Finch Locations, and his admission was corroborated by the testimony of Vanderlaan, Ciorma, Sherman, Georgiadis, Hoyme, Investor Two and Investor Five. Valde admitted that he sold York Rio securities from the Yonge and Finch Locations, and his admission was corroborated by the testimony of Vanderlaan, Ciorma, Sherman, Georgiadis, Hoyme and Investor Seven.

(d) Witnesses called by Staff

[329] Robinson, a former York Rio salesperson, and Friedman, who worked in an administrative role, testified about the sale of York Rio securities at the Eglinton and Sheppard Locations.

[330] Georgiadis testified that he played an administrative role at the Yonge Location, including giving investor cheques to York and receiving cheques from York to be given to Runic. He testified that York Rio securities were sold at the Yonge and Finch Locations.

[331] Sherman, a former York Rio salesperson, testified that he started selling York Rio securities from the Yonge Location in July 2007 and continued to do so from the Finch Location until the execution of the search warrant in October 2008.

[332] Hoyme testified that she started working at the Yonge Location in July 2007, performing receptionist and administrative duties, and continued to do so at the Finch Location until the execution of the search warrant in October 2008. She testified about the sale of York Rio securities from the Yonge and Finch Locations.

[333] Ungaro testified about the administrative role she played, including receiving the signed subscription agreements and investor cheques, sending out letters to investors, sending information to the transfer agent, and keeping the records for York Rio.

[334] McDonald testified that she prepared the York Rio website and materials to be provided to investors, based on instructions and content she received from York.

[335] Brown testified that he did the technical development of the York Rio website, including the Investors' Lounge, based on instructions from York and McDonald.

(e) Investor Witnesses

[336] All eight Investor Witnesses testified about their purchases of York Rio securities from York Rio salespersons, including Sherman (Investor One, Investor Three, Investor

Four and Investor Seven), Robinson (Investor Three), Oliver (Investor Two and Investor Five) and Valde (Investor Seven).

[337] Of the eight Investor Witnesses, at least five (Investor Two, Investor Four, Investor Six, Investor Seven and Investor Eight) clearly did not qualify as accredited investors. Four of these five (Investor Two, Investor Six, Investor Seven and Investor Eight) testified that they were not asked about their Net Income, Net Financial Assets or Net Assets; and the fifth (Investor Four) testified that he was told that an annual income of $60,000 would qualify him.

3. Analysis

(a) Trading without registration and distribution without a prospectus: subsections 25(1)(a) and 53(1) of the Act

[338] York Rio relied on the accredited investor exemption from the registration and prospectus requirements. We find that the accredited investor exemption from the registration and prospectus requirements was not available with respect to trades of York Rio securities.

[339] Based on the evidence set out at paragraphs 323-337 above, we find that York Rio traded in York Rio securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest.

[340] As the York Rio securities had not been previously issued, we find that York Rio distributed its securities without filing a prospectus or a preliminary prospectus with the Commission and obtaining receipts for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest.

(b) Fraud: section 126.1(b) of the Act

[341] Our reasons and findings with respect to Staff's fraud allegations pertain only to the period from January 1, 2006 to October 21, 2008.

[342] The sale of York Rio securities bore the characteristics of a "boiler room" scheme. York Rio and its employees, representatives and agents:

- used aliases when communicating with investors and prospective investors;
- used high pressure sales tactics, including telling investors and prospective investors, for example, that they were being offered York Rio securities at a discounted price because an existing York Rio investor is forced to sell;
- prepared and used sales scripts that included misrepresentations about York Rio's assets, the status of diamond production, and the qualifications and experience of officers, salespersons and other persons who were represented as having a role in the company;
- misrepresented the test for qualification as an accredited investor when communicating with prospective investors;

- posted on the York Rio website many falsehoods and misrepresentations that were intended to effect a sale of securities, including statements that York Rio had purchased 90% ownership of Nova and had already started the mining and production of diamonds in Brazil, and made similar misrepresentations in promotional materials disseminated to investors and prospective investors;
- made misrepresentations in the York Rio Business Plan that were intended to effect a sale of securities, including claims that York Rio had purchased Nova and that an existing investment of US$600,000 had been used to acquire the physical property and exploration rights, and expenditure and net income projections that were identical to those made in the Brilliante Business Plan, and had no basis in reality;
- failed to disclose to investors and prospective investors that the salesperson was compensated by a commission of 20%, and in some cases, misrepresented that salespersons were compensated only in securities of York Rio;
- filed incomplete and misleading Exempt Distribution Reports that relied on the accredited investor exemption, when it was not available, and failed to disclose the 70% fees and commissions paid to Schwartz and Runic; and
- made prohibited representations about a pending initial public offering and potential merger.

[343] We find that York Rio never acquired mining rights in Brazil, had not commenced operations and had not produced any diamonds, contrary to the misrepresentations made in York Rio's promotional materials and misrepresentations made by York Rio salespersons. York Rio never earned any revenue from mining.

[344] We accept the evidence of Vanderlaan and Ciorma that approximately $18 million was raised as a result of the sale of securities of York Rio during the Material Time. Out of this amount, approximately $2.75 million (approximately 70% of the York Rio Proceeds) went to Debrebud during the Schwartz Period, and another approximately $9.2 million (approximately 70% of the York Rio Proceeds and approximately 72% of the Brilliante Proceeds) went to Runic and the Runic Companies during the Runic Period. Approximately $4.1 million went to York or the York Companies.

[345] Contrary to the projected expenditures for mining development costs set out in York Rio's promotional materials, only a minimal amount went to York Rio's purported mining activity – at most, approximately 2.7% of the York Rio Proceeds, and likely much less. Instead, the York Rio Proceeds were used to pay the overhead expenses for the York Rio sales locations, including salaries for qualifiers and 20% commissions for salespersons. Investors were not told about the commission structure, and some of those who asked were told that York Rio salespersons were compensation in York Rio securities only. Several investors testified that they would not have invested had the commission structure been disclosed to them.

[346] After payment of commissions and other overhead expenses, most of the remaining money obtained from York Rio investors was appropriated by York, Runic and Schwartz for their personal use or for the benefit of their families, friends, and other individuals and companies associated with the Respondents.

[347] We find that York Rio perpetrated a fraudulent investment scheme whose purpose was to obtain money for the personal use of the York Rio Respondents and other individuals associated with York Rio and not to raise money to develop a diamond mine, as represented to York Rio investors. We find that York Rio securities were worthless and that the York Rio Investment Scheme was a sham. We find that the conduct of York Rio was contrary to the public interest. We find that York Rio engaged or participated in acts, practices or courses of conduct relating to York Rio securities that it knew or reasonably ought to have known perpetrated a fraud on York Rio investors, contrary to section 126.1(b) of the Act, contrary to the public interest.

4. Conclusion

[348] We find that York Rio traded in its own securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest.

[349] We find that York Rio distributed its securities without filing a prospectus or a preliminary prospectus with the Commission and obtaining receipts for them from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest.

[350] We also find that York Rio engaged or participated in acts, practices or courses of conduct that it knew or reasonably ought to have known perpetrated a fraud on York Rio investors, contrary to section 126.1(b) of the Act, contrary to the public interest.

B. Brilliante

1. The Allegations

[351] Staff alleges that Brilliante:

- traded in its securities without registration, where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest;

- distributed its securities without filing a prospectus or preliminary prospectus with the Commission and obtaining a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest; and

- engaged or participated in acts, practices or courses of conduct relating to securities that it knew or reasonably ought to have known perpetrated a fraud on Brilliante investors, contrary to section 126.1(b) of the Act and contrary to the public interest.

2. The Evidence

[352] We heard evidence that Brilliante, which has never been registered with the Commission, traded in its own securities, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act. We also heard evidence that Brilliante distributed its securities without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in

circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest.

(a) Section 139 Certificates

[353] Staff provided Section 139 Certificates stating that Brilliante has never been registered with the Commission in any capacity, has never been a reporting issuer as defined by the Act, and has never filed any materials, including a prospectus or preliminary prospectus or received a receipt for a prospectus.

(b) Staff Investigators

[354] Vanderlaan testified that Brilliante had been incorporated in July 2007, but appears to have been inactive until August of 2008.

[355] Vanderlaan and Ciorma testified that from September 11, 2008 to October 8, 2008, nine members of the public invested $160,000 in Brilliante.

[356] Vanderlaan testified that the documents seized during the execution of the Search Warrant at the Finch Location indicated that the sale of York Rio securities was being shut down and that the focus of securities sales from the Finch Location was shifting to Brilliante in the summer of 2008.

[357] Vanderlaan and Ciorma testified that the Brilliante Account was opened in January 2007, with an opening deposit of $1,000 payable on the York Rio Account. Two more cheques on the York Rio Account were deposited into the Brilliante Account on December 13, 2007 ($250) and March 6, 2008 ($2,500). Between September 11, 2008 and October 8, 2008, cheques from nine investors, totalling $160,000, were deposited into the Brilliante Account. Investors were the only source of funds into the Brilliante account after September 11, 2008.

[358] Vanderlaan and Ciorma testified that funds flowed from the Brilliante Account to the accounts of the York Companies. From the Brilliante Account, $18,750 was transferred to the Dude Account (two cheques for $9,375 each, both dated October 2, 2008) and $95,750 was transferred to the Munket Account (five cheques issued between September 22 and October 20, 2008). In total, $114,500 (approximately 72% of the Brilliante Proceeds) was transferred from the Brilliante Account to the Dude Account and the Munket Account. From the Dude Account and the Munket Account, money was transferred to the 2180353 Account and the Vision Account, and from there to the British Holdings Account and the NatWest Account.

(c) Compelled Examinations

[359] Brilliante securities were sold by salespersons, including Runic, Demchuk and Valde, each of whom admitted in his compelled examination that he sold Brilliante securities. Based on Runic's admissions, we find that he ran the Brilliante sales operation at the Finch Location and engaged in trades or acts in furtherance of trades of Brilliante securities. Demchuk admitted that he sold Brilliante securities to one investor from the Finch Location, using the alias "Sutton", and his admission was corroborated by the testimony of Vanderlaan, Ciorma, Georgiadis and Hoyme. Valde admitted that he sold Brilliante securities from the Finch Location, using the alias "Wade", and his admission was corroborated by the testimony of Vanderlaan, Ciorma, and Georgiadis.

(d) Witnesses called by Staff

[360] That the Brilliante investment scheme grew out of the York Rio scheme and was intended to replace it, was supported by the evidence of Georgiadis and Hoyme, who testified about the Brilliante sales operation at the Finch Location, Ungaro, who testified about her administrative role in Brilliante, and McDonald and Brown, who testified about the preparation of the Brilliante website and promotional materials. All these witnesses continued to play a similar role in relation to Brilliante that they had in relation to York Rio and their evidence indicates that the Brilliante sales operation was very similar to that of York Rio.

(e) Investor Witnesses

[361] Investor One testified that in June 2008, "Sebrook" (Sherman) called him to solicit an additional purchase of York Rio securities before York Rio went public, and also told him there would be an opportunity to invest in uranium. When Investor One spoke to York, after learning about the Temporary Order, York told him that the only connection between York Rio and Brilliante was that they were sharing office space, and that Brilliante had stolen York Rio's prospectus.

[362] Investor Seven testified that "Sebrook" told him that the Temporary Order related only to Brilliante, with which York Rio shared office space.

3. Analysis

(a) Trading without registration and distribution without a prospectus: subsections 25(1)(a) and 53(1) of the Act

[363] We find that the accredited investor exemption from the registration and prospectus requirements was not available with respect to Brilliante.

[364] Based on the evidence set out at paragraphs 353-362 above, we find that Brilliante, which has never been registered with the Commission, traded in its own securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest.

[365] As the Brilliante securities had not been previously issued, we find that Brilliante distributed its own securities without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest.

(b) Fraud: section 126.1(b) of the Act

[366] Our reasons and findings with respect to Staff's fraud allegations pertain only to the period from January 1, 2006 to October 21, 2008.

[367] We find that Brilliante engaged or participated in a course of conduct that it knew or reasonably ought to have known perpetrated a fraud on Brilliante investors, contrary to section 126.1(b) of the Act and contrary to the public interest:

- There is no evidence that any of the $160,000 raised from Brilliante investors was spent for the purported mining purposes of Brilliante. Instead, approximately 72% of the Brilliante Proceeds flowed from the Brilliante Account, in which

investor cheques were deposited, to the Munket Account and the Dude Account, which were controlled by York, and from there to the 2180353 Account and the Vision Account, which were controlled by Georgiadis, and from there to the British Holdings Account and the NatWest Account, which were controlled by Runic.

- Vanderlaan testified that much of the content of the Brilliante website was copied from Wikipedia and from a Brazilian government website about a different mine.

- The Brilliante website claimed that Brilliante had a 24,000 hectare mining claim in Brazil containing uranium and that US $5 million had been invested in the mine. There is no evidence that Brilliante engaged in any activity other than the sale and distribution of its own securities. Aidelman testified that the claims on the Brilliante website about his own qualifications and experience were false.

- The Brilliante Business Plan included many false statements, including claims that Brilliante had a mining claim for an 8,500 hectare site and that an initial investment of US $875,000 was used to acquire the physical property and secure the exploration rights. The expenditure and net income projections given in the Brilliante Business Plan are identical to those given in the York Rio Business Plan and had no basis in reality.

- Brilliante securities were sold by the same qualifiers and salespersons who had sold York Rio securities, but using different aliases. The Brilliante sales scripts that were seized from the Finch Location contained numerous misrepresentations that were intended to solicit sales of Brilliante securities, including claims that the caller (salesperson) had previously been involved in the initial public offering of another mining company.

[368] We find that Brilliante perpetrated a fraudulent investment scheme whose purpose was to obtain money for the personal use of the Brilliante Respondents and other individuals associated with Brilliante and not to raise money to develop a uranium mine, as represented to Brilliante investors. We find that Brilliante securities were worthless and that the Brilliante Investment Scheme was a sham.

[369] We find that Brilliante engaged or participated in a course of conduct that it knew or reasonably ought to have known perpetrated a fraud on Brilliante investors, contrary to section 126.1(b) of the Act and contrary to the public interest.

4. Conclusion

[370] We find that Brilliante traded in its own securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest.

[371] We find that Brilliante distributed its own securities without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest.

[372] We also find that Brilliante engaged or participated in acts, practices or courses of conduct that it knew or reasonably ought to have known perpetrated a fraud on Brilliante investors, contrary to section 126.1(b) of the Act, contrary to the public interest.

C. York

1. The Allegations

[373] Staff alleges that York:

- traded in York Rio and Brilliante securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest;
- distributed York Rio and Brilliante securities without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest;
- made prohibited representations that York Rio securities would be listed on a stock exchange, contrary to subsection 38(3) of the Act and contrary to the public interest;
- engaged or participated in acts, practices or courses of conduct relating to securities that he knew or reasonably ought to have known perpetrated a fraud on York Rio and Brilliante investors, contrary to section 126.1(b) of the Act and contrary to the public interest; and
- being a director or officer of York Rio and Brilliante, authorized, permitted or acquiesced in the contraventions subsections 25(1)(a) and 53(1), subsection 38(3), and section 126.1(b) of the Act by York Rio and Brilliante, contrary to section 129.2 of the Act and contrary to the public interest.

2. The Evidence: York's role in the York Rio Investment Scheme

[374] Staff's evidence about York's role in the York Rio Investment Scheme came from Vanderlaan and Ciorma, York's compelled examination, witnesses called by Staff (Robinson, Friedman, Georgiadis, Ungaro and McDonald), the five Investor Witnesses who spoke to York by telephone or in person – (Investor One, Investor Two, Investor Three, Investor Six and Investor Eight) and from Schwartz.

(a) Section 139 Certificate

[375] Staff provided a Section 139 Certificate stating that York has never been registered with the Commission in any capacity.

(b) Staff Investigators

[376] Vanderlaan and Ciorma provided evidence that York was the directing mind of York Rio and that he was actively involved in the sale of York Rio securities, including:

- the Corporation Profile Report for York Rio, shows York as the President and sole director of the company;

- the Exempt Distribution Reports filed by York Rio, and certified as true by York, who signed as the President of York Rio, indicate that York Rio relied on the accredited investor exemption in distributing its securities to investors, and most of the Exempt Distribution Reports indicate that no "Commissions & Finders' Fees" are paid, or that consulting fees only are paid; and

- the York Rio website, York Rio Business Plan and other promotional materials given to prospective York Rio investors with the intent of soliciting investments, and the York Rio subscription agreements, identify York as the President of the company.

[377] The Account Profiles and Account Summaries show that

- during the Schwartz Period, York authorized the transfer of approximately $2.75 million (approximately 70% of the York Rio Proceeds) from the York Rio Account to the Debrebud Account;

- during the Runic Period, York authorized the transfer of approximately $9.2 million, (approximately 70% of the York Rio Proceeds and approximately 72% of the Brilliante Proceeds) from the York Rio Account to the Superior Home Account, either directly or by flowing the money through the accounts of the York Companies and the Georgiadis Companies; and

- approximately $4.1 million of the Proceeds was used by York for his personal benefit or the benefit of his family and friends, including the following payments, from the York Rio Accounts:

    - approximately $2,529,565.03 in credit card payments on York's credit cards;
    - approximately $477,789.08 in cash withdrawals;
    - approximately $344,459.19 for car payments;
    - approximately $170,619.34 paid to stores;
    - approximately $135,630.10 to telecommunications companies, including cell phone expenses;
    - approximately $116,165.75 for personal care;
    - approximately $18,497.23 for veterinary expenses; and
    - approximately US $115,958.60 to York personally.

- the Account Summaries for the York Rio Scotiabank Accounts indicate that another approximately $109,301.16 was disbursed to or for the benefit of York, including:

    - approximately $66,007.62 paid to York personally or in credit card payments on York's credit cards; and
    - approximately $43,293.54 for personal-related expenses, including payments to stores, telecommunications companies and for car payments and life insurance.

- York received additional amounts from the accounts of the other York Companies, including:

    - approximately $32,330.75 from the Dude Account for payments on York's credit cards;

    - approximately $26,868.04 from the Munket Account for car payments; and

    - approximately $22,429.98 from the YRR Holdings Account and $2,400.00 from the Munket Account in rental payments for York.

[378] The Account Summaries indicate that approximately $4.1 million of the York Rio Proceeds was disbursed to or for the benefit of York or his family and friends.

(c) York's Compelled Examination

[379] York did not testify at the Merits Hearing. In his compelled examination, which took place on January 5, January 28 and May 15, 2009, he made the following admissions and gave the following evidence about his involvement in the York Rio Investment Scheme:

- he has never been registered to sell securities;

- he has no education or experience in the mining industry;

- he and Jbeily incorporated York Rio in May 2004 to raise money to purchase a company that owned mining rights in Brazil;

- after York Rio moved into the Langstaff Location in mid-May 2004, York and others prepared a presentation package for investors and hired staff, including Ungaro, a friend, who was hired to keep records of the investor cheques and subscription agreements and the communications with the transfer agent, and Ungaro's daughter, McDonald, who was hired to create a website;

- he and others provided information for the York Rio website, which included an Investor Lounge portal on which Investor Updates were posted, and he had input into some of the Investor Updates;

- he believed [incorrectly] that an individual qualified as an accredited investor if he or she owned, alone or with a spouse, $1 million of unencumbered real estate;

- he and others would decide whether a prospective investor qualified;

- he participated in presentations to prospective investors at the Langstaff Location;

- between early spring 2005 and Labour Day 2005, he became aware that $400,000 of the $700,000 he claims he had transferred from the York Rio Accounts to complete the Nova Transaction had not been used for that purpose, and he knew, therefore, that the transaction had not been completed;

- the York Rio website was never corrected to reflect the failure of the Nova Transaction;

- he had final approval of the content on the website after September 2005;
- after September 2005, York Rio moved its bank accounts from the Scotiabank to TD Canada Trust, and he and Ungaro had signing authority on those accounts;
- after September 2005, he and Schwartz entered into an agreement that Schwartz to solicit accredited investors for York Rio in return for a 70% "consulting fee".
- he and Robinson met with Investor Three and his wife over lunch in Toronto;
- he ended the arrangement with Schwartz in July of 2007 and asked Runic, who had worked with Schwartz at the Sheppard Location, to open a sales office, in return for a fee of 70% of the proceeds of the sales;
- Georgiadis acted as his "eyes and ears" during the Runic Period;
- York Rio never obtained the required approvals from the Brazilian government, and did not obtain core samples or a survey;
- contrary to the claims on the York Rio website, York Rio did not do any dredging, and the dredging photographs on the York Rio website depicted Brinton's Rio Paranaiba site, not York Rio's site;
- York Rio "was not a revenue-producing company";
- he visited the Eglinton, Sheppard and Yonge Locations;
- he was aware that some representations made to prospective investors were not true, for example, the claim in a York Rio sales script that York Rio was producing diamonds of 1-69 carats; and
- he was aware that some salespersons were using aliases.

[380] York made the following admissions and gave the following evidence, during his compelled examination, about the disbursement of the York Rio Proceeds.

- he authorized payment of approximately $11 million of the York Rio Proceeds to Schwartz or Runic through Big Brother, Dude, Evason, Munket, and YRR Holdings Inc. (York's Companies) and through 2180353 (Georgiadis's company), including numerous cheques in small amounts flowed through different accounts in the same time period; and
- he authorized payments from York Rio to or for the benefit of Ungaro, McDonald and Aidelman, and to or for his own benefit, as alleged by Staff.

[381] As discussed at paragraphs 418-423 below, York admitted that he authorized the disbursement of approximately $4 million of the York Rio Proceeds to himself or others associated with the York Rio Investment Scheme. Although he claimed that many of these expenses were incurred for York Rio's business, he did not provide any documentation in support of that claim.

(d) Witnesses called by Staff

(i) Friedman

[382] Friedman worked as a York Rio salesperson at the Eglinton and Sheppard Locations during the Schwartz Period.

[383] Friedman testified that York did not have an office at the Eglinton Location or the Sheppard Location, but visited 2 or 3 times a week, on average. He testified that he observed cheques changing hands between York and Schwartz "many times", and added that if York did not visit the office in any week, generally it meant that no sales had been made. However, sometimes Friedman would deliver the subscription agreements and investor cheques to York at his home, and York would give him cheques for delivery to Schwartz.

[384] On cross-examination by York, Friedman agreed that he was not employed or paid by York Rio and that York did not hire him, did not hire any salespersons, did not choose the offices and did not write any scripts. He also agreed that York Rio did not have a parking space at the Eglinton Location or the Sheppard Location and did not appear in the lobby or any building directory or on anyone's name tag.

(ii) Robinson

[385] Robinson testified that he first met York at the Eglinton Location. York did not have an office there but he would visit once or twice a week to talk to Schwartz, and he would visit whenever a cheque came in.

[386] Robinson testified that in March or April of 2006, he and York met with Investor Three and his wife, who had flown in from Manitoba for the meeting, to talk about York Rio. Investor Three had already invested approximately $250,000 in York Rio and went on to make additional purchases. Robinson testified that York talked about York Rio at the meeting.

[387] Robinson testified in about June of 2007, York told him to stop selling York Rio securities to new investors from the Sheppard Location. This was at around the time York Rio moved its sales operation to the Yonge Location, run by Runic.

(iii) Georgiadis

[388] Georgiadis testified that in about June of 2007, York introduced him to "Turner" (Runic) who was in charge of the Yonge Location, and suggested that he work for Runic doing "investor relations" for York Rio. Initially, Georgiadis mailed out information packages to prospective investors and picked up the investor packages, including completed subscription agreements and investor cheques ("**Investor Packages**") from a virtual office near the Yonge Location.

[389] Georgiadis testified that he did not observe any transactions between "Turner" and York in the office, and said that York "mostly . . . wouldn't come to the office". Eventually, Georgiadis began delivering cheques from "Turner" to York and from York to "Turner", usually visiting York at home or some other location outside of the office. Georgiadis testified that initially he delivered the Investor Packages from "Turner" to York and delivered cheques from York to "Turner", but later he went with Turner to meet with York for this purpose.

[390] Georgiadis appeared to be reluctant to recognize York's role in overseeing the sales operation at the Yonge Location and the Finch Location. He testified that York told him to do whatever "Turner" asked, and could not remember whether York had ever asked him for information about what was going on in the office. After refreshing his memory by reviewing the transcript of his compelled examination, he conceded "I was there sort of helping managing the office, but not really. It was never really a title, but I was there, I guess, as my uncle's eyes and ears." (Hearing Transcript, March 23, 2011, p. 69, ll. 19-22)

(iv) Sherman

[391] Sherman testified that he understood York to be the President of York Rio, and that he saw York in the Yonge Location and the Finch Location about six times over the approximately 14 months when Sherman was involved. He testified that Runic hired him, dictated scripts to him, instructed him, gave him contact lists and paid him, and that he relied on information Runic provided about York Rio's purported mine and about the accredited investor exemption. On cross-examination by York, Sherman testified that York did not hire him, instruct him, pay him or provide him with information about York Rio's business.

(v) Ungaro

[392] Ungaro testified that she performed administrative functions for York Rio at York's direction, including receiving the Investor Packages, sending letters to investors, sending information to Capital Transfer Agency, and keeping records for York Rio.

[393] Ungaro testified that she did not have any kind of employment agreement with York or York Rio, or Schwartz or Debrebud. On an irregular basis, York would pay her rent, her Visa bill, her veterinary and medical expenses, including $25,000 for cosmetic surgery, her cell phone and for family vacations for her McDonald, as well as York's daughter and her children, and she drove York's cars (a Range Rover, a Mercedes and an Audi – she did not drive the Aston Martin). She estimated that York paid her bills of approximately $2,000-2,500 per month.

(vi) McDonald

[394] McDonald testified that York asked her to prepare a brochure, information package, and newsletters for the York Rio website in 2005 or 2006; there was no material available yet at that time. She also designed the Investors' Lounge portal. According to McDonald, it was Jbeily who provided the content in the beginning, though York also contributed. After Jbeily's departure, York instructed her to remove Jbeily's name from the York Rio website. From then on, York was in charge of York Rio, and her instructions came from York or from Runic, approved by York. McDonald identified the brochure, "Beyond Brilliance", which she prepared on instructions from Jbeily and York, and the York Rio Business Plan, which she prepared on instructions from York and Runic.

[395] McDonald testified that York paid her, on a project basis, by cheques payable on the York Rio Account, and she agreed with Staff's estimate that she received approximately $30,000 in total between 2005 and 2008. She testified that she also had the

use of a Volvo that York leased for about $750 per month, which he paid for, and that York paid for her gas, rent, veterinary bills and vacations.

(vii) Brown

[396] Brown, who is a freelance web developer, testified that McDonald hired him to do the technical work involved in creating the York Rio website, based on content she provided. McDonald and York would email him with instructions for changes or updates to the York Rio website, and he created 300-400 usernames and passwords to allow new investors to access the Investor Lounge. Brown testified that he was paid approximately $10,000 for his work, paid by cheque on the York Rio Account.

(e) The Investor Witnesses

[397] Five of the Investor Witnesses spoke to York in relation to their purchases of York Rio securities. Although York cross-examined most of the Investor Witnesses, he did not challenge their evidence about what he had said to them, but instead focused on their reasons for signing the Certificate of Investor Accreditation.

(i) Investor One

[398] When Investor One and Investor Four called York Rio after the Temporary Order was issued, York returned their calls to reassure them that York Rio had a mine in Brazil and that it was, or would be, producing diamonds.

[399] Investor One asked why York Rio was still raising money if the mine was producing diamonds; he testified that York's response was "not yet, but soon". When Investor One asked if dividends were a possibility, as was stated in the newsletters, York said, "yes, they're a possibility". According to Investor One, York also told him that the Commission's allegations overlooked the cost of raising capital (20% of each dollar raised) and operational costs (50%); York claimed that the 70% commission paid on York Rio sales was not excessive. Investor One testified that he did not agree, and would not have invested if he had known that 70% was coming "off the top" for these costs. Finally, York also told Investor One that the only relationship between York Rio and Brilliante was that they were sharing office space, and that Brilliante had stolen York Rio's prospectus.

(ii) Investor Two

[400] Investor Two testified that York told him, in the summer of 2008, that York Rio was producing 30% gem quality and 70% industrial quality diamonds, that they were raising money in order to buy equipment to bring the mine to production level, that they had turned down a buy-out offer because they had discovered uranium deposits on the property and had decided to purchase nearby property where they had a uranium operation, and that they were going to take the company public themselves. Investor Two invested another $100,000 in York Rio following this conversation with York. Investor Two testified that neither York nor "Roberts" (who had initially contacted him) told him that 70% of the York Rio Proceeds went in commissions to Debrebud and Superior Home, and if they had, he would not have invested because that would not have been a "reasonable use of the money".

(iii) Investor Three

[401] Investor Three, who invested approximately $800,000 in York Rio between 2005 and 2008, testified that York told him in October 2008 that he would be flying to Germany the following month to arrange for York Rio to be listed on the Frankfurt Exchange, and tried, unsuccessfully, to convince him to invest another $18,000.

(iv) Investor Six

[402] Investor Six called York to complain that her new share certificate, following the share-split, wrongly listed her intended beneficiaries as the owners of the shares. He told her to return the share certificate to he could resolve the problem. She did so, but did not receive a corrected share certificate.

3. Analysis: York's role in the York Rio Investment Scheme

(a) Trading without registration and distribution without a prospectus: subsections 25(1)(a) and 53(1) of the Act

[403] We heard evidence that York engaged in numerous acts in furtherance of trades in York Rio securities:

- he incorporated York Rio;
- he authorized McDonald to create the York Rio website;
- he instructed McDonald and Brown with respect to the content of the York Rio website and the creation of Investor Lounge accounts for new York Rio investors;
- he authorized the preparation of the York Rio subscription agreement and its dissemination to prospective investors;
- he authorized Debrebud (during the Schwartz Period) and Runic (during the Runic Period) to pay the qualifiers and salespersons who sold York Rio securities at the Eglinton Location, the Sheppard Location, the Yonge Location and the Finch Location and to pay for other expenses of the sales operation;
- he visited the Eglinton Location, the Sheppard Location and the Yonge Location on a regular basis;
- he received the Investor Packages from Schwartz or Friedman (during the Schwartz Period) and from Georgiadis (during the Runic Period);
- he participated in decisions about whether a prospective investor was an accredited investor;
- with Robinson, he met with Investor Three, a York Rio investor who went on to make additional purchases after the meeting;
- he spoke to Investor Two, who made additional investments in York Rio after speaking to him;

- he spoke to three other Investor Witnesses (Investor One, Investor Four and Investor Six) who called him after making their investment or learning about the Temporary Order;
- he deposited investors' cheques into the York Rio Accounts, or authorized Georgiadis or others to do so;
- he authorized the payment from the York Rio Accounts of approximately $2.75 million (approximately 70% of the York Rio Proceeds) to Debrebud during the Schwartz Period, some of which went to pay for expenses of the sales operation, including office rent, courier and telecommunications fees, salaries for qualifiers and commissions for salespersons;
- he authorized the payment from the York Rio Accounts of approximately $9.2 million (approximately 70% of the York Rio Proceeds and approximately 72% of the Brilliante Proceeds) to the Runic Companies during the Runic Period, by authorizing its flow to Superior Home either directly from the York Rio Accounts or indirectly through the accounts of the York Companies and the Georgiadis Companies and eventually to the Runic Companies, including Superior Home and British Holdings;
- he caused various form letters to be sent to York Rio investors over his facsimile signature, including a letter enclosing a share certificate, which also bore his facsimile signature, a letter giving instructions for signing on to the York Rio Investor Lounge, a letter advising investors about a share split, and a letter dated August 1, 2007 describing the steps York Rio was taking to be listed on a stock exchange; and
- he received consideration for the sale of York Rio securities by retaining approximately $4.1 million of the York Rio Proceeds for his own use or to or for the benefit of friends and family.

[404] As stated in *Re Limelight*, "In determining whether a person or company has engaged or participated in acts in furtherance of a trade, the Commission has taken 'a contextual approach' that examines "the totality of the conduct and the setting in which the acts have occurred.' The primary consideration is, however, the effect of the acts on investors and potential investors." (*Re Limelight*, above, at paragraph 131) The Commission's decisions have established that "acts directly or indirectly in furtherance of a trade" include preparing and disseminating promotional materials to investors or posting promotional materials on a website intended to solicit investors, conducting information sessions for groups of investors, meeting with investors, issuing and signing share certificates and receiving consideration for the sale of securities. York was engaged in all of those activities.

[405] Although we heard no evidence that York cold-called prospective investors, we find that he met with or spoke to existing investors who went on to make additional investments, and, when contacted by existing investors who were concerned about their investments, attempted to reassure them. We find that that such "after-sales support" communications, intended to solicit additional investments, discourage investors from

attempting to sell their securities, or discourage complaints to securities regulators, are acts directly or indirectly in furtherance of trades.

[406] We are not satisfied that the accredited investor exemption from the registration and prospectus requirements was available in respect of the trades and distribution of York Rio securities. We find that York traded in York Rio securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest.

[407] We also find that York distributed York Rio securities without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest.

(b) Prohibited representations: subsection 38(3) of the Act

[408] We find that York made prohibited representations that York Rio would be applying to be listed on a stock exchange, contrary to subsection 38(3) of the Act.

[409] At least two of the Investor Witnesses (Investor Seven and Investor Eight) received a letter dated August 1, 2007, signed by York, which started out by saying "We have very good news! In the last newsletter, we indicated that York-Rio would be applying for a listing on the Frankfurt stock exchange" and describing steps the company had purportedly taken to move forward. The letter also enclosed a US share certificate, which would replace the no longer valid Canadian certificate, and would be "the only certificate recognized once we receive the listing at the Frankfurt exchange."

[410] In addition, based on the evidence described in paragraphs 400-401 above, we find York made verbal representations to two other Investor Witnesses (Investor Two and Investor Three) that York Rio would be going public.

[411] We find that York made prohibited representations that York Rio securities would be listed on a stock exchange, contrary to subsection 38(3) of the Act and contrary to the public interest.

(c) Fraud: section 126.1(b) of the Act

[412] Our reasons and findings with respect to Staff's fraud allegations pertain only to the period from January 1, 2006 to October 21, 2008.

[413] In his compelled examination, York admitted that he was aware, by September 2005, when Jbeily was ousted, that York Rio had never completed the Nova Transaction. He admitted that, despite representations and photographs showing dredge-mining on the Rio Paranaiba, which remained on the York Rio website in February 2008, York Rio was not, in fact, involved in dredging, and the site depicted was the site of Brinton's claim, not the site that York Rio planned to mine. He admitted that York Rio was not a revenue-producing company, never had a working mine, never obtained the required approvals from the Brazilian government, and did not obtain core samples or a survey. He admitted that he was unaware of the whereabouts of any mining licences or geologists' reports, or any other documents that would support his testimony about steps taken by York Rio to develop a mine in Brazil, and he could not say how much money was sent to Brazil to develop the mine.

[414] York admitted that he was aware of the contents of the York Rio website, the York Rio Business Plan and other promotional materials, and that he authorized, permitted or acquiesced in their preparation and ongoing distribution to investors and prospective investors. However, although York knew that York Rio was a worthless company, this was not disclosed in the content York authorized for the website or promotional materials, or in York's letters and conversations with investors.

[415] For example, some two years after he realized that the Nova Transaction had not been completed, York authorized the August 1, 2007 letter that promised "very good news" about York Rio's purported application for a listing on the Frankfurt stock exchange.

[416] In July 2008, York told Investor Two that York Rio needed to raise more money to invest in mining equipment to bring the mine to production level. According to Investor Two, York told him the diamonds coming out of the mine were 30 percent gem grade and 70 percent commercial/industrial grade, and that York Rio was looking for cutters to cut the gem quality diamonds. As a result of this conversation, Investor Two invested another $100,000 in York Rio. In fact, by July 2008, York had taken steps to wind down the sale of York Rio securities and begin selling Brilliante securities. Nor did York disclose to Investor Two that 70% of the York Rio Proceeds went in commissions to Debrebud and Superior Home. And, when York Rio investors contacted York after the Temporary Order was issued in October 2008, York reassured them that York Rio had a mine in Brazil that was, or would be, producing diamonds.

[417] Between September 2005 and June 2008, York signed and certified to be true a number of Exempt Distribution Reports that were filed with the Commission and other securities regulators which indicated that no commissions or finder's fees were charged to York Rio investors. In his compelled examination, York characterized the 70% fees York Rio paid to Debrebud and Runic's Companies as "consulting fees" paid to "consulting companies" (Transcript of Compelled Examination, May 15, 2009, pp. 217-225). We find that York knew that the 70% fee he paid to Debrebud during the Schwartz Period, and to the Runic Companies during the Runic Period, was used to pay the commissions of York Rio salespersons. We also find that he knew or reasonably ought to have known that York Rio was not entitled to rely on the accredited investor exemption. We find that he knowingly misrepresented the facts to encourage prospective investors who viewed York Rio's public filings.

[418] York profited personally from the sale of York Rio securities. Of the approximately $16 million that York Rio and Brilliante raised from investors from September 2005 to October 2008, approximately $12 million (approximately 70%) was paid either to Debrebud (during the Schwartz Period) or the Runic Companies (during the Runic Period). When questioned about the disbursement of approximately $4 million during his compelled examination, York did not, for the most part, challenge Staff's figures, but repeatedly noted that the expenditures had been made over a period of approximately three years. He also claimed that certain expenditures were made for York Rio business purposes, but he provided no documentation in support of those claims.

[419] York admitted that the York Rio Proceeds were used to pay his credit card balances of approximately $2.4 million, though he claimed, without support, that these

were mostly York Rio business expenses. He also admitted paying off the credit card balances of Ungaro, McDonald and Aidelman, which he claimed was part of their remuneration; the York Rio Account Summary indicates that these payments totalled $119,024.05.

[420] York admitted that York Rio spent approximately $350,000 for six vehicles: (i) the lease and eventual purchase of his 2000 Mercedes CL; (ii) the lease of a Land Rover; (iii) the lease of a Volvo that was used by McDonald; (iv) the lease of an Audi that was used by Ungaro; (v) the down payment on a lease of an Aston Martin ($75,000 paid in July 2007); and (vi) the purchase of a Saturn for Aidelman. Although York claimed that these expenses were all for York Rio business purposes, taken as income (in the case of McDonald, Ungaro and York himself) or owed to the company (in the case of Aidelman), he provided no documentary support for these claims.

[421] York admitted that York Rio made payments totalling approximately $175,000 to various stores, including Staples, Canadian Tire, Sporting Life, Walmart, Loblaws, Costco, Dominion, LCBO, Bass Pro Shops, Henry's Camera, and Pottery Barn. Though he claimed that at least 80% of these expenses were business-related, he stated that he no longer had supporting invoices.

[422] He also admitted that an April 2008 payment of $84,575.29 to the CRA represented his own taxes owing for the 2007 tax year. He explained that he borrowed this amount from the company because he did not have the funds available. He claimed to have signed a note in York Rio's minute book indicating that he owed the company that money, but stated he did not have the documents available.

[423] York also admitted that personal expenses totalling $115,516.06 were paid out of the York Rio Account for friends and family members, including $25,000 for cosmetic surgery, regular payments to a diet doctor, pet care expenses totalling $18,497.23 for five dogs, and $5,400 for laser eye surgery.

[424] We accept Staff's evidence that York misappropriated approximately $4.1 million from York Rio investors for his personal use and for the use of his family and friends.

[425] We find that York orchestrated and perpetrated a fraudulent investment scheme whose purpose was to obtain money for his own personal benefit and the personal benefit of his friends and family, the other York Rio Respondents, and other individuals and companies associated with the York Rio Respondents, and not to raise money to develop a diamond mine, as represented to York Rio investors.

[426] We find that York knowingly deceived York Rio investors and prospective investors with the aim of soliciting their investments in what he knew to be a sham, and as a result, investors lost approximately $18 million.

[427] We also find that during the Runic Period, York authorized the transfer of approximately 72% of the York Rio Proceeds to Runic through the accounts of the York Companies and the Georgiadis Companies in an attempt to conceal the source and use of the York Rio Proceeds.

[428] We find that York engaged or participated in acts, practices or courses of conduct that he knew or reasonably ought to have known perpetrated a fraud on York Rio investors, contrary to section 126.1(b) of the Act and contrary to the public interest.

(d) Directors and Officers: section 129.2 of the Act

[429] Staff alleges that York, being a director and officer of York Rio, authorized, permitted or acquiesced in York Rio's non-compliance with subsections 25(1), 53(1) and 38(3) and section 126.1(b) of the Act, contrary to section 129.2 of the Act and contrary to the public interest.

[430] There is no dispute that York was a co-founder of York Rio, its President and CEO and the sole director of York Rio throughout the Material Time. York admitted this. As there is no dispute that York was a director and officer of York Rio throughout the Material Time, the remaining question is whether he authorized, permitted or acquiesced in York Rio's non-compliance.

[431] York's position was that he was not involved in the sale of York Rio securities, did not employ the York Rio salespersons, and had no part in any wrongdoing that gave rise to Staff's allegations.

[432] We are not persuaded of York's position on the facts, the evidence and on a balance of probabilities. In his compelled examination, York admitted that he had overall responsibility for York Rio. We heard overwhelming evidence that he orchestrated the York Rio Investment Scheme and authorized, permitted or acquiesced in all of the activities of the employees, representatives and agents of York Rio. York authorized the preparation of the York Rio website and promotional materials intended to solicit sales of York Rio securities, and failed to correct them despite knowing that the Nova Transaction had never been completed. He entered into an arrangement with Schwartz in March 2005 to sell York Rio securities from the Sheppard Location, and entered into an arrangement with Runic in July 2007 to sell York Rio securities from the Yonge Location, while arranging with Georgiadis to act as his "eyes and ears" during the Runic Period. In July 2008, he ordered that sales of York Rio securities be shut down and sales of Brilliante securities begin. Throughout the Material Time, he played a central and controlling role in the flow of funds. He authorized the transfer of the York Rio Proceeds from the York Rio Accounts to the accounts of the York Companies, Debrebud and the Runic Companies, while retaining approximately $4.1 million for his own use.

[433] We find that York was a director and officer of York Rio, and the directing mind of York Rio throughout the Material Time, and that he authorized, permitted or acquiesced in York Rio's non-compliance with Ontario securities law, contrary to section 129.2 of the Act and contrary to the public interest.

4. The Evidence: York's role in the Brilliante Investment Scheme

[434] Staff's evidence about York's role in the Brilliante Investment Scheme came from Vanderlaan and Ciorma, York's compelled examination, and witnesses called by Staff (Aidelman, Georgiadis, McDonald, Brown and Ungaro). Staff alleges that York was the directing and controlling mind of Brilliante, and that Aidelman was only nominally the President and director of the company.

[435] York submits that his role in Brilliante was limited to putting in some "seed money" to help Aidelman start up a business, and that he did not foresee and could not have foreseen the wrongdoing that led to Staff's allegations.

(a) The Conflicting Evidence given by York and Aidelman

[436] In his compelled examination, York denied acting as a director or officer of Brilliante and denied that he was its directing and controlling mind. He testified that Brilliante was owned by Aidelman, his former son-in-law. York told Staff that he helped Aidelman, who was unemployed, incorporate the company, showed him how to register the business and open up a bank account, then "I left it to him" (Transcript of Compelled Examination, January 18, 2009, p. 46, l. 13); basically Brilliante was Aidelman's company, and York didn't get involved.

[437] Aidelman testified at the Merits Hearing that York approached him in late 2006 about setting up a company relating to mining. Aidelman testified that on January 19, 2007, he was with York in York's apartment when York incorporated Brilliante online, listing Aidelman as the sole director and giving Aidelman's then home address as the registered office address for the company. Aidelman testified that York paid for the incorporation.

[438] Aidelman and York then visited a branch of the TD Canada Trust together and opened up Canadian and USD bank accounts for Brilliante. York made the initial deposit of $1,000 by cheque dated January 22, 2007 from the York Rio Account. The bank provided some cheques for the Brilliante account, and Aidelman signed a number of blank cheques and gave them to York, along with the client card and personal identification number. Aidelman received account statements at his home address, but gave them to York. He later added York as a signatory on the account.

[439] York also accompanied Aidelman to the offices of the Capital Transfer Agency, where Aidelman signed some documents and a cheque for $1,500, marked "Initial Retainer". Aidelman forwarded later invoices to Brilliante from Capital Transfer Agency to York for his attention.

[440] Aidelman testified that he had no involvement in setting up Brilliante's virtual office. The documents obtained by Vanderlaan bear this out. The invoice from Rostie lists York as the contact for Brilliante, and gives York's Email Address and a phone number and residential address that Aidelman identified as belonging to York. Aidelman testified he was not aware that his name had been used as a contact person on a second invoice from Rostie (though the address and email address information remained those of York).

[441] Aidelman testified that he had no involvement in creating Brilliante newsletters or promotional materials or the Brilliante website, had no involvement in creating the Brilliante Business Plan, and was not aware that it described him as having "extensive background and knowledge" in uranium mining, a claim that he described as a "lofty crock" (Hearing Transcript, June 6, 2011, p. 183, l. 21).

[442] Aidelman testified that he performed no work and had no involvement in Brilliante after incorporating the company and setting up the bank accounts and virtual office. He never communicated with prospective investors and never visited the Finch Location, of which he was unaware.

[443] Aidelman testified that he had no knowledge of five cheques from Alberta investors, totalling $95,000.00, that had been deposited into the Brilliante Account in

September 2008 and obtained by Staff. The memo line on one $12,500 cheque reads "Common Share Purchase," while the memo line on a $50,000 cheque reads "Rio York". Aidelman testified that the signature on the deposit slips was not his own. Aidelman testified that a $37,500 cheque payable by Brilliante to Munket was one of the blank cheques he had signed and given to York when they opened the Brilliante Account; he did not make out the cheque, and was unaware of Munket.

[444] According to Aidelman, York was in charge of Brilliante and did not ask for his advice in making decisions. They had no agreement about how the company was to be run.

[445] Consistent with Aidelman's testimony, York admitted, in his compelled examination, that:

- he "may have" paid the fee to incorporate Brilliante (Transcript of Compelled Examination, January 28, 2009, p. 71, l. 23);
- he "may have" advanced money to Aidelman now and again, including money to set up a virtual office (Transcript of Compelled Examination, January 28, 2009, p. 79, ll. 6-13);
- he used York Rio Proceeds to purchase a vehicle for Aidelman;
- he also used York Rio Proceeds to pay off the credit card balances of Aidelman, Ungaro and McDonald;
- he introduced Aidelman to Runic, McDonald and people at the Capital Transfer Agency;
- the Brilliante Proceeds were first deposited into the Brilliante Account, then cheques were written on that account payable to Munket, of which he was the sole director;
- York wrote cheques on the Munket Account payable to 2180353, including, on one day, multiple cheques in amounts between $9,000 and $10,000;
- cheques drawn on the 2180353 Account payable to British Holdings (one of the Runic Companies);
- Brilliante raised $160,000 from nine investors;
- Runic retained approximately 72% of the Brilliante Proceeds; and
- Munket retained a percentage of the investor funds it received from Brilliante as a consulting fee or commission.

[446] Vanderlaan testified that emails were recovered from a computer that was seized during the execution of the search warrant on October 21, 2008, including an email from York's Email Address to McDonald, dated March 26, 2007, with the subject line, "Start putting everything together for the Brilliante company so we can have it on the web". The body of the email is as follows: "Denise, Further to our ongoing discussions and the previous info would you formulate the foundation info (logo, history etc.) for the website and come back to me as to the particulars for names, etc. as needed. I'd like to have this put together as soon as is practical given your schedule and the need for the website to be

in place for potential investors. Liaise with Richard at investorrelations@yrrresources.com. . . . Thanks, Victor York". Vanderlaan testified he found no such emails from Aidelman to McDonald.

[447] York attempted to explain this in his compelled examination by saying that he allowed Aidelman to use his computer, and any emails from his computer would appear to be from him. Aidelman admitted having access to York's computer but denied using it for Brilliante purposes. McDonald acknowledged receiving the email from York's email address.

(b) Georgiadis and the Flow of Funds

[448] Georgiadis testified that his role in the Brilliante Investment Scheme was similar to the role he played in the York Rio Investment Scheme: he worked for Runic, and received his instructions from Runic. He understood Aidelman to be the President of Brilliante and believed that Aidelman received 25 percent of the money raised after Runic took 75 percent.

[449] Approximately 72% of the Brilliante Proceeds ($114,500) was transferred from the Brilliante Account to the accounts of Dude and Munket which were York Companies, and from there, funds were transferred to, amongst others, the accounts of 2180353 and Vision, which were Georgiadis Companies, and from there to the accounts of British Holdings and NatWest, which were Runic Companies.

[450] Georgiadis's evidence at the Merits Hearing about 2180353 was consistent with York's testimony in his compelled examination. Georgiadis testified that he incorporated 2180353 and opened a bank account for it because Runic told him he would pay him half of one percent of all the money going into the account if he did so. Georgiadis claimed he did not tell York that he owned the 2180353 because Runic told him not to. According to Georgiadis, York would give him the cheques with the instruction to give them to Runic; instead, on Runic's instructions, and unbeknownst to York, Georgiadis deposited the cheques he received from York into the 2180353 Account before writing cheques on that account to British Holdings.

[451] We do not believe that York did not know that 2180353 was Georgiadis's company or that the cheques he was giving to Georgiadis were being deposited into the 2180353 Account. We find that York and Georgiadis attempted to emphasize the roles played by Aidelman and Runic while minimizing the role played by York in the Brilliante Investments Scheme. In our view, the most telling of York's admissions is that he was aware that Brilliante Proceeds flowed from Brilliante, which was purportedly Aidelman's company, through Munket to British Holdings. Consistent with that admission is Georgiadis's testimony at the Merits Hearing, when presented with an excerpt from the transcript of his compelled examination, that he was there, in the office, as his uncle's "eyes and ears" (Hearing transcript, March 23, 2011, p. 69, ll. 21-22).

(c) Witnesses called by Staff

[452] The evidence of Ungaro, McDonald and Brown was that their work for Brilliante was similar to and grew out of their work for York Rio. They also testified about Aidelman's involvement.

(i) McDonald

[453] McDonald testified that she first heard about Brilliante when Aidelman called her some time in 2007 or 2008 and asked her to put together a website for the company. She received instructions for the content of the website from email addresses belonging to Aidelman and York, though she testified that she understood the content came from Aidelman.

(ii) Ungaro

[454] Ungaro's testimony about Brilliante was consistent with McDonald's. She testified that she found out about the company through York and Aidelman and performed the same tasks for Brilliante that she did for York Rio.

(iii) Brown

[455] Brown testified that in doing the technical work in developing the Brilliante website, his only contact was with McDonald, who provided the content, although he believes Aidelman and York may have been copied on some of his emails from McDonald.

(d) Findings on the Conflicting Evidence

[456] Although the evidence about the roles played by Aidelman and York in the Brilliante Investment Scheme was not entirely consistent, we find that the evidence discussed at paragraphs 436-455 above provides compelling support for Staff's allegation that York orchestrated the Brilliante Investment Scheme and was the directing and controlling mind of Brilliante who authorized, permitted or acquiesced in the contraventions of Ontario securities law by Brilliante.

5. Analysis: York's role in the Brilliante Investment Scheme

(a) Trading without registration and distribution without a prospectus: subsections 25(1)(a) and 53(1) of the Act

[457] We heard evidence that York, who was not registered with the Commission, engaged in numerous acts in furtherance of trades of Brilliante securities, including the following:

- he incorporated Brilliante or caused Aidelman to do so;
- he authorized McDonald and Brown to prepare the Brilliante website, and authorized the content to be posted on it, either directly or through Aidelman, who was only nominally in charge of Brilliante;
- he applied for a mailbox account for Brilliante at Rostie;
- he opened the Brilliante Account in Aidelman's name;
- he authorized Runic to pay the salespersons who sold Brilliante securities at the Finch Location and to pay for other expenses of the sales operation;
- he received the subscription agreements that had been completed by investors and returned to Brilliante, along with the investors' cheques, from Georgiadis;

- he caused the transfer of approximately 72% of the proceeds of the sale of Brilliante securities from the Brilliante Account, which he controlled, to the accounts of Dude and Munket, his companies, and wrote cheques on the Dude and Munket Accounts to the 2180353 Account, for subsequent transfer to accounts controlled by Runic; and
- he received consideration for the sale of Brilliante securities.

[458] We find that the accredited investor exemption from the registration and prospectus requirements was not available in respect of the trades and distribution of Brilliante securities.

[459] We find that York traded in Brilliante securities, without registration, in circumstances where no exemption from the registration requirement was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest.

[460] We also find that York distributed Brilliante securities without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest.

(b) Fraud: section 126.1(b) of the Act

[461] Our reasons and findings with respect to Staff's fraud allegations pertain only to the period from January 1, 2006 to October 21, 2008.

[462] We find that York orchestrated the fraudulent Brilliante Investment Scheme as the successor to the York Rio Investment Scheme and that little changed, apart from the name of the company, the mineral purportedly being mined, and the aliases used by the salespersons. We find that York engaged or participated in a course of conduct that he knew or reasonably ought to have known perpetrated a fraud on Brilliante investors. York, directly or with the assistance of Aidelman, acting under his authority, incorporated Brilliante, applied for a mailbox account at Rostie, and opened the Brilliante Account. York instructed McDonald to "start putting everything together for the Brilliante company so we can have it on the web", and approved the fraudulent content of the Brilliante website and promotional materials. He authorized the flow of funds from the Brilliante Account through the Dude Account and the Munket Account, to the 2180353 Account and the Vision Account, and further authorized Georgiadis to flow these funds to the accounts of the Runic Companies. York benefitted from the Brilliante Investment Scheme, as it appears he obtained approximately 28% of the proceeds that remained after the approximately 72% was flowed through to Runic.

[463] We find that from York engaged or participated in acts, practices or courses of conduct that he knew or reasonably ought to have known perpetrated a fraud on Brilliante investors, contrary to section 126.1(b) of the Act and contrary to the public interest.

(c) Directors and Officers: section 129.2 of the Act

[464] Staff alleges that York, being a *de facto* director or officer of Brilliante, authorized, permitted or acquiesced in Brilliante's non-compliance with subsections 25(1)(a) and 53(1), subsection 38(3), and section 126.1(b) of the Act, contrary to section 129.2 of the Act and contrary to the public interest.

[465] For the reasons given at paragraphs 436-455 above, we find that York was the directing and controlling mind of Brilliante and that he authorized, permitted or acquiesced in Brilliante's non-compliance with Ontario securities law, contrary to section 129.2 of the Act and contrary to the public interest.

6. Conclusion

(a) York Rio

[466] We find that York traded in securities of York Rio, without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest.

[467] We find that York distributed securities of York Rio without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest.

[468] We find that York made prohibited representations that York Rio securities would be listed on a stock exchange, contrary to subsection 38(3) of the Act and contrary to the public interest.

[469] We find that York engaged or participated in acts, practices or courses of conduct that he knew or reasonably ought to have known perpetrated a fraud on York Rio investors, contrary to section 126.1(b) of the Act and contrary to the public interest

[470] We also find that York, being a director and officer of York Rio, authorized, permitted or acquiesced in the contraventions of subsections 25(1)(a) and 53(1), subsection 38(3), and section 126.1(b) of the Act by York Rio, contrary to section 129.2 of the Act and contrary to the public interest.

(b) Brilliante

[471] We find that York traded in securities of Brilliante, without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest.

[472] We find that York distributed securities of Brilliante without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest.

[473] We find that York engaged or participated in acts, practices or courses of conduct that he knew or reasonably ought to have known perpetrated a fraud on Brilliante investors, contrary to section 126.1(b) of the Act and contrary to the public interest.

[474] We also find that York, being a *de facto* director or officer of Brilliante, authorized, permitted or acquiesced in the contraventions subsections 25(1)(a) and 53(1), subsection 38(3), and section 126.1(b) of the Act by Brilliante, contrary to section 129.2 of the Act and contrary to the public interest.

D. Schwartz

1. The Allegations

[475] Staff alleges that Schwartz:

- traded in York Rio securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest;
- distributed York Rio securities, without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest;
- engaged or participated in acts, practices or courses of conduct relating to securities that he knew or reasonably ought to have known perpetrated a fraud on York Rio investors, contrary to section 126.1(b) of the Act and contrary to the public interest;
- being a director or officer of York Rio, authorized, permitted or acquiesced in the contraventions of subsections 25(1)(a) and 53(1), subsection 38(3), and section 126.1(b) of the Act by York Rio, contrary to section 129.2 of the Act and contrary to the public interest.
- traded in securities while he was prohibited from doing so by order of the Commission, contrary to subsection 122(1)(c) of the Act and contrary to the public interest.

2. The Evidence

(a) Section 139 Certificates

[476] Staff provided a Section 139 Certificate stating that Schwartz has never been registered under the Act. Schwartz admitted this when he testified at the Merits Hearing.

[477] Staff also provided a Section 139 Certificate stating that Debrebud has never been registered under the Act.

(b) Schwartz and Debrebud

[478] Staff obtained a Corporation Profile Report for Debrebud, which indicates that Debrebud was incorporated on September 22, 1999 and cancelled on June 7, 2008. Schwartz was listed as its sole director and President.

[479] Schwartz testified at the Merits Hearing. He made a number of substantial admissions of fact, and the focus of his defence was his submission that his activities did not implicate him in any non-compliance with Ontario securities law by York Rio. On cross-examination, Schwartz did not agree with Staff's suggestion that he was the directing and controlling mind of Debrebud. However, he admitted that he was the sole director, officer and shareholder of Debrebud, that Debrebud had no employees, that he was the only signatory on the Debrebud Account, and that no one else ever signed a cheque on the Debrebud Account.

[480] We accept that Schwartz was a director and officer of Debrebud, and we find that he was its directing and controlling mind.

[481] Staff alleges that Schwartz, acting through Debrebud, acted in the capacity of a director or officer of York Rio and authorized, permitted or acquiesced in York Rio's non-compliance with Ontario securities law. Schwartz disputes that allegation, and characterizes his, and Debrebud's role, as that of "paymaster" for York Rio. Whether Schwartz, through Debrebud, was a third-party service provider for York Rio (like the entities that provided telephone or courier services, for example) or engaged in trades or acts in furtherance of trades in York Rio securities was the main dispute between Schwartz and Staff.

[482] Staff's evidence about the role that Schwartz and Debrebud played in the sale of York Rio securities came from Vanderlaan and Ciorma, who testified about the flow of York Rio investor funds through Debrebud, and from Friedman and Robinson, who testified about their observations of Schwartz's role in the York Rio office.

(c) Schwartz's Evidence at the Merits Hearing

(i) The sale of York Rio securities at the Eglinton and Sheppard Locations

[483] In his testimony at the Merits Hearing, Schwartz denied that he was a directing and controlling mind of York Rio. He testified that he did not make decisions for York Rio, did not have financial control of York Rio, did not have a management or operating role, and did not participate in any attempts by York Rio to acquire new property.

[484] On cross-examination by Staff counsel at the Merits Hearing, Schwartz made the following admissions:

- he admitted that York Rio securities were sold from the Eglinton and Sheppard Locations and that the vast majority of activity at both offices related to the sale of York Rio securities;

- he admitted that he and York had a verbal agreement that Debrebud would receive 70% of the money raised by York Rio, which he described as an "outsourcing fee"; from this amount, all York Rio expenses would be paid;

- he admitted that Debrebud received approximately $2.75 million from York Rio from March 8, 2005 to August 2, 2007, as shown on the Debrebud Account Summary, and that this amount is approximately 70% of $4 million, indicating that York Rio raised approximately $4 million during the Schwartz Period;

- he admitted that out of the 70% that he received, he paid all of York Rio expenses, including salaries and sales commissions, the rent at the Eglinton and Sheppard Locations, and the mailbox rent, at least 15 telephones (including long-distance charges), courier expenses, photocopy expenses and furniture;

- he stated that he believed 70% was a reasonable fee "in this day and age";

- he confirmed the evidence of Friedman and Robinson, that York Rio salespersons at the Eglinton and Sheppard Locations were paid a commission of 20% of the gross amount invested in York Rio;

- he admitted that, as shown in the Debrebud Account Summary, Debrebud paid $470,781.58 to Superior Home (Runic's company), and that these payments represented Runic's 20% commission on his sales of York Rio securities during the Schwartz Period, when Runic worked as a salesperson at the Sheppard Location; and
- he admitted that Debrebud paid $454,145.49 to Robinson and his company, and $174,906.16 to Friedman and his company during the Schwartz Period.

(ii) Amounts paid to or for the benefit of Schwartz and his family

[485] Schwartz admitted that money was paid out of the Debrebud Account to or for the benefit of himself or his family:

- he admitted that from March 9, 2005 to May 20, 2007, $143,900.48 was paid out of the Debrebud Account to himself or companies of which he is the officer and director, or was used to pay his credit card balances;
- he admitted that $456,000 was paid out of the Debrebud Account to his wife, $20,605 was used to or for the benefit of his son, and $30,300 was used to or for the benefit of his daughter;
- he admitted that another $131,930.91 was paid out of the Debrebud Account towards his wife's credit card balances; although he suggested that she may have been using her credit card to pay York Rio expenses or lending it to someone to pay York Rio expenses, he admitted she did no work for York Rio, he was unable to provide any details and he could not recall seeing any record of such expenses; and
- he admitted that $106,118.39 was paid out of the Debrebud Account in cash, but claimed he could not recall the purpose of those payments. He admitted that the only debit cards on that account belonged to himself, his wife and his daughter, and he had no knowledge that the account had been compromised.

[486] Schwartz claimed that some of the payments made by Debrebud to or for the benefit of himself or his family were loan payments or an untaxable deemed dividend. At several points in the Merits Hearing, he undertook to provide supporting documents, but none were provided.

[487] We find that the payments from the Debrebud Account described above, which totalled approximately $889,000, were made to or for the benefit of Schwartz and his family.

[488] The Debrebud Account Summary also indicates that Debrebud spent $556,188.79 for miscellaneous expenses from January 4, 2005 to October 1, 2008. Schwartz suggested, on cross-examination, that $400,000 of this amount was for telephone charges payable to Bell Canada, but this was not supported by the evidence. Schwartz confirmed that Bell Canada was York Rio's only telephone service provider, and the list of miscellaneous expenses includes only seven payments to Bell Canada, totalling $27,690.96. The miscellaneous expenses list, which covers 24 single-spaced pages of the Debrebud Account Summary, includes many entries for restaurants (for example, Swiss Chalet and the Unicorn Pub, which Schwartz testified were virtually next door to the

Eglinton Location, the Golden Griddle, Cora's and Pizza Pizza), stores (Bayview Village, the Bay, Shoppers Drug Mart, Future Shop and Radio Shack, for example), gas, utilities (Bell Canada and Enbridge); financial services (Canada Life), as well as numerous service charges that appear to be ATM or other banking fees. The list also includes unattributed cheques and, on many days, there are multiple (usually 5 or 6) cash withdrawals in odd amounts, usually in the $400-600 range, consistent with salary payments.

(iii) Investors' responsibility

[489] Schwartz testified that the York Rio subscription agreement used during the Schwartz Period stated that the investment was for accredited investors, and that the York Rio qualifiers asked prospective investors whether they were accredited.

[490] Schwartz submits that "financial assets" include real estate, and he cross-examined the Investor Witnesses about their net assets, including their principal residence. He submitted that Investor Three, who he described as the only Investor Witness who invested during the Schwartz Period, was an accredited investor. We are not satisfied that Investor Three was an accredited investor. We also find that the accredited investor exemption from the registration requirement was not available with respect to trades of York Rio securities because York Rio was a market intermediary.

[491] Schwartz cross-examined the Investor Witnesses as to whether they had read the subscription agreement, and in general about their experience entering into contracts. He relied, in particular, on the subscription agreement signed by Investor Three on June 20, 2006, which, under "Representations, Warranties and Covenants of Subscriber", states that the Subscriber "represents, warrants and covenants to [York Rio] (and acknowledges that [York Rio], and its counsel, are relying thereon)" that, amongst other things, the subscriber had been independently advised as to restrictions on trading the shares imposed by applicable securities legislation, he has not requested and does need an offering memorandum, he relies solely on available published information relation to York Rio and not on any oral or written representation as to fact or otherwise made by York Rio, he is purchasing the shares under the accredited investor exemption, no securities regulator has reviewed or passed on the merits of the shares, there is no government or other insurance covering the shares, and there are risks associated with purchasing the shares.

[492] Schwartz stated, in his testimony, that if the York Rio investors had read the subscription agreement and the risk disclosure statement, they would not have invested "and I would not have walked away with these hundreds of thousands of dollars" (Hearing Transcript, August, 12, 2011, p. 35, ll. 8-10).

[493] Schwartz's attitude towards investors is best captured in the following exchange about the York Rio subscription agreement, which followed Staff counsel's suggestion that Schwartz's conduct amounted to misappropriation:

> A. Basically, if you want to get to the, you know, to the ugly mudslinging here, as I reviewed each one of these people up here, all the witness [sic], they're the ones who embezzled us because they should not have bought those securities in the first place.

Q. You're blaming the investors?

A. I'm blaming the investors that they didn't do their homework and they shouldn't have been involved in that exercise in the first place.

Q. So what you're saying is, let me get this straight, everything is okay if you can separate somebody from their money. Is that correct?

A. No, no, I didn't say that.

. . . .

A. What I said is that the investors were supposed to have read the package and stick to what they represented and warranted that they're going to do, and had that happened, nobody would have been out of money and I wouldn't have made these hundreds of thousands of dollars and I wouldn't be sitting here for the last 25 days. That's what I said.

Q. Looking at page 150 --

CHAIR: Did you say that it was the investors who embezzled you?

THE WITNESS: No, I did not say that, Commissioner.

CHAIR: Then I must have misheard it. We'll check the transcript.

THE WITNESS: I just said that from my point of view, I would not have made this fantastic amount of money through what is called pillaging and misappropriation had the investors done their proper homework and read a very simple four-page letter. It was not a twenty-five-page or a fifty-page form that you would expect from a Bay Street law firm. So it wasn't heavy reading for them. It's very plain, ordinary language, no legalese. It asked them to review this thing. Are you an accredited investor? Are you -- you're not going to rely on any phone business. You're just going to read the material. You undertake that you don't need any further information. You don't need any extra disclosure by an offering memorandum.

CHAIR: Yes. Yes.

THE WITNESS: And so I'm not saying that's their fault and it’s okay to separate people from their money if they don't have to read something. I'm just saying that this extravagant wealth that I was supposed to have received, okay, was -- would not have been there had people done their proper homework. So it wasn't that I was out to slip one past them and hoping that they wouldn't read, you know, the representations and warranties.

CHAIR: That's the part I want you to explain a little bit more clearly. If they had read these documents and risk disclosure statements that you have described, you say you would not have made the extravagant money?

THE WITNESS: Yeah.

CHAIR: Why would you not have made the extravagant money?

THE WITNESS: Because then most of these witnesses that we saw and others, probably, you know, on the law of probabilities, they would have just hung up and say, you know, I can't see that in the material that you sent me, sir. You know, if there's going to be a takeover, how come -- if there's going to be such a large takeover, how come it's not in the form? Why isn't it disclosed? Why is there no press release for that?

CHAIR: As I understand what you're saying, is had they read the risk disclosure statement, they would not have invested?

THE WITNESS: Exactly, and I would not have walked away with these hundreds of thousands of dollars.

(Hearing Transcript, Aug. 12: 31-35)

[494] We consider Schwartz's disregard of his obligations towards York Rio investors to be egregious conduct.

(iv) Summary of Schwartz's Testimony

[495] In summary, Schwartz admitted that he entered into an agreement with York that Debrebud would sell York Rio securities in return for approximately 70% of the proceeds; that York Rio paid Debrebud approximately $2.75 million out of the proceeds of the sale of York Rio securities during the Schwartz Period, out of which amount Debrebud paid the expenses of the Eglinton and Sheppard Locations, including salaries and commissions to the salespersons selling York Rio securities, as well as payments of approximately $889,000 to or for the benefit of himself and his family.

[496] The dispute between Schwartz and Staff relates to the legal consequences of these admissions. Schwartz submits that he was a "payroll master" or "agent" of York Rio or performed an "outsourced" sales function for York Rio. He submits that Friedman, Robinson, Ungaro and McDonald supported his evidence on this point.

(d) Witnesses called by Staff

(i) Friedman

[497] Friedman testified that he has known Schwartz and his family for well over 25 years.

[498] Friedman testified that he worked with Schwartz in relation to the sale of Euston securities at the Eglinton Location. According to Friedman, he performed an administrative and clerical role at Euston, sending out promotional material to potential investors.

[499] In late 2005, Schwartz told him that the Euston project was no longer proceeding and that they would be involved in a new project, York Rio, which was involved in alluvial diamond mining in Brazil. York Rio operated out of the same office (the Eglinton Location) and Friedman performed the same administrative function.

[500] Friedman described himself as administrative assistant to Schwartz. He testified that he never spoke to investors. His role was to send out the subscription agreements to prospective investors who had been identified by the salespersons, and to receive the signed subscription agreements and investor cheques (Investor Packages), which he

would pass on to Schwartz, after making note of the amount invested. Friedman kept records of sales on a week-by-week basis, so that Schwartz would know what to pay each salesperson.

[501] Friedman testified that Schwartz did not call investors. Friedman testified that he observed Schwartz giving the Investor Packages to York, and he understood that York would then pay 70% of the amounts raised to Schwartz, keeping 30% for himself. He testified that he saw York pass cheques to Schwartz in the office many times. From the 70%, Schwartz paid the qualifiers and salespersons, as well as the rent and all other office expenses. Schwartz paid the salespersons by cheque for 20% of the amount invested. Friedman was also paid by cheque, signed by Schwartz, on the Debrebud Account. He testified that he received a salary of approximately $300 per week plus a bonus (or "override") of 2 or 3% of the amounts raised at the Eglinton Location.

[502] Friedman testified that he had no power to hire or fire anyone. Schwartz was in charge of staffing the office. It was Schwartz who ran the sales operation at the Eglinton Location.

[503] Friedman testified that when the Eglinton lease came to an end, Schwartz found the Sheppard Location, though Friedman visited it to see if it was suitable and arranged the logistics of the move, and Robinson signed the lease. Again, it was Schwartz who was in charge of the sales operation at the Sheppard Location. He was the boss, and did not report to anyone else on a day-to-day basis. He dealt with any questions or concerns, and he was "the authoritative person in the office".

[504] Friedman testified that after York Rio ceased operating, Schwartz told him that it was no longer necessary to retain the computer records of York Rio sales, since York had the originals. Friedman removed the files on those instructions.

[505] To summarize, Friedman testified that Schwartz:

- recruited him for the York Rio operation;
- was in charge of staffing the office;
- received Investor Packages and passed them on to York;
- received 70% of the proceeds back from York, from which amount he paid Friedman and the qualifiers and salespersons at the Eglinton Location, as well as the office expenses;
- dealt with any questions or concerns; and
- instructed him to destroy the computer records of York Rio sales.

[506] On cross-examination, Schwartz questioned Friedman about his 25 years of experience in sales and marketing, suggesting that Friedman was not an administrative assistant but a sales manager at the Eglinton and Sheppard Locations. In response, Friedman insisted "It was your office. They were your salespeople. They were your responsibility" (Hearing Transcript, June 6, 2011, p. 77, ll. 10-11).

[507] Schwartz also challenged Friedman on his testimony that it was Schwartz who hired the salespersons for the Eglinton Location, suggesting instead that the Euston staff

had simply switched offices, moving from the Euston sales office on St. Clair Avenue, in Toronto, to the Eglinton Location. Friedman insisted that it was Schwartz who selected the salesmen who would come with him from Euston.

[508] Though Schwartz questioned Friedman at length in an attempt to secure a retraction, Friedman repeatedly insisted that Schwartz was "not just paying people cheques" but was "in charge of the office", had the accountability for the office, and provided and paid for the office space, desks, telephones, couriers, promotional material and other tools for use by the salespersons. He rejected Schwartz's suggestion that he, Friedman, kept track of the office expenses, and stated that he would pass bills onto Schwartz.

[509] Schwartz submitted that Friedman's evidence at the Merits Hearing was inconsistent with his compelled testimony, which included statements, for example, that he did not know how Schwartz filled his day.

[510] Schwartz also argued that Friedman's evidence about his role and his remuneration is inconsistent with the Debrebud Account Summary, which shows that Debrebud paid Friedman and his company $174,906.16 from March 21, 2005 to June 21, 2007.

[511] We are not persuaded that the amount Friedman received, paid over approximately 28 months, is inconsistent with his testimony that he received a salary of approximately $300 per week plus an "over-ride" of 2-3% of the proceeds of the sales made by York Rio salespersons at the Eglinton and Sheppard Locations. In contrast, we find that Debrebud paid approximately $889,000 to or for the benefit of Schwartz or his family over about the same period, which strongly suggests, in our view, that Schwartz had a much more central and directing role in the York Rio operation.

[512] Although Friedman may have minimized his role in the York Rio Investment Scheme, we find that his evidence, considered as a whole, supports Staff's allegation that Schwartz was the ultimate authority at the Eglinton and Sheppard Locations during the Schwartz Period.

(ii) Robinson

[513] Robinson testified that he was introduced to Schwartz in around 2002, and he went to work for him two to three months later in marketing a company called Alliance Explorations. He later worked for Schwartz, Friedman and others in selling shares of Euston. In around November 2005, Schwartz hired him to sell York Rio securities from the Eglinton Location, and he continued to work as a York Rio salesperson when the operation moved to the Sheppard Location in late 2005 or early 2006. He testified that he stopped selling York Rio securities in June 2007, on York's instructions.

[514] Robinson testified that he was paid a commission of 20% of the amount invested, if he had "opened" the account (made the first sale), 10% if someone else had opened the account. He was paid by cheque, generally written on the Debrebud Account, and handed to him by Schwartz, and occasionally by Friedman. He testified that he received approximately $454,000 from the Debrebud Account, and kept about $250,000 for his own purposes. Some of the money he received was for qualifiers who asked him to cash their cheques for them, and he owed some money to Schwartz.

[515] Robinson testified about the roles played by Friedman, Schwartz, York and Runic. He testified that Friedman generally ran the office, interviewed job applicants, provided the contact lists that Robinson and the other salespeople would use in calling prospective investors, and authorized anything going out of the office to prospective investors. Friedman prepared a script, together with Robinson. Friedman also provided the weekly sales records for Schwartz, who would use them to make out the commission cheques for the salespersons.

[516] However, Robinson testified that Friedman reported to Schwartz. Schwartz had an office at the Eglinton and Sheppard Locations, and it was Schwartz who was probably ultimately in charge, although it wasn't always clear. Schwartz answered the salespersons' questions about York Rio. In late 2006, Schwartz, along with Runic, asked Robinson to sign the lease for the Yonge Location.

[517] Robinson described Schwartz's role as paying the salespeople, and agreed with Schwartz's description of his role as "payroll contractor", a firm that acts as a third party for paying salaries and expenses. He agreed with Schwartz's suggestion that York had "outsourced" the sales function.

[518] Robinson attempted neither to minimize his own or Friedman's role in the sale of York Rio securities nor to maximize Schwartz's. In cross-examination, he agreed with Schwartz's characterization of Schwartz's role as "payroll contractor", but this did not detract from the main point he made in his evidence in chief – that it was Schwartz who was ultimately in charge of the York Rio sales operation at the Eglinton and Sheppard Locations. We accept Robinson's evidence.

(iii) Ungaro

[519] Ungaro testified that Schwartz ran the sales operation at the Eglinton Location and later the Sheppard Location. She acted as a liaison between York and Schwartz. She did not have an office at either location, but occasionally visited Schwartz at the Eglinton Location and may have visited him at the Sheppard Location to deliver messages on York's behalf. In particular, she testified that when Schwartz wanted to receive more shares of York Rio for his own purposes, she relayed York's refusal to him.

[520] On cross-examination, Schwartz suggested to Ungaro that his request for 10 million shares of York Rio was related to the expulsion of Jbeily, but Ungaro testified that she was unable to recall.

[521] Ungaro's evidence does not assist Schwartz, and indeed, supports Staff's submission that Schwartz played an integral role in the York Rio Investment Scheme during the Schwartz Period.

(iv) McDonald

[522] McDonald testified that she met Schwartz once and understood him to be "the sales arm of York Rio". However, on cross-examination by Schwartz, she admitted that she had no direct knowledge about his role, and that it was Friedman she communicated with when setting up investor access to the Investor Lounge pages of the York Rio website.

[523] McDonald's evidence does not assist Schwartz.

(v) Jbeily

[524] Jbeily testified that in mid-2005, York took him to an office on Eglinton and introduced him to Schwartz, who York described as someone they might have to use to raise money for York Rio.

[525] Jbeily's evidence supports Staff's submission that Schwartz played an integral role in the York Rio Investment Scheme during the Schwartz Period.

3. Analysis

(a) Trading without registration and distribution without a prospectus: subsections 25(1)(a) and 53(1) of the Act

[526] Staff does not allege and we received no evidence that Schwartz communicated directly with investors or prospective investors to solicit or complete sales of York Rio securities. There is no evidence that Schwartz had any role in preparing the York Rio Business Plan or any other promotional documents given to investors and posted on the website. There is also no evidence that he hired, trained or supervised York Rio qualifiers or salespersons.

[527] Schwartz submits that, through Debrebud, he acted as an "outsourced" payroll administrator, and he compares his role to that of a third-party service provider. He also submits that he did not receive or deposit monies from York Rio investors but only received and deposited monies from York Rio, the issuer of the securities. He submits that his activities did not require registration, and, that he worked behind a "firewall" in order to avoid engaging in registrable activities.

[528] We find that Schwartz's evidence, when considered as a whole, makes a compelling case for his having played an integral role in the York Rio Investment Scheme during the Schwartz Period. For example:

- he testified that he relied on what he understood to be a *bona fide* conveyance of mineral rights, pursuant to the July 2004 Contract between York Rio and Nova, which he had been given by York;

- he admitted that he hired Friedman, who had worked with him previously, and testified that Friedman was in charge of the office;

- he admitted that he had seen the York Rio subscription agreement that was sent out to prospective investors, and he admitted that he relied on the completed subscription agreements that were received from investors;

- he admitted relying on the private issuer exemptions, stating: "I was confident and [*sic*] still confident to this day that I made use of the private exemptions, and every deed and act done in Debrebud was within the confines of the law." (Hearing Transcript, August 12, 2011, p. 72, ll. 5-8);

- he admitted that "we were engaged in raising money for York Rio" (Hearing Transcript, August 11, 2011, p. 101, ll. 10-11); and

- he admitted that Debrebud "could be construed as an agent" in connection with the sale of the securities through the outsourcing by York Rio (Hearing Transcript, August 12, 2011, p. 73, ll. 20-21).

[529] In addition, the evidence of Friedman, Robinson, Ungaro and Jbeily supports Staff's submission that Schwartz played an integral role in the York Rio Investment Scheme during the Schwartz Period.

[530] We place particular importance on Staff's evidence as to the flow of funds, which Schwartz admitted. Schwartz admitted that Debrebud received 70% of the proceeds of the sale of York Rio securities – approximately $2.75 million – during the Schwartz Period. Of this amount, we find that approximately $889,000 (approximately 22% of the York Rio Proceeds during the Schwartz Period) was paid to or for the benefit of Schwartz or his family. These amounts are inconsistent with Schwartz's characterization of Debrebud's role as merely that of "payroll contractor" or "paymaster" and provide compelling evidence that Debrebud, and Schwartz, played an integral role in the York Rio Investment Scheme.

[531] Considering the evidence as a whole, including Staff's evidence as to the flow of funds, Schwartz's admissions, and the evidence of Friedman, Robinson, Ungaro and Jbeily, we find that Schwartz played an integral role in the York Rio Investment Scheme. We do not accept Schwartz's submission that he avoided personal responsibility by operating through Debrebud (of which he is the sole owner, director and officer) or by receiving monies from York Rio, rather than directly from investors. We find that Schwartz had overall authority for the sales of York Rio securities at the Eglinton and Sheppard Locations during the Schwartz Period, and we find that he did this acting in concert with York. We find that he has made a deliberate attempt to circumvent the provisions of the Act, and has failed to do so. We find that Schwartz engaged in numerous acts in furtherance of trades of York Rio securities during the Schwartz Period.

[532] Although we received insufficient evidence to determine whether Investor Three was an accredited investor, this does not assist Schwartz, who failed to establish that the approximately $4 million of York Rio securities that were sold during the Schwartz Period were sold only to accredited investors. We find that the accredited investor exemption from the registration and prospectus requirements was not available with respect to the trades of York Rio securities.

[533] We find that Schwartz traded in York Rio securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest. We also find that Schwartz distributed York Rio securities without filing a preliminary prospectus or prospectus with the Commission, and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest.

(b) Fraud: section 126.1(b) of the Act

[534] Our reasons and findings with respect to Staff's fraud allegations pertain only to the period from January 1, 2006 to October 21, 2008.

[535] Staff alleges that Schwartz engaged or participated in securities fraud, contrary to section 126.1(b) of the Act and contrary to the public interest, by participating in the York Rio Investment Scheme during the Schwartz Period.

[536] Schwartz submits, with respect to the *actus reus* of fraud, that, during the Schwartz Period:

- There was no reasonable expectation of York Rio's demise at that time. York Rio engaged sufficient expertise in mining personnel, and produced viable plans and reports of the property.

- York Rio did not claim that it owned an operating mine or was extracting diamonds but claimed that it owned mineral rights, and was in exploration mode with a seven-stage plan of development. It issued forecasts and budgets, clearly marked as such.

- The funding needs of York Rio's start-up operation, known to the investors through the published plans, were met, so that their investment was not at any greater risk than the normal industry risk that was disclosed by York Rio.

- Prospective investors were cautioned in writing to rely only on documented information from York Rio and not to rely on representations from anyone else.

- There was no detriment to or deprivation of investors. The mining rights were acquired with the investors' money, as represented.

- All payments to Debrebud were properly authorized by York Rio. There was no unauthorized use or diversion of investors' funds.

- There is no legal restriction on the amount of fees or commissions that may be charged, and there is no evidence that the 70% fee paid to Debrebud put investors' funds at risk. York Rio had sufficient money to fulfill its phased plans, and Debrebud's 70% fee was partially spent on *bona fide* York Rio corporate expenses.

[537] With respect to the *mens rea* of fraud, Schwartz submits that there is no evidence that he was aware of any risk to the interests of York Rio investors or that he was wilfully blind or reckless as to his conduct and the truth or falsity of any statements made to York Rio investors. He also submits: "Knowledge of any risk would have required a clear reading of the proverbial crystal ball, that is that with foreknowledge and malice, I knew the mining project was doomed. If it is indeed doomed then it was not by any one's [sic] design. The Commission's intervention was the termination of the mining project."

[538] We find that Schwartz played an integral role in perpetrating the York Rio Investment Scheme fraud during the Schwartz Period. In making this finding, we give significant weight to the evidence that Debrebud received and disbursed approximately 70% of the York Rio Proceeds during the Schwartz Period, that Debrebud disbursed approximately $889,000 to or for the benefit of Schwartz and his family during the Schwartz Period, and that Schwartz was unable to explain the over $500,000 of miscellaneous disbursements out of the Debrebud Account, which included numerous payments at restaurants and retail stores. We find that these are not the business practices of a legitimate third-party service provider.

[539] Although we find that the flow of funds evidence is sufficient to establish Schwartz's direct and knowing participation in the York Rio Investment Scheme, this conclusion is also supported by Schwartz's admissions about his ongoing involvement in the direction and control of the sale of York Rio securities, and by the evidence of Robinson and Friedman about Schwartz's directing role at the Eglinton and Sheppard Locations during the Schwartz Period.

[540] The Commission's fraud cases have affirmed that in considering the mental element of fraud, a respondent's state of mind may be inferred from the totality of the circumstances (*Re Lehman Cohort*, above, at paragraphs 93-94; *Re Goldpoint*, above, at paragraphs 140-141; and *Re Maple Leaf*, above, at paragraph 319). Despite Schwartz's careful attempts to characterize his and Debrebud's role as that of "payroll contractor", we find that the evidence as to the flow of York Rio investor funds through Debrebud is entirely inconsistent with the role of a legitimate third-party service provider and provides compelling evidence that Schwartz knowingly played a direct and central role in the fraudulent scheme. In any event, the best evidence of Schwartz's state of mind may come from Schwartz himself (see paragraphs 492-493 above).

[541] We find that Schwartz engaged or participated in acts, practices or courses of conduct that he knew or reasonably ought to have known perpetrated a fraud on York Rio investors, contrary to section 126.1(b) of the Act and contrary to the public interest.

(c) Directors and Officers: section 129.2 of the Act

[542] Schwartz was not a director or officer of York Rio, and he denies that he acted in the capacity of a director or officer of York Rio. He testified that he did not make decisions for York Rio, did not have financial control of York Rio, did not have a management or operating role, and did not participate in any attempts by York Rio to acquire new property. He submits that he was not a directing and controlling mind of York Rio and did not exercise any delegated executive authority with respect to York Rio.

[543] We find that during the Schwartz Period, Schwartz was a *de facto* officer of York Rio, as defined in the Act, because he performed functions similar to those of an officer, such as a general manager, chief operating officer or comptroller at various times. We find that Schwartz, who had an office at the Eglinton and Sheppard Locations and attended every day, was far more than a "paymaster" or service-provider. He hired Friedman and Robinson, amongst others. He was aware of the sales activity at the Eglinton and Sheppard Locations during the Schwartz Period, and he was ultimately in charge of the sales operation. He relayed Investor Packages to York, and received 70% of the York Rio Proceeds during the Schwartz Period, from which he authorized payment of York Rio's expenses, including commissions for York Rio salespersons, and approximately $889,000 to or for the benefit of himself and his family. We find that Schwartz played a central and integral role in the York Rio Investment Scheme during the Schwartz Period.

[544] For all the reasons given, we find that Schwartz, being a *de facto* officer of York Rio, authorized, permitted or acquiesced in York Rio's non-compliance with subsections 25(1)(a) and 53(1), subsection 38(3), and section 126.1(b) of the Act during the Schwartz Period, contrary to section 129.2 of the Act and contrary to the public interest.

4. Breach of the Euston Order: subsection 122(1)(c) of the Act

(a) The Allegations

[545] Staff alleges that Schwartz contravened Ontario securities law, contrary to subsection 122(1)(c) of the Act, by trading in York Rio securities at a time when he was prohibited from trading in any securities as a result of the Euston Order.

[546] The Euston Order was issued on May 1, 2006 and was continued on May 11, 2006, June 9, 2006, October 17, 2006, December 4, 2006, March 20, 2009 and April 1, 2009. It prohibited all trading in securities of Euston, prohibited Schwartz and Euston from trading in any securities, and made any exemptions contained in Ontario securities law inapplicable to Euston and Schwartz. On July 29, 2009, the Commission prohibited trading in any securities by or of Euston or Schwartz for ten years, prohibited the acquisition of any securities by Euston or Schwartz, and made any exemptions contained in Ontario securities laws inapplicable to Euston and Schwartz for ten years, ordered Schwartz to resign any position he holds as a director or officer of an issuer, and prohibited Schwartz from becoming or acting as a director or officer of any issuer for a period of ten years.

(b) Schwartz's Submissions

[547] Schwartz submits that the Euston Order expired precisely at the commencement of the temporary order hearing on June 9, 2006 at 10:00 a.m. and, once expired, could not be continued by the Commission. He submits that because the May 11, 2006 order continued the Euston Order until June 9, 2006 and set a return date for the same day, there was a lapse in coverage that could not be remedied because of subsection 127(6) of the Act, which states: "The temporary order shall take effect immediately and shall expire on the fifteenth day after its making unless extended by the Commission." Schwartz does not accept that the Commission had the authority to continue the Euston Order at the conclusion of the June 9, 2006 hearing.

(c) The Evidence

[548] In his testimony at the Merits Hearing, Schwartz admitted that:

- he was aware that the Euston Order was issued on May 1, 2006 (Hearing Transcript, August 11, 2011, p. 113, ll. 16-19);
- he was aware that the Euston Order was continued on May 11, 2006 (Hearing Transcript, August 11, 2011, p. 113, ll. 20-24);
- he was aware that on June 9, 2006, the Commission made a further order against him, continuing the Euston Order until October 17, 2006 (Hearing Transcript, August 11, 2011, p. 113, l. 25- p. 114, l. 17);
- he "may have consented" to the continuation of the Euston Order on June 9, 2006, as is stated in a recital in the order (Hearing Transcript, August 11, 2011, p. 71, ll. 6-9);
- he was aware that on October 17, 2006, at a time when he was represented by counsel, the Commission made a further order continuing the Euston Order in

writing, which order states, in a recital, that it was made on consent (Hearing Transcript, August 11, 2011, p. 116, l. 24 - p. 117, l. 6);

- he was aware that on December 4, 2006, the Commission made a further order against him continuing the Euston Order, at the conclusion of a hearing that was attended by his counsel, who told the Commission that the continuation of the Euston Order had been consented to until that time (Hearing Transcript, August 11, 2011, p. 121, l. 23 – p. 122, l. 5, p. 194, ll. 18-22; Exhibit 18);

- the Euston Order prohibited him from trading in any securities, and none of the exemptions available in the Act were to apply to him (Hearing Transcript, August 11, 2011, p. 114, l. 18 – p. 115, l. 4);

- he did not contact the Commission or seek legal advice as to whether the Euston Order remained in place after June 9, 2006 (Hearing Transcript, August 11, 2011, p. 116, ll. 8-20, p. 123, l. 24 – p. 124, l. 7); and

- he did not apply for a variation of the Euston Order pursuant to section 144 of the Act (Hearing Transcript, August 11, 2011, p. 123, l. 24 – p. 124, l. 7).

[549] Schwartz does not dispute that the Euston Order was in place from May 1, 2006 to June 9, 2006 (the "**Undisputed Period**"), and that York Rio securities were traded during the Undisputed Period:

> Q. . . . So you have no issue with respect to the fact that the order was in place on May the 1st, 2006 and June the 9th, 2006. At least we agree on that, correct?
>
> A. Yes, we do.
>
> Q. Did Debrebud or York Rio participate in the sale of any securities during that period of time?
>
> A. Debrebud? Yes.
>
> Q. All right. So in other words, Debrebud was involved in raising capital for York Rio during the period of time that you do not dispute. Correct?
>
> A. During the time that I do not dispute?
>
> Q. That being May the 1st, 2006 to 6 June the 9th, 2006 at 9:59 a.m.
>
> A. Yes.
>
> (Hearing Transcript, August 11, 2011, p. 122, l. 15 – p. 123, l. 8)

[550] Questioned about an entry in the York Rio Account Summary showing a deposit of $30,000 from an Alberta investor on May 24, 2006, Schwartz responded by saying "Yes, but Debrebud was not cease traded at that point, only I was, and I dispute that I was trading" (Hearing Transcript, August 11, 2011, p. 126). This was one of ten deposits into the York Rio Account between May 1, 2006 and June 9, 2006, and money flowed from that account to Debrebud during that same period.

[551] The Debrebud Account Summary indicates that approximately $77,573.92 was transferred from the York Rio Account to the Debrebud Account during the Undisputed Period in eight transactions from May 3, 2006 to June 8, 2006. It also shows that Debrebud made payments to Friedman and Robinson and to or for the benefit of Schwartz and his family during the Undisputed Period.

[552] For the reasons given above, we find that Schwartz was the directing and controlling mind of Debrebud and engaged in numerous acts in furtherance of trades in York Rio securities during the Schwartz Period. We do not accept Schwartz's submission that his activities through Debrebud were immune from the effect of the Euston Order.

(d) Analysis

[553] We do not accept Schwartz's interpretation of the temporary order provisions of the Act. We find that subsection 127(6) of the Act must be read together with subsection 127(5), which authorizes the Commission to make certain temporary orders without a hearing (*ex parte*) if, in the opinion of the Commission, the length of time required to conclude a hearing could be prejudicial to the public interest. In these circumstances, subsection 127(6) requires that the *ex parte* order, which takes effect immediately, shall expire on the fifteenth day unless extended by the Commission, and subsection 127(7) authorizes the Commission to extend the temporary order until the hearing is concluded if a hearing is commenced within the fifteen-day period.

[554] Applying those provisions to this case, the Euston Order was issued *ex parte* on May 1, 2006, pursuant to subsection 127(5) of the Act, and a Notice of Hearing was issued on May 2, 2006, setting a return date of May 11, 2006, which was within the 15 days set out in subsection 127(6) of the Act. At the May 11, 2006 hearing, the order was continued "until the June 9, 2006 hearing or until further order of the Commission." The 15-day rule set out in subsection 127(6) of the Act had no further application in this case after May 11, 2006.

[555] We note that the May 11, 2006 order did not say that the order was continued "until June 9, 2006, at 10:00 a.m." or "until the start of the June 9, 2006 hearing" but "until the June 9, 2006 hearing or until further order of the Commission." In our view, the May 11, 2006 order was intended to remain in place until the Commission made a further order at the conclusion of the hearing on June 9, 2006, which the Commission did.

[556] We find that Schwartz engaged in numerous acts in furtherance of trades in York Rio securities, contrary to the Euston Order, during and after the Undisputed Period. With respect to Schwartz's submission that because the Euston Order prohibited him from trading but not from acquiring securities, it would not apply to a reverse takeover, it is sufficient to note that Debrebud received 70% of the proceeds of *sales* of York Rio securities during the Undisputed Period, and at no time did York Rio embark on a reverse takeover. Nor do we accept Schwartz's submission that any change in the Commission's general approach to temporary orders practice reflects a view that a temporary order expires at 12:01 a.m. on the day of the hearing, or that it expires at the start of any temporary order hearing.

[557] We find that Schwartz contravened Ontario securities law, contrary to subsection 122(1)(c) of the Act and contrary to the public interest, by trading in York Rio securities at a time when the Euston Order prohibited him from trading in any securities.

5. Conclusion

[558] We find that Schwartz traded in York Rio securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest.

[559] We find that Schwartz distributed York Rio securities without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest.

[560] We find that Schwartz engaged or participated in a course of conduct that he knew or reasonably ought to have known perpetrated a fraud on York Rio investors, contrary to section 126.1(b) of the Act and contrary to the public interest.

[561] We also find that Schwartz, being a *de facto* officer of York Rio during the Schwartz Period, authorized, permitted or acquiesced in York Rio's non-compliance with subsections 25(1)(a) and 53(1), subsection 38(3), and section 126.1(b) of the Act during the Schwartz Period, contrary to section 129.2 of the Act and contrary to the public interest.

[562] Finally, we find that Schwartz contravened Ontario securities law, contrary to subsection 122(1)(c) of the Act and contrary to the public interest, by trading in York Rio securities at a time when the Euston Order prohibited him from trading in any securities.

E. Runic

1. The Allegations

[563] Staff alleges that Runic:

- traded in York Rio and Brilliante securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest;
- distributed York Rio and Brilliante securities without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest;
- made prohibited representations that York Rio securities would be listed on a stock exchange, contrary to subsection 38(3) of the Act and contrary to the public interest;
- engaged or participated in acts, practices or courses of conduct relating to securities that he knew or reasonably ought to have known perpetrated a fraud on York Rio and Brilliante investors, contrary to section 126.1(b) of the Act and contrary to the public interest; and

- being a director or officer of York Rio and Brilliante, authorized, permitted or acquiesced in the contraventions of subsections 25(1)(a) and 53(1), subsection 38(3), and section 126.1(b) of the Act by York Rio and Brilliante, contrary to section 129.2 of the Act and contrary to the public interest.

2. The Evidence

(a) Identification of Runic as "Richard Turner", "Richard Taylor" and "John Taylor"

[564] The photograph from Runic's driver's licence was shown to Georgiadis and Hoyme, who testified during the first week of the Merits Hearing. Georgiadis testified that he knew the person in the photograph as "Richard Turner" or "Richard Taylor". Hoyme testified that she knew the person in the photograph as "Richard Turner".

[565] During his compelled examination, Runic admitted that he used the name "Richard Turner" when he spoke to "clients" of York Rio at the Sheppard, Yonge and Finch Locations, that he used "John Taylor" when he signed the application for the mailbox rental in April 2008 and that he used "Richard Taylor" when he signed the lease for the Finch Location in June 2008.

[566] Based on this evidence, we are satisfied that "Richard Turner", "Richard Taylor" and "John Taylor" were aliases used by Runic while he worked at the Sheppard, Yonge and Finch Locations.

(b) Section 139 Certificate

[567] Staff provided a Section 139 Certificate stating that Runic has never been registered under the Act.

(c) Staff Investigators

[568] Vanderlaan and Ciorma gave the following evidence about the flow of funds from York Rio and Brilliante securities to Runic and individuals and companies associated with Runic.

(i) The Superior Home Account

[569] From Oct. 7, 2004 to Oct. 30, 2008, $9,224,325.53 was deposited into the Superior Home Account, including:

- $470,781.18 from Debrebud; and
- $8,753,544.35 from companies controlled by York – $7,123,276.15 from Evason, $1,478,932.30 from Big Brother, $105,139.78 from Munket, and $46,196.12 from YRR Holdings Inc.

[570] The registered address of Superior Home is the office of Koch Inc. From June 4, 2007 to October 22, 2008, approximately $2,687,000 was transferred from the Superior Home Account to the trust account of Koch Inc. (the "**Koch Account**"), which was controlled by Koch.

[571] Another $3,800,000 was transferred from the Superior Home Account to the account of Palkowski Law (the "**Palkowski Account**"), in three transactions in September and October 2008 (September 30, October 3 and October 20, 2008). The

Palkowski Account also received $1 million which was transferred from the Koch Account in two transactions (October 6 and October 22, 2008).

[572] The Superior Home Account was also used as a York Rio payroll account, including payments to Bassingdale, Demchuk, Oliver's Spouse and Valde. Over $2 million was taken out of the Superior Home Account in cash, and $21,974.50 went to Runic.

(ii) The Koch Account

[573] Approximately $2,687,000 was transferred from the Superior Home Account to the Koch Account from June 4, 2007 to October 22, 2008. Transfers out of the Koch account included $1 million to the Palkowski Account in two transactions ($900,000 on October 6, 2008 and $100,000 on October 22, 2008), $893,328.20 to the Blue Star Account between January 18 and September 16, 2008, and, $581,858.14 to or for the benefit of Siegel in the summer of 2007.

(iii) The Palkowski Account

[574] Approximately $4.8 million was transferred from the Superior Home Account to the Palkowski Account in September and October 2008. In early 2009, these funds were frozen by order of the BCSC.

(iv) The Blue Star Account

[575] Koch is registered as the director of the numbered company (0796249 B.C. Ltd.) carrying on business as Blue Star, which was incorporated on February 1, 2008. Koch (as President) and Siegel are the signing officers on the Blue Star Account. A total of $893,328.20 was transferred from the Koch Account to the Blue Star Account from January 18 to September 16, 2008. The Blue Star Account was used as a payroll account, with payments going to Bassingdale ($67,658.42), Demchuk ($201,833.74), Oliver's Spouse ($53,543.54) and Valde ($75,585.03), as well as to Siegel ($6,100) and Palkowski ($5,700), amongst others.

(v) The British Holdings Account

[576] Money from investors was deposited into the Brilliante Account, and was then transferred to the Munket Account (controlled by York), and from there to the 2180353 Account (controlled by Georgiadis). From the 2180353 Account, $56,000 was transferred to the British Holdings Account. British Holdings was incorporated in B.C. on September 26, 2008, with Koch as director. Koch, as President and Secretary of British Holdings, and Runic, are the signing officers on the British Holdings Account, which was opened on October 7, 2008.

(vi) Siegel and the 0795624 Account

[577] Siegel appears to have been associated with the flow of funds. She was listed as a signing officer on the Superior Home Account and the Blue Star Account and received money from both accounts. In July 2007, the Aurora Property was purchased in her name with $534,875 sent from the Koch Account to a Richmond Hill law firm. A numbered B.C. company (0795624) of which Koch is the sole director placed a lien of $525,000 on the Aurora Property immediately after it was purchased. Staff registered a certificate of direction to the Land Registry office in respect of the Aurora Property on July 7, 2009.

(d) Runic's Compelled Examination

[578] Staff was unsuccessful in its attempts to serve Runic before the Merits Hearing began. On April 5, 2011, at the beginning of the sixth day of the Merits Hearing, Staff advised that Runic had recently been located and been served with a summons to attend at the Commission for examination under section 13 of the Act. Runic attended for compelled examination, with counsel, on April 20 and May 4, 2011, and the transcript was admitted in evidence. Runic did not attend or testify at the Merits Hearing.

[579] In his compelled examination, Runic made the following admissions and gave the following testimony about his involvement in the sale of York Rio securities:

- He has never been registered with the Commission. He did not finish high school and his previous work involved multi-level marketing.

- In 1999, he moved to Vancouver and incorporated Anyphone, which later became Superior Home, to sell prepaid long distance phone cards from vending machines. He continued the business until about 2003, but then returned to multi-level marketing. He moved back to Toronto in 2005.

- In October 2006, he answered an ad in the newspaper for Debrebud, which he described as the marketing arm for York Rio. After meeting with Friedman and Schwartz at the Sheppard Location, he was hired as a salesman to sell York Rio securities. He started the following week.

- He identified himself as "Richard Turner" when he interviewed for the job because he did not know whether this was a legitimate company and he knew there were a lot of unregistered and unscrupulous investment companies in Toronto. He also used the named "Richard Turner" when he contacted clients of York Rio.

- He called investors across Canada, but not in Ontario. He was told that there was a limit of 29 investors for a private placement in Ontario and that York Rio had reached that limit.

- He was not involved in determining whether a prospective investor was an accredited investor – this was the job of the qualifiers, who worked in a different room. The qualifiers would fill out lead cards, which would be given to Friedman and handed on to Runic and the other salesmen ("openers") to make the initial sale; "loaders" would later contact investors to solicit additional sales.

- When he started selling York Rio securities, he was given several scripts, as well as marketing materials, newsletters and other print-outs from the York Rio website. He relied on the materials provided. He had no direct knowledge about whether any of this information was true.

- He told prospective investors that York Rio had a diamond mine, and in late 2006, he was told that the mine was in production, which he passed on to prospective investors.

- He was also told that York Rio was negotiating for a buyout or merger. He was aware that a March 2007 York Rio newsletter stated that York Rio had

completed negotiations for the purchase of additional land and had been approached with a merger offer.

- He had nothing to do with any mining operations for York Rio. He told Staff: “The only thing I did for York Rio was raise money, hire other salesmen to raise money, period, and pay out commissions to those salesmen, give them a home to work in, period.” (Transcript of Compelled Examination, May 4, 2011, p. 337, ll. 2-5) Nor was any part of the money he received for selling York Rio securities used to develop the mining operation, and there was no discussion of this.

- He identified a number of York Rio scripts that were used by York Rio salesmen. He agreed with Staff’s suggestion that the scripts were “full of lies”, including the following:

    - “I am a venture capitalist.”

    - “We look at about 80 to 100 proposals every year from companies all over the globe.”

    - “So naturally they come to people like us who have thousands of clients in our portfolio, hundreds of millions under management and a ROCK-SOLID track record.”

    - “I only get shares as payment for my services.”

    - “Phase Two: The Production Phase: Currently in production and selling Diamonds to generate revenues.”

    - various claims that the salesperson was previously involved in successful private placements in the past – Diamond Fields International Ltd. (“**Diamond Fields**”) Resources, Petrolifera Petroleum Limited (“**Petrolifera**”) or Aurelian.

    (Transcript of Compelled Examination, April 20, 2011, p. 131, ll. 12-15)

- Runic claimed he did not personally use the scripts, but knew that the salesmen did. Some created their own scripts. He admitted he was condoning people lying to investors. He also admitted personally telling prospective investors that he had been involved in taking Aurelian public, which was not true.

- During the Schwartz Period, Runic was paid a commission of 20% of the proceeds of his sales of York Rio securities. He was paid by cheque payable to Anyphone. Every Friday, Schwartz would hand him a cheque on the Debrebud Account. The amount was based on sales information provided by Friedman. Runic admitted that prospective investors were not told about the commission structure.

- Runic admitted that he was the most successful York Rio salesman at the Sheppard Location.

- By the end of 2006, he didn’t want to work at the Sheppard Location anymore. He met with York and Schwartz, and it was agreed that Runic would open a satellite office in partnership with Schwartz. Runic found the new office at

the Yonge Location. According to Runic, Schwartz had Robinson sign the lease so that Schwartz could control the Yonge Location.

- Starting in January 2007, he ran the Yonge Location on a 50/50 partnership with Schwartz. York paid Debrebud 70% of the proceeds of the York Rio sales from the Yonge Location, from which commissions and other expenses were paid. Schwartz and Runic split the net profit on a 50/50 basis.

- At the Yonge Location, Runic hired salesmen and provided them with the scripts, promotional materials and website materials from the Sheppard Location. He told the salesmen that York Rio had a diamond mine in Brazil that was producing diamonds.

- From October 18, 2006 to late spring 2007, he received approximately $450,000 from Debrebud in commission payments and profit sharing. He agreed with the Superior Home Account Summary, shown to him by Staff, which indicated that he received $470,781.18 from Debrebud. He explained that approximately $40,000 of this was his commission for selling York Rio shares while he was a salesman for Debrebud, and the remainder was net profits from his partnership with Schwartz.

- According to Runic, in early 2007, York told him that they were planning to take York Rio public and were considering a buyout or merger. Runic admitted that he passed this on to the salesmen, who would "automatically" pass it on to prospective investors.

- York Rio sales "took off" after the move to the Yonge Location, and soon outstripped the sales at the Sheppard Location. In late 2007, he hired more qualifiers and salespersons, and hired Hoyme.

- According to Runic, all the people he hired used false names (or "phone names") as a matter of course, and didn't need to be told to do so. Runic passed on what he had been told about York Rio and the registration requirement – that the only requirement was for York Rio to file an Exempt Distribution Report in any province.

- Runic stated that Hoyme and the qualifiers were paid in cash, which he withdrew from the Superior Home Account at a nearby RBC branch that he attended daily. Anyone who asked was paid in cash. Runic admitted paying some salesmen by the following process. Runic would write a cheque payable to a nominee, then have someone endorse the cheque in that name. He would return to the bank, cash the cheque, and buy a bank draft in the same amount payable to the nominee, then return to the bank later, redeem the bank draft as its purchaser, and pay that amount to the salesman involved. Initially, Runic was reluctant to admit that he had done this on multiple occasions and said he did not understand this as creating a false paper trail. When Staff suggested to him that approximately $1.2 million of such transactions had been traced to the Superior Home Account, he admitted that this was "probably a good figure", with 80% of this amount going to a single nominee for sales commissions (Transcript of Compelled Examination, April 20, 2011, p. 117, ll. 1-4). Ultimately, when Staff asked him whether this

was "a deceitful paper trail", he admitted "Yes, I guess it is" (Transcript of Compelled Examination, April 20, 2011, p. 124, l. 5).

- Runic was also unable to explain the numerous transactions for $9,900 recorded in the Superior Home Account, other than by saying he had been advised to do this by an unidentified person.

- In April or May 2007, his partnership with Schwartz came to an end. From then on, he ran the Yonge Location himself and received 70% of York Rio Proceeds from the Yonge Location.

[580] Runic made the following admissions and gave the following testimony, during his compelled examination, about the flow of the York Rio Proceeds through the Superior Home Account:

- He admitted, as set out in the Superior Home Account Summary, that his commission and profit-sharing payments in relation to the sale of York Rio securities did not come directly from York Rio, but came from the York Companies, including Evason, Big Brother, Munket and YRR Holdings Inc., and from Debrebud.

- He did not dispute Staff's calculation that in total, he received approximately $9,393,513.18 from October 7, 2004 to October 30, 2008 in relation to sales of York Rio securities, including the $470,781.18 he received from Debrebud.

[581] Runic also confirmed Staff's analysis of his disbursement of York Rio Proceeds that were deposited into the Superior Home Account.

[582] He admitted that he instructed Koch set up several companies in British Columbia for him, including British Holdings, NatWest, Blue Star and 0795624.

[583] He admitted that he transferred approximately $2.687 million from the Superior Home Account to the Koch Account. From the Koch Account, he authorized the transfer of monies to the Blue Star Account, which he used as a payroll account for York Rio.

[584] He admitted that approximately $1 million of the monies that were transferred from the Superior Home Account to the Koch Account were transferred on to the Palkowski Account in October 2008, and that another $3.8 million of York Rio investor funds was transferred from the Superior Home Account to the Palkowski Account in September and October 2008. He admitted that all the money that was transferred from the Superior Home Account to the Koch Account and the Palkowski Account came from the York Rio Proceeds.

[585] Runic told Staff that on October 15, 2008, he signed an agreement, on behalf of Superior Home, to purchase 1,000 shares of New World Timbers Limited, a timber company in Belize ("**New World**"), for $8.5 million, which was to be paid in nine instalments from October 31, 2008 to April 15, 2009. New World was purportedly in the business of recovering logs from a river. According to Runic, the first $5 million of the purchase price was to be paid from the Palkowski Account, and the remainder would be paid later. The agreement included a clause that stated that all funds would be forfeited if any of the payments was not made on time and in strict compliance with the agreement.

In fact, this transaction did not go forward because the funds in the Palkowski Account were frozen by order of the BCSC.

[586] Questioned about the New World agreement during his compelled examination, Runic claimed not to have known who the owners of the company were or that the company had no assets. He could not explain how he planned to obtain the remaining $3.5 million. He denied Staff's suggestion that the contract was backdated and was actually prepared in March 2009. He could not recall what documents he was shown before making the investment. He could not explain why $4.2 million was transferred from the Superior Home Account to the Palkowski Account before the agreement was purportedly executed on October 15, 2008.

[587] We find that the purported Belize transactions provide compelling evidence of an attempt to conceal the source and ultimate use of money raised from York Rio and Brilliante investors.

[588] Runic also admitted that he gave Siegel approximately $500,000, which she used to buy the Aurora Property. He claimed that the money was consideration for a list of leads of high net worth accredited investors, which he no longer has. He admitted that he sent the money to Koch and instructed Koch to fund the purchase. He also admitted that a numbered B.C. company that he controlled has a registered mortgage on the property, but claimed he did not know why this was done. He agreed that the money used to purchase the Aurora Property is directly traceable to York Rio investors. Runic also admitted he bought an Audi A8 for Siegel using investor funds.

[589] Runic made the following admissions and gave the following testimony in relation to his involvement in Brilliante during his compelled examination:

- York Rio "loaders" continued to sell York Rio securities at the Finch Location, but most of the York Rio sales staff switched to selling Brilliante securities. They used a different alias from the one they used when selling York Rio securities.

- Runic did not sell any Brilliante securities himself. He claimed he was not involved in Brilliante, but continued to oversee York Rio when Brilliante securities were being sold. He used the alias "Richard Taylor" after the move to the Finch Location.

- The documents used for promoting Brilliante were very similar to the York Rio materials. The Brilliante Business Plan is almost identical to the York Rio Business Plan except for the name of the company and the resource being mined – uranium rather than diamonds. The summaries of projected expenditures are exactly identical, and Runic agreed "there is no excuse for that" (Transcript of Compelled Examination, April 20, 2011, p. 185, ll. 16-17). In addition, Brilliante scripts were modified versions of York Rio scripts, and in general, the materials were commingled.

- The Brilliante Proceeds were deposited into the Brilliante Account, then transferred to the Munket Account, and from there to the 2180353 Account. From the 2180353 Account, Georgiadis wrote a cheque for $56,000 to British Holdings, an account belonging to Palkowski (Runic's accountant) because Georgiadis

owed Runic money for office expenses and commissions for both companies. Runic admitted that he would have benefitted from this money if the British Holdings Account had not been frozen.

(e) Witnesses called by Staff

(i) Robinson

[590] Robinson testified that he first met Runic at the Sheppard Location, when both worked as salesmen. He knew Runic as "Richard Taylor" but understood this was not his real name. Robinson testified that in November 2006, Runic and Schwartz asked him to sign the lease for the new location (the Yonge Location) and Runic left the Sheppard Location to run the Yonge Location in December 2006 or January 2007.

(ii) Friedman

[591] Friedman testified that he met "Richard Turner" for the first time in the fall of 2006 at the Sheppard Location. Friedman testified that "Turner" was "very actively" selling York Rio securities and had "very good" sales ability.

(iii) Sherman

[592] Sherman testified that he has known Runic since childhood. He testified that he learned about York Rio in the summer of 2007, when Runic offered him a job at the Yonge Location updating the client base and raising capital for a diamond mining company. According to Sherman, he asked Runic whether you had to be a broker to do this and was repeatedly told "no". Sherman testified that Runic ran the Yonge Location and hired him to call existing investors to solicit additional investments.

[593] Sherman testified that he shared an office with Runic for the first couple of months so that he could observe Runic calling investors. Runic gave Sherman contact sheets and instructions, and dictated a script for Sherman to read verbatim. Sherman testified that apart from viewing the York Rio website, he relied on Runic and scripts dictated by Runic for all the information he passed on to investors, including a claim that a 69 carat diamond had been found, that the caller had been involved in previous successful private placements (Diamond Fields Resources, Petrolifera and Aurelian Resources), and that York Rio was talking about a merger with a large global mining firm that was listed on the Frankfurt Stock Exchange. Runic also told him about the accredited investor exemption, and Sherman relied on Runic's explanation.

[594] According to Sherman, Runic told him to use a "phone name" so that investors could not contact him at home if their investment did not do well. Runic used the phone name "Richard Turner" and asked him to refer to him by that name in the office; most people, Sherman said, called Runic "Richard" or "Rob".

[595] Sherman testified that a total of 20% commission was paid for the sale of York Rio securities: 10% to the "tier 1" salesperson, who made the initial sale, and 10% to the "tier 2" salesperson who sold the additional investments, but this was shared with anyone else who helped to make the sale. Runic paid everyone in cash every Friday. However, on Runic's instructions, Sherman told investors he was compensated in York Rio shares, a statement that Sherman admitted was not true.

(iv) Hoyme

[596] Hoyme testified that in July 2007, “Richard Turner” hired her to perform administrative tasks at the Yonge Location and paid her $650 cash per week. According to Hoyme, “Turner” told her to use a false name because investors might get upset if they lost their money (she used the name “Vanessa”). He also told her that York owned York Rio, which was doing alluvial mining for diamonds in Brazil.

[597] Hoyme testified that “Turner” was the office manager. He provided a directory for use by the qualifiers and handed out the call lists to the qualifiers and salespeople. Once Georgiadis picked up the Investor Packages from the post office box, he would leave them for “Turner”. Hoyme testified that “Turner” told her that he gave the Investor Packages to York, but she did not observe this happening. It was Hoyme who arranged for the courier pickups, and on that basis, she estimated that about 15 cheques were received every week.

[598] Hoyme testified that it was “Turner” who decided to move to the Finch Location. According to Hoyme, “Turner” told her that they had completed the fund-raising for York Rio, which was going to go public on the Frankfurt Exchange, and they would now begin fund-raising for Brilliante. Hoyme understood that York owned Brilliante as well as York Rio. “Turner” continued to run the office, and most of the York Rio qualifiers and salespersons stayed on to sell Brilliante securities.

(v) Georgiadis

[599] Georgiadis testified that York introduced him to “Richard Turner” (Runic) in the summer of 2007 and suggested he work for “Turner” at the Yonge Location. Georgiadis testified that he did administrative work for “Turner”, who ran the office, and that “Turner” paid him a salary of $650 per week, in cash. He testified that “Turner” paid the qualifiers an hourly rate, plus a bonus for sales, in cash, and paid the salespeople a 20% commission by cash or cheque. Georgiadis also testified that if an investor called in with a question – for example, about when York Rio was going to go public – he would refer the question to “Turner”.

[600] Georgiadis also testified that “Turner” chose the location for the Finch Location, but asked him to co-sign the lease to ensure it would be approved. “Turner” signed as “Richard Taylor”. This was the first time Georgiadis had seen him use that name, though he had given his name as “John Taylor” on the mailbox application form.

[601] Georgiadis testified that he did not observe any transactions between “Turner” and York at the office, and said that York “mostly . . . wouldn’t come to the office”. Georgiadis delivered cheques from “Turner” to York and from York to “Turner”, usually visiting York at home or some other location outside of the office. Georgiadis testified that initially he delivered the Investor Packages from “Turner” to York and delivered cheques from York to “Turner”, but later he went with Turner to meet with York for this purpose.

[602] We do not believe Georgiadis’s evidence that Runic asked him to incorporate 2180353 and not to tell his uncle about it. We find that York asked Georgiadis to incorporate 2180353 for the purpose of flowing the proceeds of the sale of York Rio securities (and later, Brilliante securities) from York’s companies to Runic’s companies.

Georgiadis admitted that he acted as his uncle's "eyes and ears" and that he reported back to York, though "Richard was my boss". However, although York was ultimately in charge of the York Rio Investment Scheme, we accept Georgiadis's testimony that he reported to Runic, who ran the Yonge and Finch Locations, which was consistent with the weight of the evidence we heard.

(f) Schwartz

[603] Schwartz testified that he knew Runic as "Richard Taylor". He confirmed that Debrebud paid out $470,781.58 to Superior Home, and that this represented Runic's 20% commission on sales of York Rio securities. He testified that Runic earned the highest commission of any of the York Rio salespersons at the Sheppard Location.

[604] Schwartz testified that he and Runic parted ways when Runic entered into an arrangement with York to set up his own sales office (the Yonge Location), which led to the termination of Schwartz's arrangement with York.

3. Analysis

(a) Trading without registration and distribution without a prospectus: subsections 25(1)(a) and 53(1) of the Act

[605] We find that Runic traded in York Rio securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest, based on the following evidence, which we accept:

- Runic admitted that, as stated in Staff's Section 139 Certificate, he has never been registered with the Commission.

- Runic admitted that he was hired as a York Rio salesperson in October 2006, that he sold York Rio securities to investors across Canada (but not in Ontario), and that he was the most successful salesperson at the Sheppard Location. He admitted that he was paid a commission of 20% of the proceeds of his sales of York Rio securities during the Schwartz Period, and that the payment was made to the Superior Home Account, which he controlled, from the Debrebud Account.

- Runic admitted that in January 2007, he entered into a 50/50 partnership with Schwartz in relation to York Rio sales at a new sales office (the Yonge Location). Confirming evidence about Runic's direct involvement in York Rio sales came from Schwartz, Robinson and Friedman, and from Sherman, who observed Runic making sales calls while they shared an office.

- Runic admitted that in April or May 2007, his partnership with Schwartz came to an end, and that he ran the Yonge Location thereafter, receiving 70% of the York Rio Proceeds.

[606] We find, based on Runic's admissions in his compelled examination, Staff's evidence about the flow of funds, and the evidence of Sherman, Hoyme and Georgiadis, that during the Runic Period, Runic engaged in a number of acts in furtherance of trades in York Rio securities apart from his direct sales activities, including:

- hiring qualifiers and salespersons;

- training salespersons, including Sherman;
- writing scripts and providing scripts to qualifiers and salespersons;
- providing qualifiers and salespersons with York Rio promotional materials, including newsletters and other print-outs from the York Rio website, and information provided by York, knowing that this information would be used to sell York Rio securities; and
- giving the Investor Packages to York, or arranging for this to be done;
- receiving 70% of the York Rio Proceeds from the accounts of the York Companies; and
- from this amount, paying the expenses of the York Rio sales operation, including the salaries and commissions of the York Rio qualifiers and salespersons.

[607] Though Runic denied selling Brilliante securities directly, he admitted that he received approximately 72% of the Brilliante Proceeds. He admitted that Brilliante and York Rio promotional materials were commingled, that Brilliante scripts and promotional materials were modified versions of York Rio materials, and that Brilliante securities were sold by the same salespersons who sold York Rio securities, although under a different alias. Runic's admissions are supported by the evidence of Georgiadis and Hoyme that Runic managed the sales of Brilliante securities at the Finch Location, just as he had managed the sales of York Rio securities. We find that Runic engaged in a number of acts in furtherance of trades in Brilliante securities, as he had in relation to York Rio securities.

[608] The evidence of Vanderlaan and Ciorma shows that Runic received $470,781.18 from Debrebud between October 2006 and late spring 2007. Runic admitted this, and stated that this represented a 20% commission on his own York Rio sales and his 50% share of the net profits of the Yonge Location. Staff's evidence shows that Runic also received $8,753,544.35 from the York Companies from October 7, 2004 to October 30, 2008, and Runic admitted that he received these amounts. We find that Runic received $9,224,325.53 (approximately $9.2 million) from the sale of York Rio and Brilliante securities during the Material Time.

[609] We find that Runic traded in York Rio and Brilliante securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest.

[610] We also find that Runic distributed York Rio and Brilliante securities without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest.

(b) Prohibited representations: subsection 38(3) of the Act

[611] We are not satisfied that Staff has proven, on a balance of probabilities, that Runic made prohibited representations that York Rio securities would be listed on a stock exchange, contrary to subsection 38(3) of the Act. However, for the reasons given at

paragraph 621 below, we find that Runic, being a *de facto* director and officer of York Rio, authorized, permitted or acquiesced in York Rio's non-compliance with subsection 38(3) of the Act.

(c) Fraud: section 126.1(b) of the Act

[612] Our reasons and findings with respect to Staff's fraud allegations pertain only to the period from January 1, 2006 to October 21, 2008.

[613] We find that Runic engaged or participated in acts, practices or courses of conduct that he knew or ought to have known perpetrated a fraud on York Rio and Brilliante investors, contrary to section 126.1(b) of the Act and contrary to the public interest, based on the following.

[614] Runic admitted that he used the alias, "Richard Turner" when he sold York Rio and Brilliante securities, he used the alias "John Taylor" when he signed the application for the mailbox rental in April 2008 and he used "Richard Taylor" when he signed the lease for the Finch Location in June 2008. We find that Runic knew or reasonably ought to have known that using an alias while engaging in acts in furtherance of trades in securities was a badge of fraud.

[615] Runic admitted that he told prospective investors that York Rio had a diamond mine and that the mine was in production. He claimed that he relied on the materials provided to him, including scripts, newsletters, promotional material and print-outs from the York Rio website. He admitted that he had no knowledge as to whether any of these statements were true. We find that Runic knew or reasonably ought to have known that these representations had no basis in fact. Runic admitted that the York Rio scripts that were used to sell York Rio securities contained a number of lies, including claims that the caller had previously been involved in successful private placements and was paid only in shares, and that he had been involved in taking Aurelian public, which was not true.

[616] Runic admitted that none of the money he receiving for selling York Rio securities was used to develop the mining operation, and that this information was not disclosed to investors. Instead, most of the York Rio Proceeds was used to compensate the York Rio Respondents and others associated with the York Rio Investment Scheme. Runic admitted that prospective investors were not told about the commission structure.

[617] We find that Runic attempted to conceal the use of the York Rio Proceeds and the Brilliante Proceeds by authorizing the transfer of the funds from the Superior Home Account through the accounts of the other Runic Companies and from there to the Koch Account and the Palkowski Account. We did not receive sufficient evidence to determine the nature and purpose of the New World agreement, and we accept Staff's submission that we do not need to do so for our purposes. We are satisfied that none of the approximately $9.2 million that flowed through the accounts of the Runic Companies was used for the purported mining operations of York Rio and Brilliante.

[618] We find that Runic played a crucial role in the operation of the York Rio and Brilliante Investment Schemes. From April or May 2007, he took over the running of the Yonge Location, and later ran the Finch Location, working with York, to sell worthless securities to investors across Canada. He was the person who hired qualifiers and salespersons, told them to use aliases when contacting investors, trained them, provided

them with scripts and promotional materials that were "full of lies". Of the approximately $18 million of York Rio securities sold during the Material Time, approximately $9.2 million passed through accounts controlled by or associated with Runic, in an obvious attempt to conceal the source and ultimate use of investors' money.

[619] We find that Runic engaged or participated in acts, practices or courses of conduct that he knew or ought to have known perpetrated a fraud on York Rio and Brilliante investors, contrary to section 126.1(b) of the Act and contrary to the public interest.

(d) Directors and Officers: section 129.2 of the Act

[620] We find that Runic was a *de facto* officer of York Rio, and that he authorized, permitted or acquiesced in York Rio's non-compliance with Ontario securities law during the Runic Period (from January 2007 to October 21, 2008), based on the following:

- Runic admitted that he opened the Yonge Location in January 2007, after a meeting with York and Schwartz. Rather than receiving the 20% sales commission he had received in his first months at the Sheppard Location, he was now Schwartz's partner and entitled to a 50% share of the net profit.

- At the Yonge Location, Runic admitted that he hired and paid York Rio qualifiers and salesmen, including Bassingdale, Oliver, Sherman and Valde. In April or May 2007, Runic ended his partnership with Schwartz and took over the management of the Yonge Location. From that point on, Runic received a commission of approximately 72% of the York Rio Proceeds. Runic admitted these arrangements during his compelled examination, but stated that Georgiadis, who started working at the Yonge Location at about that time, was "overseeing everything" on York's behalf. We accept that York continued to have ultimate oversight of the York Rio Investment Scheme, as evidenced by the commission structure and the flow of funds. However, this does not affect our finding that Runic performed functions similar to those normally performed by an officer and played an important role in executing the York Rio Investment Scheme during the Runic Period.

- In the summer of 2008, Runic, with Georgiadis, signed the lease for the Finch Location. Again, Runic's evidence that he took this step at York's direction does not affect our finding that Runic was a directing mind of York Rio at this time.

- Runic admitted that at the Yonge and Finch Locations, he passed on information he received about York Rio, knowing the qualifiers and salespersons would pass it onto investors. He admitted that he knew that York Rio salespersons were using scripts that were "full of lies" to sell York Rio securities, and he admitted he condoned people lying to investors. He also admitted telling York Rio salespersons that York Rio was planning to take the company public, knowing that they would "automatically" pass the information on to prospective investors.

[621] We also find that Runic authorized, permitted or acquiesced in York Rio making prohibited representations that York Rio securities would be listed on a stock exchange, contrary to subsection 38(3) of the Act and contrary to the public interest, based on the following evidence:

- Runic admitted that a March 2007 York Rio newsletter stated that York Rio had been approached with a merger offer from a UK oil, gas and mineral company, and he stated that he was also advised by York in early 2007 that they were planning on taking the company public and were considering a buyout or merger. He admitted that he passed on this information to qualifiers and salespersons, who used it to sell York Rio securities.

- Sherman testified that in speaking to prospective investors, he relied on the information provided by Runic and the scripts that Runic dictated for his verbatim use, which included the representation that York Rio was talking about a merger with a large global mining firm that was listed on the Frankfurt Exchange, and he and other York Rio salespersons would pass this on to prospective investors.

- Hoyme testified that Runic told her, in the context of the planned move to the Finch Location, in the summer of 2008, that they had completed the fund-raising for York Rio, which was going to go public on the Frankfurt Exchange, and were about to begin raising funds for Brilliante.

[622] We find that Runic was a *de facto* officer of Brilliante and that he authorized, permitted or acquiesced in Brilliante's non-compliance with Ontario securities during the Runic Period from the summer of 2008, when the Brilliante Investment Scheme was started up, to October 21, 2008, based on the following evidence.

- Although Runic claimed he was not involved in the Brilliante Investment Scheme, he admitted that Brilliante securities were sold at the Finch Location that he managed, often by salespersons who also sold York Rio securities, and using promotional materials that were modified versions of the York Rio promotional materials.

- Hoyme testified that Runic told her they would now begin fund-raising for Brilliante, that Runic continued to run the Finch Location, and that most of the York Rio and Brilliante salespersons stayed on.

- In our view, the best evidence of Runic's central role in the Brilliante Investment Scheme is the evidence, which he admitted, that he received approximately 72% of the proceeds of the sale of Brilliante securities, an amount that is inconsistent with anything but a role as a *de facto* officer of Brilliante.

[623] Of the approximately $16 million raised from York Rio and Brilliante investors from September 2005 to October 2008, approximately $9.2 million passed through the Superior Home Account, and from that amount, significant amounts were then transferred into other accounts controlled by Runic. In our view, the flow of funds provides compelling evidence that Runic was a *de facto* officer of York Rio and Brilliante during the Runic Period and that he authorized, permitted or acquiesced in the contraventions of Ontario securities law by York Rio and Brilliante, contrary to section 129.2 of the Act and contrary to the public interest.

4. Conclusion

[624] We find that Runic traded in York Rio and Brilliante securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) and contrary to the public interest.

[625] We find that Runic distributed York Rio and Brilliante securities without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest.

[626] We find that Runic engaged or participated in acts, practices or courses of conduct that he knew or should have known perpetrated a fraud on York Rio and Brilliante investors, contrary to section 126.1(b) of the Act and contrary to the public interest.

[627] We also find that Runic, being a *de facto* officer of York Rio during the Runic Period, authorized, permitted or acquiesced in York Rio's non-compliance with subsections 25(1)(a) and 53(1), subsection 38(3), and section 126.1(b) of the Act during the Runic Period, contrary to section 129.2 of the Act and contrary to the public interest.

[628] We also find that Runic, being a *de facto* officer of Brilliante during the Runic Period, authorized, permitted or acquiesced in Brilliante's non-compliance with subsections 25(1)(a) and 53(1), subsection 38(3), and section 126.1(b) of the Act during the Runic Period, contrary to section 129.2 of the Act and contrary to the public interest.

F. Demchuk

1. The Allegations

[629] Staff alleges that Demchuk:

- traded in York Rio and Brilliante securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest;
- distributed York Rio and Brilliante securities without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest;
- made prohibited representations that York Rio and Brilliante securities would be listed on a stock exchange, contrary to subsection 38(3) of the Act and contrary to the public interest; and
- engaged or participated in acts, practices or courses of conduct relating to securities that he knew or reasonably ought to have known perpetrated a fraud on York Rio and Brilliante investors, contrary to section 126.1(b) of the Act and contrary to the public interest.

2. The Evidence

[630] Demchuk did not testify at the Merits Hearing. Evidence about his role in the York Rio and Brilliante Investment Schemes came from Vanderlaan and Ciorma, Sherman, Georgiadis and Hoyme. Through Vanderlaan, Staff introduced into evidence

excerpts from Demchuk's compelled examination, which took place on December 16, 2008.

(a) Identification of Demchuk as "Simon McKay" and "Andrew Sutton"

[631] Vanderlaan identified the photograph of Demchuk that Staff obtained from the Ministry of Transportation and showed to Sherman, Georgiadis and Hoyme during the Merits Hearing (the "**Demchuk Photograph**"). Georgiadis and Hoyme testified that the person in the Demchuk Photograph sold York Rio securities using the name "Simon McKay", and sold Brilliante securities as "Andrew Sutton". Georgiadis knew his first name to be "Ryan". Hoyme could not recall his real name at the Merits Hearing but refreshed her memory by reviewing the transcript of her compelled examination, when she had identified him as "Ryan".

(b) Section 139 Certificate

[632] Staff provided a Section 139 Certificate stating that Demchuk has never been registered under the Act.

(c) Documents seized from the Finch Location

[633] Vanderlaan identified various documents found at the Finch Location on October 21, 2008: a file folder marked "Simon McKay/Andrew Sutton", an August 22, 2008 email from "Simon McKay" to a York Rio investor enclosing York Rio newsletters and the York Rio Business Plan; two handwritten lead cards for "Simon McKay", and, with respect to Brilliante, three sales order logs, Brilliante subscription agreements and covering emails.

(d) Demchuk's Compelled Examination

[634] In his compelled examination, Demchuk made the following admissions and gave the following evidence about his involvement in selling York Rio securities:

- He has never been registered with the Commission and has no background in securities. After finishing high school, he worked in telemarketing and insurance sales, and at one time, he was a registered insurance broker.

- In December 2007, he found out about York Rio from someone who had been a colleague at an insurance company. Demchuk was interviewed by "Richard Turner" (Runic) at the Yonge Location. He started working at York Rio in mid-December 2007.

- He used the alias "Simon MacKay" when selling York Rio securities and "Andrew Sutton" when selling Brilliante securities because he was told it was company policy for everyone to use a false name. Demchuk claimed he questioned this policy.

- Demchuk was initially hired as a qualifier at $12 per hour, but "Turner" asked him to become a salesman after one week.

- As a qualifier, Demchuk was provided with a script to read to prospective investors. He identified several York Rio scripts as scripts he had seen, but stated that he used only parts of them. He said that the use of scripts is standard in the

telemarketing industry.

- The York Rio script that Demchuk used included a claim that the caller had spoken to the prospective investor about another company, and solicited interest in receiving information about York Rio. Qualifiers would also qualify prospective investors as accredited investors. "Turner" or Hoyme provided the call list, which consisted of names in the western provinces, not Ontario.

- Demchuk was told that an accredited investor was an individual with a net worth of $1 million or a combined net worth of $2 million with a spouse, or an individual with an annual pre-tax income of $200,000 or, combined with a spouse, $300,000, for the last two years. This was the definition Demchuk passed on to prospective investors. If a prospective investor told Demchuk they qualified as an accredited investor, he would fill out a lead card and give it to Hoyme.

- As a salesman, Demchuk received a 20% commission on his York Rio sales plus an additional 10% commission on subsequent sales made to the same investor ("loads"). His commission was paid by cheque on the Blue Star Account. He kept a sales log and admitted that he earned commissions of approximately $200,000 for sales and another approximately $20,000 for loads while selling York Rio securities.

- Initially, Demchuk deposited his commission cheques into his own bank account, then incorporated his company, Demchuk Marketing Inc. (of which he is the sole director and President, Secretary and Treasurer) on March 19, 2008, and afterwards deposited most of his cheques into the company account.

- As a salesman, he called the names on the lead cards provided to him. The sales script he used was different from the qualifier sales script. He told prospective investors that York Rio had a diamond mine in Brazil, and that the mine was in production and had recovered diamonds. He denied saying anything about the quality or size of the diamonds being produced.

- He admitting reading from a script that "My average investor comes on board at the $50,000 to 75,000 level", although in fact the average investment he sold was a little more than $10,000.

- He told prospective investors that York Rio would be going public, and that traditionally a company went public in 10-12 months, although he knew nothing about the process of taking a company public. He denied giving any figures, even estimates, about what the share price would be when York Rio went public or how much profit investors might make. When a prospective investor asked about this, Demchuk would say that the company had called them previously about Aurelian, which had gone from $2.75 to $35 per share.

[635] In his compelled examination, Demchuk made the following admissions and gave the following evidence about his role in the sale of Brilliante securities:

- He stopped selling York Rio securities at the end of August and started selling Brilliante securities in mid-September. He used the alias, "Andrew Sutton" when selling Brilliante securities. He called investors in Alberta, not in Ontario. The

share price was $1 per share.

- He was told that Brilliante was a uranium mine in Brazil, and that Brilliante owned a reserve of uranium or had rights to it. He was given a script and was told to read it, as he had done when selling York Rio securities. He identified a Brilliante script that he used when selling Brilliante shares.

- He read what was in the script. He told prospective investors that it was a good time to invest in uranium, which was an energy source good for the environment. He also read the part of the script that included a representation that the company had offered the prospective investor a deal two years before.

- He admitted reading to prospective investors the claim, from the script, that "I brought you Thompson Creek 2 years ago when it was at 60 cents/share, and my investors who we're [sic] on board at that time were layered out between $18-$20", although this was not true. However, he denied telling prospective investors that Brilliante was going public or that their shares were going to go up.

- He admitted reading, from the script, "my experience in the venture capital arena dates back over 12 years spanning three highly successful ventures", though this was not true: he has no experience in venture capital.

- He admitted reading, from the script, "As an independent contractor of Brilliante, I am not provided a salary nor am I paid any commissions. My interest here is solely in shares of the company", although this was not true: he was paid in commissions and owns no shares in Brilliante.

- He admitted writing the handwritten note at the bottom of the typed script saying "we are essentially bringing the world's third largest reserve of uranium into production". Demchuk explained that someone told him "it was the third largest or Brazil is the third largest reserve for uranium. There's – I looked on the internet and read about uranium." (Transcript of Compelled Examination, December 16, 2008, p. 112, ll. 1-4)

- He initially told Staff that he understood, based on the Brilliante website and on what he had been told, that Brilliante was mining uranium, but later admitted that they had a mine but the mine was not "in production, "so I don't know whether that means they're mining uranium or not." (Transcript of Compelled Examination, December 16, 2008, p. 114, ll. 5-7)

- He admitted that he had read the Brilliante Business Plan and understood that the company was not yet in production, and he could not explain the year 1 projection of US $28.9 million set out in the Brilliante Business Plan.

- He admitting selling $25,000 of Brilliante securities to a single investor in Alberta in late September 2008, but stated that he never received the commission he was owed on the sale. He had also sent out Brilliante subscription agreements to two other prospective investors, but they were never returned.

(e) Amounts obtained by Demchuk

[636] The Superior Home Account Summary prepared by Ciorma indicates that Demchuk received $17,000 in cheques from the Superior Home Account from January 4, 2008 to February 20, 2008. The Blue Star Account Summary indicates that Demchuk and Demchuk Marketing Inc. received $201,833.74 in cheques from the Blue Star Account from March 3, 2008 to October 8, 2008. Staff presented no evidence that would allow us to break these figures down into York Rio and Brilliante commissions.

[637] We note that Demchuk's estimate that he received approximately $220,000 in York Rio commissions is consistent with Ciorma's evidence that he received $218,833.74 from January 4, 2008 to October 8, 2008, and we accept Ciorma's evidence on this point.

3. Analysis

(a) Trading without registration and distribution without a prospectus: subsections 25(1)(a) and 53(1) of the Act

[638] Based on the evidence of Vanderlaan, Georgiadis and Hoyme, and based on Demchuk's admissions, made in his compelled examination, we find that Demchuk sold York Rio securities at the Yonge and Finch Locations using the alias "Simon McKay", and that he sold Brilliante securities at the Finch Location using the alias "Andrew Sutton". Although Demchuk admitted to making only one sale of Brilliante securities, he also admitted to sending Brilliante subscription agreements to two other prospective investors who did not go ahead with their purchases. By admittedly making sales calls to these investors and sending them subscription agreements, Demchuk engaged in acts in furtherance of trades in Brilliante securities, and therefore also engaged in unregistered trading with respect to these investors.

[639] We accept the evidence of Staff's Section 139 Certificate that Demchuk has never been registered under the Act, which was admitted by Demchuk.

[640] We find that Demchuk misrepresented the Net Financial Assets Test for the accredited investor exemption by telling prospective investors that an individual with a net worth of $1 million, including real property and personal property, was an accredited investor. We find that the accredited investor exemption to the registration and prospectus requirements was not available for sales of York Rio or Brilliante securities.

[641] We find that Demchuk traded in York Rio and Brilliante securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest.

[642] We find that Demchuk distributed York Rio and Brilliante securities, without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest.

(b) Prohibited representations: subsection 38(3) of the Act

[643] Based on Demchuk's admission that he told prospective investors that York Rio would go public, which traditionally happened within 10-12 months, we find that he

made a prohibited representation that York Rio securities would be listed on a stock exchange, contrary to subsection 38(3) of the Act, and contrary to the public interest.

[644] Demchuk denied telling prospective investors that Brilliante would be going public, and we heard no evidence that he did so. We find that Staff has not satisfied its burden of proving, on a balance of probabilities, that Demchuk made prohibited representations that Brilliante securities would be listed on a stock exchange, and accordingly Staff's allegation that Demchuk contravened subsection 38(3) of the Act with respect to Brilliante is dismissed.

(c) Fraud: section 126.1(b) of the Act

[645] Our reasons and findings with respect to Staff's fraud allegations pertain only to the period from January 1, 2006 to October 21, 2008.

[646] Demchuk admitted that he sold York Rio and Brilliante securities using an alias and that he knowingly misrepresented to investors that he or the company had contacted the investor previously, that he had been involved in taking Thompson Creek public, which had resulted in the share price increasing from $0.60 to $18-20 per share, that the York Rio diamond mine was already in production, that the average York Rio investor invested at the $50,000-75,000 level, and that that he was not paid commission. Although he claimed that he relied on what he was told by others and on information obtained from the York Rio and Brilliante websites and Business Plans, we find that he knew or reasonably ought to have known that his sales pitch included numerous misrepresentations. For example, he was unable to explain how Brilliante, which he knew not to be in production, could project revenues of US $28.9 million in the first year, as stated in the Brilliante Business Plan.

[647] We accept Ciorma's evidence that Demchuk obtained $218,833.74 as a result of his non-compliance with Ontario securities law in relation to the sale of York Rio and Brilliante securities. Based on a 20% commission rate, this suggests that York Rio and Brilliante investors were deprived of approximately $1.1 million as a result of Demchuk's non-compliance with the Act.

[648] We find that Demchuk engaged in dishonest acts which he knew or reasonably ought to have known would result in York Rio and Brilliante investors being deprived of their investments.

[649] We find that Demchuk engaged or participated in acts, practices or courses of conduct that he knew or reasonably ought to have known perpetrated a fraud on York Rio and Brilliante investors, contrary to section 126.1(b) of the Act and contrary to the public interest.

4. Conclusion

[650] We find that Demchuk traded in York Rio and Brilliante securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest.

[651] We find that Demchuk distributed York Rio and Brilliante securities, without filing a preliminary prospectus or prospectus with the Commission and receiving a

receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest.

[652] We find that Demchuk made prohibited representations that York Rio securities would be listed on a stock exchange, contrary to subsection 38(3) of the Act, and contrary to the public interest. We are not satisfied he contravened subsection 38(3) in respect of Brilliante securities.

[653] We find that Demchuk engaged or participated in acts, practices or courses of conduct relating to securities that he knew or reasonably ought to have known perpetrated a fraud on York Rio and Brilliante investors, contrary to section 126.1(b) of the Act and contrary to the public interest.

G. Oliver

1. The Allegations

[654] Staff alleges that Oliver:

- traded in York Rio and Brilliante securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest;
- distributed York Rio and Brilliante securities without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest;
- made prohibited representations that York Rio and Brilliante securities would be listed on a stock exchange, contrary to subsection 38(3) of the Act and contrary to the public interest; and
- engaged or participated in acts, practices or courses of conduct relating to securities that he knew or reasonably ought to have known perpetrated a fraud on York Rio and Brilliante investors, contrary to section 126.1(b) of the Act and contrary to the public interest.

2. The Evidence

[655] Oliver did not testify at the Merits Hearing. Evidence about his role in the York Rio and Brilliante Investment Schemes came from Vanderlaan, Ciorma, Sherman, Georgiadis and Hoyme. Through Vanderlaan, Staff introduced into evidence excerpts from Oliver's compelled examination, which took place on July 6, 2009.

(a) Identification of Oliver as "Mark Roberts" and "Bill Hastings"

[656] Vanderlaan testified that Oliver was present during the search of the Finch Location on October 21, 2008, and provided his name and date of birth at that time. Vanderlaan could not recall whether Oliver provided his driver's licence number but in any event, his car, which was parked outside, carried personalized plates. Based on that information, Vanderlaan obtained from the Ministry of Transportation the photograph of Oliver that Staff showed to Sherman, Georgiadis and Hoyme at the Merits Hearing (the "**Oliver Photograph**"). Sherman testified that the person in the Oliver Photograph sold York Rio securities using the name "Mark Roberts". Georgiadis testified that "Roberts"

sold York Rio securities only, not Brilliante securities. Hoyme identified the person in the Oliver Photograph as “Matt”.

(b) Section 139 Certificate

[657] Staff provided a Section 139 Certificate stating that Oliver has never been registered under the Act.

(c) Documents Seized from the Finch Location

[658] Vanderlaan testified that the documents seized from the Finch Location included a file folder, labelled “Mark Roberts”, which contained and email correspondence from September and October 2008 between “Mark Roberts” and nine York Rio investors, the cover page of the subscription agreement that the investor was asked to sign, and the sales order log for each of the sales.

(d) Oliver’s Compelled Examination

[659] In his compelled examination, Oliver made the following admissions and gave the following evidence about his involvement in selling York Rio securities:

- He has never been registered with the Commission. He did not finish high school and has no background in securities. Before getting involved in selling York Rio securities, he was involved in telemarketing of pens, precious stones, voice-over-internet protocol (“**VOIP**”) services, and selling securities in a tech company.

- He is married to Oliver’s Spouse.

- He met Runic when he was selling VOIP for his own company, which was not doing well. In May 2007, Runic called Oliver, told him about York Rio and suggested he check the York Rio website. Runic called again about two months later, and as a result, Oliver met him twice in the York Rio office on Yonge. Runic offered him a job selling York Rio securities.

- He began selling York Rio securities from the Yonge Location in July 2007, made the move to the Finch Location in August 2008, continued to sell York Rio securities from the Finch Location until the Search Warrant was executed on October 21, 2008, and was present at the Finch Location at that time.

- He made “quite a number of sales”.

- He used the name “Mark Roberts” when selling York Rio securities. According to Oliver, he asked why he had to use a “pseudonym” and was told it was because if an investment doesn’t go quite as planned, some investors can be vengeful.

- According to Oliver, Runic gave him a script, and he read the script to prospective investors. He was not concerned whether statements in the script were untrue because he believed that the company as it was represented to him and over the internet was legitimate, and he was interested in making some money. He stated “I did what I was asked to do and I got paid. . . . So whether or not I believed it to be truthful or not truthful, if that’s what you’re asking, I never

questioned. I just did what was asked." (Transcript of compelled examination, July 6, 2009, p. 85, ll. 18-24)

- He told prospective investors that York Rio was producing 1 to 69 carat diamonds, that 80% of the diamonds were gem quality and 20% industrial quality, and that York Rio had outbid De Beers and others in a successful bid for another 38,000 hectares of land.
- He told prospective investors that York Rio was in negotiations about a possible merger with a company trading in double digit Euros on the Deutsche Börse, and that York Rio was at the 90 to 95% stage of completion for a merger with a global mining firm, which would result in returns of 6 or 7 to one. He admitted telling prospective investors that he could see York Rio valued easily at 4 to 7 times its earnings at $1.25 per share, although he claimed he never made any promises as far as dollar amounts.
- He told prospective investors that he had been involved in taking Aurelian and Petrolifera public, although this was not true.
- He was paid commission of 10% on sales of York Rio securities. He was paid in cash and by cheque, and he asked Runic to make his cheques payable to Oliver's Spouse; for personal reasons, Oliver does not have a bank account or credit card.
- He did not tell prospective investors how he was compensated.

[660] With respect to Brilliante, Oliver stated, during his compelled examination, that he never sold any Brilliante securities, although he admitting talking about Brilliante to one client who called in looking for a share certificate. He used the name "Bill Hastings" when speaking to this client. Oliver stated that he was handed fewer than a dozen Brilliante accounts for "updating" just five or six days before the raid, but he did nothing because he had no direction beyond "do the same thing".

(e) Investor Two

[661] Investor Two testified that "Roberts" called him in April 2008 to solicit an investment in a diamond mine, at $0.55 per share, before it went public. "Roberts" described himself as a broker or stock promoter and said he was contracted by York Rio to sell the securities. Investor Two testified that "Roberts" told him the mine was in preliminary production, and was producing 30% gem quality and 70% industrial quality diamonds, and that York Rio was in negotiation with another company that was likely going to make an offer in the $4-10 range by the end of 2008. Investor Two also testified that "Roberts" urged him to make a commitment right away, on the basis that the share offering was closing. Each time "Roberts" called, he tried to convince Investor Two to "bump up" the number of shares he purchased to make the share count an even "block" – 50,000 shares at the time of this first purchase. Eventually, Investor Two invested $27,500.

[662] In June 2008, "Roberts" called again, offering shares at $0.375 per share. Investor Two invested another $120,000 to obtain approximately 320,000 additional shares.

[663] "Roberts" called again in July 2008, offering additional shares at $0.25 per share. Again, he urged Investor Two to "bump up" his purchases to bring his total number of shares to 1 million. He explained that he knew some Hong Kong investors who were keen on getting in on this but couldn't do so until it went public, and when that happened, "Roberts" had arranged to sell them blocks of shares. Investor Two was unwilling to invest that much money.

[664] "Roberts" also told Investor Two that a partner in York Rio was not well and was trying to sell his shares quickly to clean up his estate. Investor Two thought that sounded unusual, and insisted on seeing some financial documents before investing any more money. "Roberts" suggested he speak to York, and Investor Two did so, before investing another $100,000 in York Rio.

[665] Investor Two testified that neither "Roberts" nor "York" told him that 70% of the York Rio Proceeds went in commissions to Debrebud and Superior Home, and if they had, he would not have invested because that would not have been a reasonable use of the money.

(e) Investor Five

[666] Investor Five initially bought York Rio securities from "Jack Baker". "Mark Roberts" called him in January 2008 to solicit an additional investment, and, as a result, in February 2008, Investor Five invested another $25,000 in York Rio. To induce him to buy more York Rio shares, "Roberts" told him that York Rio was pulling diamonds out of the ground, 70-80% of which were high grade gem diamonds and 20-30% industrial diamonds, that the diamonds ranged from 1 to 69 carats, and that uranium and traces of gold had been found. "Roberts" also told Investor Five that York Rio was raising money to buy another 38,000 hectares of land, that a geologist, Daniel Pasin, was involved, that they were getting close to listing on the Frankfurt exchange and that a German company was interested in buying 85% of the company.

[667] Investor Five testified that neither "Roberts" nor "Baker" told him they were paid a 20% commission, and if they had, he "would have thought more about" his investment, because it would mean they were selling the security "because they were putting money in their own pocket", not "because it was a good stock".

(f) Amounts obtained by Oliver

[668] The Superior Home Account Summary prepared by Ciorma indicates that Oliver received $65,071.97 from that account from August 2007 to February 2008 by cheques made payable to Oliver's Spouse. The Blue Star Account Summary indicates that Oliver received $53,543.94 from that account from February 2008 to June 2008 by cheques made payable to Oliver's Spouse. We accept Ciorma's evidence that Oliver, through cheques made payable to Oliver's Spouse, received $118,615.91 from the Superior Home Account and the Blue Star Account from August 2007 to June 2008.

[669] Although Oliver admitted that he received some commission payments in cash, and we heard some evidence that some of his commission cheques were made out to a cheque-cashing service, Staff does not rely on these payments, which cannot be ascertained with reasonable certainty, and relies only on the payments by cheques payable to Oliver's Spouse.

3. Analysis

(a) Trading without registration and distribution without a prospectus: subsections 25(1)(a) and 53(1) of the Act

[670] Based on the evidence of Vanderlaan, Sherman, Georgiadis and Hoyme, and based on Oliver's admissions, made in his compelled examination, we find that Oliver sold York Rio securities at the Yonge and Finch Locations, using the alias "Mark Roberts".

[671] We accept the evidence of Staff's Section 139 Certificate that Oliver has never been registered under the Act, which he admitted.

[672] We find that Oliver sold York Rio securities to at least one investor who was not an accredited investor (Investor Two). We also find that the accredited investor exemption from the registration and prospectus requirements was not available in relation to York Rio securities.

[673] We find that Oliver received at least $118,615.91 from August 2007 to June 2008 in relation to the sale of York Rio securities. Based on a 10% commission rate, this suggests that Oliver sold at least $1.18 million of York Rio securities in a little less than a year.

[674] Based on Oliver's admission, during his compelled examination, we find that Oliver spoke to one investor about Brilliante, using the name "Bill Hastings". However, Oliver denied having sold any Brilliante securities, stating that he was handed fewer than a dozen Brilliante accounts for "updating" just five or six days before the raid, but he did not follow up because he had receiving little direction. We note that the documents seized from the Finch Location indicate that Oliver was still soliciting sales of York Rio securities in September and October 2008, just before the execution of the Search Warrant. Georgiadis testified that Oliver sold only York Rio securities, not Brilliante. Staff presented no other evidence as to Oliver's involvement in selling Brilliante securities. We find, in the circumstances of this case, that we have insufficient evidence to find that Oliver engaged in trades or acts in furtherance of trades in Brilliante securities.

[675] We find that Oliver traded in York Rio securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest.

[676] We find that Oliver distributed York Rio securities, without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest.

[677] Staff's allegations that Oliver contravened subsection 25(1)(a) and 53(1) of the Act with respect to Brilliante securities are dismissed.

(b) Prohibited representations: subsection 38(3) of the Act

[678] Based on Oliver's admission during his compelled examination and based on the evidence of Investor Two and Investor Five, we find that Oliver made prohibited

representations that York Rio securities would be listed on a stock exchange, contrary to subsection 38(3) of the Act and contrary to the public interest.

(c) Fraud: section 126.1(b) of the Act

[679] Our reasons and findings with respect to Staff's fraud allegations pertain only to the period from January 1, 2006 to October 21, 2008.

[680] Oliver admitted that he sold York Rio securities using an alias and that he read a number of representations from a script without exercising any diligence to determine whether they were true, including claims that York Rio had a mine that was producing diamonds of 1-69 carats, 70-80% of which were gem quality diamonds, that York Rio had outbid De Beers to acquire rights to another 38,000 hectares of land, and that York Rio was about to complete a merger with a global mining firm. He also admitted telling investors that he had been involved in taking Aurelian and Petrolifera public, though he knew this to be untrue. He did not tell prospective investors how he was compensated. As a result of his misrepresentations, Oliver earned commission of at least $118,615.91 from August 2007 to June 2008 in relation to his sales of York Rio securities. As a result of his non-compliance with Ontario securities law, York Rio investors lost at least $1.18 million. We find that Oliver engaged in dishonest acts which he knew or reasonably ought to have known would result in York Rio investors being deprived of their investments.

[681] We find that Oliver engaged or participated in acts, practices or courses of conduct relating to securities that he knew or reasonably ought to have known perpetrated a fraud on York Rio investors, contrary to section 126.1(b) of the Act and contrary to the public interest.

4. Conclusion

[682] We find that Oliver traded in York Rio securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest.

[683] We find that Oliver distributed York Rio securities without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest.

[684] We find that Oliver made prohibited representations that York Rio securities would be listed on a stock exchange, contrary to subsection 38(3) of the Act and contrary to the public interest.

[685] We find that Oliver engaged or participated in acts, practices or courses of conduct relating to securities that he knew or reasonably ought to have known perpetrated a fraud on York Rio investors, contrary to section 126.1(b) of the Act and contrary to the public interest.

[686] We are not satisfied that Staff has satisfied its burden of proving its allegations against Oliver with respect to the Brilliante Investment Scheme on a balance of probabilities, and accordingly those allegations are dismissed.

H. Valde

1. The Allegations

[687] Staff alleges that Valde:

- traded in York Rio and Brilliante securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest;
- distributed York Rio and Brilliante securities, without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest;
- made prohibited representations that York Rio and Brilliante securities would be listed on a stock exchange, contrary to subsection 38(3) of the Act and contrary to the public interest; and
- engaged or participated in acts, practices or courses of conduct relating to securities that he knew or reasonably ought to have known perpetrated a fraud on York Rio and Brilliante investors, contrary to section 126.1(b) of the Act and contrary to the public interest.

2. The Evidence

[688] Valde did not testify at the Merits Hearing. Evidence about his role in the York Rio and Brilliante Investment Schemes came from Vanderlaan, Ciorma, Sherman, Georgiadis and Hoyme. Through Vanderlaan, Staff introduced into evidence excerpts from Valde's compelled examination, which took place on January 13, 2009.

(a) Identification of Valde as "Doug Bennett" and "Don Wade"

[689] Vanderlaan identified the photograph of Valde that Staff obtained from the Ministry of Transportation and showed Sherman, Hoyme and Georgiadis at the Merits Hearing (the "**Valde Photograph**"). Hoyme and Sherman identified the person in the Valde Photograph as "Doug Bennett", a York Rio salesman. Georgiadis testified that the person in the Valde Photograph was known to him as "Don Wade", who had an office at the Finch Location.

(b) Section 139 Certificate

[690] Staff provided a Section 139 Certificate stating that Valde has never been registered under the Act.

(c) Documents Seized from the Finch Location

[691] Vanderlaan testified that several May 2007 emails between "Doug Bennett" and two York Rio investors were seized from the Finch Location. Amongst the other things seized from the Finch Location were a file folder, labelled "Don Wade", which contained email correspondence between "Don Wade" and four Brilliante investors, the cover page of the subscription agreement which the investor was asked to sign, and the sales order log for each of the four sales.

(d) Valde's Compelled Examination

[692] In his compelled examination, Valde made the following admissions and gave the following evidence about his involvement in selling York Rio securities:

- He has never been registered with the Commission. He has no background in securities. Before getting involved in selling securities, he worked mainly in non-securities sales.
- He worked as a salesman for Maitland Capital from July to October 2005.
- "Richard Turner" (Runic) called him in early 2007 about York Rio. He met with "Turner" and York, and as a result, "Turner" hired him.
- He started working as a salesman for York Rio at the Yonge Location in March or April 2007 and continued for a year or a year and a half, until at least August or September of 2008. He worked three or four days a week on an irregular basis, and worked fewer hours in the summertime. He made sales calls to investors all over Canada, except in Ontario and Quebec.
- Because of his experience with Maitland, he understood that a private placement could only be sold to accredited investors. He understood that all York Rio investors were pre-screened as accredited investors and had to sign a form saying so.
- He understood that York Rio was raising funds for a diamond mine in Brazil, and hoped to take it public. He understood the mine had limited production by late 2007. He read the York Rio Business Plan, which was sent out to prospective investors, but did not review the material on the York Rio website.
- According to Valde, "Turner" told him that no one at the office used their real name. He admitted using the alias "Doug Bennett", when selling York Rio securities.
- When calling a prospective investor, Valde told them about the York Rio project and ask if they were interested in receiving information on it; if so, the information would usually be emailed. He also told prospective investors that the investment was for accredited investors, which he understood to be someone with a net worth of $1 million, including the value of any business or real estate, or an annual income of $200,000.
- He was given a script to use when selling York Rio securities, and used the same script throughout his time there. He admitted telling prospective investors that York Rio hoped to go public within 12 to 18 months, and that he thought it would do very well. York Rio shares cost $0.75 per share at the time; he would tell prospects that although he could not guarantee what the stock would do, it was expected to go up, and York had been successful in the past. Towards the end of the Material Time, he would say that the mine was in limited production, which is a good base for going public, and the mandate was to go public six months to a year from the start of production.
- The script also included the statement that York had brought Aurelian public,

and that it had done very well. Sometimes Valde read this part of the script. He also sometimes told investors he had been in the business a few years. He did not tell investors about the commission structure, and no one ever asked.

- In August 2008, Valde made the move to the Finch Location with York Rio. He continued to sell York Rio securities "a little bit" but he believed that York was winding it down to start his new venture, Brilliante.

- He was paid a commission of 20% of the proceeds of his York Rio sales, and, if another salesperson made an additional sale to the same investor, he would also receive a 10% commission on that sale. According to Valde, he sold about $200,000 worth of York Rio securities to 20-30 people, his largest sale was approximately $20,000 and his sales averaged approximately $7,500. He was paid by cheque payable on a company whose name he was unable to remember (not York Rio), and later received cheques from Blue Star. He was paid in cash sometimes, and he estimated that he received one cash payment of $1,200 in addition to the cheques. He did not receive any T4s in relation to his York Rio income and claimed he was unable to estimate how much he received in York Rio commissions in 2007-2008. He declined to provide income tax or other supporting income documentation.

[693] In his compelled examination ,Valde made the following admissions and gave the following evidence about his involvement in selling Brilliante securities:

- He read the Brilliante Business Plan. He understood that Brilliante was a uranium mine in Brazil, and that it was scheduled to begin production in 2011 or 2012.

- He phoned people to try to sell them shares of Brilliante, using the alias "Don Wade". He sold Brilliante securities to only two or three people because the fall of 2008 was a bad time in the stock market. Again, he earned 20% commissions, "maybe $5,000." He was paid by cheque from the Blue Star Account.

- He would tell prospective investors that Brilliante was raising funds to take the company public, and that the price of uranium had gone up 200% in the past three years. Shares were selling at a dollar per share. He would tell prospective investors that he could not guarantee what the shares would come out at, but quite often on private placements "it comes out higher". He claimed he also told prospective investors that more than half of private placements never hit the market.

- He used a script when soliciting sales of Brilliante securities, but would vary it to make it shorter. Included in the script was the claim that York or Aidelman had been involved with Thompson Creek, and Valde admitted talking about Thompson Creek in his sales calls.

[694] Valde admitted he took no steps to confirm or deny the information he was given about York Rio or Brilliante.

(e) Amounts Obtained by Valde

[695] The Superior Home Account Summary prepared by Ciorma indicates that Valde received $117,850.23 from that account between February 2007 and February 2008. The Blue Star Account Summary indicates that Valde received $75,585.03 from that account between February 2008 and October 2008.

(f) Investor Seven

[696] Investor Seven testified that he invested $10,000 in York Rio through "Bennett" in May 2007. "Bennett" told Investor Seven, amongst other things, that York Rio had out-bid DeBeers on some land in Brazil.

3. Analysis

(a) Trading without registration and distribution without a prospectus: subsections 25(1)(a) and 53(1) of the Act

[697] Based on the evidence of Vanderlaan, Sherman, Hoyme and Investor Seven, and based on Valde's admissions, made in his compelled examination, we find that Valde sold York Rio securities at the Yonge and Finch Locations using the alias "Doug Bennett". Based on the evidence of Vanderlaan and Georgiadis, and based on Valde's admissions, made in his compelled examination, we find that Valde sold Brilliante securities at the Finch Location using the alias "Don Wade".

[698] We accept the evidence of Staff's Section 139 Certificate that Valde has never been registered under the Act, which he admitted.

[699] Although Valde stated, in his compelled examination, that he always told prospective investors that the investment was only available for "accredited investors", we find that Valde misunderstood or misstated the "accredited investor" definition as including someone with a net worth of $1 million, including the value of any business or real estate, or an annual income of $200,000. We find that Valde sold York Rio securities to at least one investor who was not an "accredited investor" (Investor Seven). We find that the accredited investor exemption from the registration and prospectus requirements was not available in relation to the sale of York Rio and Brilliante securities.

[700] Valde estimated that he sold about $200,000 of York Rio securities, which would result in a commission of $40,000, based on a 20% commission. He estimated that he received only about $5,000 in commission for his Brilliante sales. He provided no supporting documentation. In the absence of reliable evidence from Valde about his income from selling York Rio and Brilliante securities, we accept Ciorma's evidence that Valde received commission of at least $193,435.26 between February 2007 and October 2008 in relation to his sales of York Rio and Brilliante securities. Based on a 20% commission rate, this suggests that Valde sold at least $967,176.30 or York Rio and Brilliante securities between February 2007 and October 2008.

[701] We find that Valde traded in York Rio and Brilliante securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest. We find that Valde distributed York Rio and Brilliante securities, without filing a prospectus or preliminary prospectus with the Commission and receiving a receipt for it from the Director, in

circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest.

(b) Prohibited representations: subsection 38(3) of the Act

[702] Based on Valde's admission that he told prospective investors that York Rio and Brilliante were intended to go public, we find that he made prohibited representations that York Rio and Brilliante securities would be listed on a stock exchange, contrary to subsection 38(3) of the Act and contrary to the public interest.

(c) Fraud: section 126.1(b) of the Act

[703] Our reasons and findings with respect to Staff's fraud allegations pertain only to the period from January 1, 2006 to October 21, 2008.

[704] Valde admitted that he sold York Rio and Brilliante securities using an alias, misrepresented the accredited investor exemption, falsely claimed that York had been involved in taking Aurelian public, that York Rio's diamond mine was in limited production and that York Rio planned to go public, and failed to tell prospective investors that he would receive 20% of their investment as his sales commission. He did not exercise any diligence to confirm the information he was given. As a result of his misrepresentations, Valde earned commission of at least $193,435.26 between February 2007 and October 2008 in relation to his sales of York Rio and Brilliante securities, and York Rio and Brilliante investors lost at least $967,176.30. We find that Valde engaged or participated in dishonest acts which he knew or reasonably ought to have known would result in York Rio and Brilliante investors being deprived of their investments.

[705] We find that Valde engaged or participated in acts, practices or courses of conduct relating to securities that he knew or ought to have known perpetrated a fraud on York Rio and Brilliante investors, contrary to section 126.1(b) of the Act and contrary to the public interest.

4. Conclusion

[706] We find that Valde traded in York Rio and Brilliante securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest.

[707] We find that Valde distributed York Rio and Brilliante securities, without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest.

[708] We find that Valde made prohibited representations that York Rio and Brilliante securities would be listed on a stock exchange, contrary to subsection 38(3) of the Act and contrary to the public interest.

[709] We find that Valde engaged or participated in acts, practices or courses of conduct relating to securities that he knew or ought to have known perpetrated a fraud on York Rio and Brilliante investors, contrary to section 126.1(b) of the Act and contrary to the public interest.

I. Bassingdale

1. The Allegations

[710] Staff alleges that Bassingdale:

- traded in York Rio and Brilliante securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest;
- distributed York Rio and Brilliante securities without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest;
- made prohibited representations that York Rio and Brilliante securities would be listed on a stock exchange, contrary to subsection 38(3) of the Act and contrary to the public interest; and
- engaged or participated in acts, practices or courses of conduct relating to securities that he knew or reasonably ought to have known perpetrated a fraud on York Rio and Brilliante investors, contrary to section 126.1(b) of the Act and contrary to the public interest.

2. The Evidence

[711] Bassingdale did not testify at the Merits Hearing. Staff attempted to summons him for a compelled examination under section 13 of the Act, but could not locate him. Evidence about his role in the York Rio and Brilliante Investment Schemes came from Vanderlaan, Ciorma, Georgiadis, Sherman and Hoyme.

(a) Identification of Bassingdale as "Gavin Myles" and "Brent Gordon"

[712] The photograph from Bassingdale's driver's licence, which Vanderlaan obtained from the Ministry of Transportation, was shown to three witnesses at the Merits Hearing (the "**Bassingdale Photograph**"). Georgiadis identified the person in the Bassingdale Photograph as "Scott", and testified that "Scott" sold York Rio securities using the name "Gavin Myles" and sold Brilliante securities using the name "Brent Gordon". Hoyme identified the person in the Bassingdale Photograph as "Gavin Myles". Sherman identified him as "Scott", but said that he only knew him by his "phone name" ("Gavin Myles"), until the Commission became involved. Sherman testified that "Gavin Myles" sold York Rio shares.

(b) Section 139 Certificate

[713] Staff provided a Section 139 Certificate stating that Bassingdale has never been registered under the Act.

(c) Documents Seized from the Finch Location

[714] Vanderlaan testified that the handwritten names "Gavin Myles" and "Brent Gordon" were found on file folders, sales scripts, subscription agreements, lead cards, sales order logs, email correspondence and other documents that were seized from the

Finch Location at the time of the execution of the search warrant, including scripts using the name "Brent Gordon" and a lead chart with "Brent Gordon" written on it.

[715] Amongst the documents seized was an October 15, 2008 memo from "Brent Gordon" to an investor, Investor A, stating "As discussed, the attached is your subscription agreement for 5,000 shares of Brilliante Brasilcan Resources Corp. Please sign all copies and enclose with your cheque for $5,000 payable to Brilliante Brasilcan Resources Corp.". The first page of the subscription agreement for Investor A was also seized, as well as an October 16, 2008 sales order log identifying "Brent Gordon" as the salesperson who made the sale. In an October 15, 2008 email, Investor A declined to proceed with the transaction.

[716] Also seized from the Finch Location was a September 29, 2008 sales order log sheet listing "Brent Gordon" as the salesperson and another investor, Investor B as the "contact", indicating a sale of 10,000 shares at $1 per share.

(d) Investor C

[717] Vanderlaan testified that Investor C, an Alberta investor whose name appeared on a courier slip for a Brilliante pick-up, stated that he had invested $50,000 in Brilliante in September 2008 after receiving a sales call from a person who called himself "Brent Gordon". Investor C's statement was admitted into evidence through Vanderlaan. Investor C stated that he had received several earlier calls about Brilliante in August and September 2008, and he had told those callers to send him information about Brilliante. "Brent Gordon" called him on September 10, 2008 to follow up.

[718] According to Investor C, "Brent Gordon" told him he had called him two years earlier and the stock he was recommending at that time did very well. He said he was now working for Brilliante, and they had a group of directors with "very good credentials". "Brent Gordon" "said it was for a uranium mine in Brazil, all of the information I had seen was for York Rio which is diamonds. I thought it was odd that the website that I was directed to did not mention anything about uranium or Brilliante."

[719] According to Investor C, "Brent Gordon" asked if he could invest for one block at $1 per share of 50,000 shares. "He then said there would be an opportunity once the company went public for additional shares at $0.75 (up to 35,000 shares). He said he expected the price to list at a minimum of $1.25 when the company was listed. He also mentioned that it would be a minimum of three months before the listing and that the price should do as well as the last offer ($20). He said he was investing his money in this opportunity and was committed for the next two years to this one stock."

[720] Investor C stated that "Brent Gordon" asked him if he was an accredited investor, and said that would send a contract by email for him to sign and return. Vanderlaan testified that Investor C was an accredited investor.

(e) Amounts Obtained by Bassingdale

[721] The Brilliante Account Summary prepared by Ciorma indicates that Brilliante received $10,000 from Investor A and $50,000 from Investor C.

[722] The Superior Home Account Summary indicates that Bassingdale received $87,936.98 from the Superior Home Account from August 2007 to February 2008. The

Blue Star Account Summary indicates that Bassingdale or 2182130 Ont. Inc. ("**2182130**"), of which Bassingdale is an officer and director, received $67,658.42 from the Blue Star Account from March to October 2008.

3. Analysis

(a) Trading without registration and distribution without a prospectus: subsections 25(1)(a) and 53(1) of the Act

[723] Based on the evidence of Vanderlaan and Ciorma, Georgiadis, Hoyme and Sherman, we find that Bassingdale sold York Rio securities at the Finch Location, using the alias "Gavin Myles". Based on the evidence of Vanderlaan and Ciorma, Investor C and Georgiadis, we find that Bassingdale sold Brilliante securities at the Finch Location using the alias "Brent Gordon".

[724] Based on the Brilliante Account Summary and the Superior Home Account Summary, we find that Bassingdale or his company received $155,595.40 from August 2007 to October 2008 from the Superior Home Account and the Blue Star Account, which were accounts used by Runic to pay the commissions of York Rio and Brilliante salespersons. We find that that Bassingdale received $155,595.40 from these accounts, representing his commission for sales of York Rio and Brilliante securities. This suggests Bassingdale's non-compliance with Ontario securities law resulted in York Rio and Brilliante investors being deprived of approximately $777,977.00, if Bassingdale was paid a 20% commission, like the other York Rio and Brilliante salespersons.

[725] We accept the evidence of Staff's Section 139 Certificate that Bassingdale has never been registered under the Act. Staff acknowledged at the Merits Hearing that Investor C was an accredited investor. However, we find that the accredited investor exemption from the registration and prospectus requirements was not available in relation to the sale of York Rio and Brilliante securities.

[726] We find that Bassingdale traded in York Rio and Brilliante securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest.

[727] We find that Bassingdale distributed York Rio and Brilliante securities, without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest.

(b) Prohibited representations: subsection 38(3) of the Act

[728] We received no evidence that Bassingdale made prohibited representations that York Rio securities would be listed on a stock exchange.

[729] We find that Staff has satisfied its burden of proof, on a balance of probabilities, with respect to the allegation that Bassingdale made prohibited representations that Brilliante securities would be listed on a stock exchange, contrary to subsection 38(3) of the Act. Investor C's evidence about what "Brent Gordon" said to him, is hearsay evidence. Hearsay evidence is admissible in Commission proceedings, subject to weight. We accept Investor C's evidence, which was uncontroverted and consistent with the evidence we heard about the sales practices adopted by the York Rio and Brilliante

Respondents. We find that Bassingdale made a prohibited representation that Brilliante securities would be listed on a stock exchange, contrary to subsection 38(3) of the Act and contrary to the public interest.

(c) Fraud: section 126.1(b) of the Act

[730] Our reasons and findings with respect to Staff's fraud allegations pertain only to the period from January 1, 2006 to October 21, 2008.

[731] Bassingdale sold York Rio and Brilliante securities using an alias, falsely claimed that Brilliante had a uranium mine in Brazil, that Brilliante had a group of directors with "very good credentials" and that Brilliante was expected to be listed on a stock exchange at a minimum of $1.25 per share and increase to $20 per share, and, as a result, he received commission payments of $155,595.40 in relation to his sales of York Rio and Brilliante securities. We are satisfied that Staff has satisfied its burden of proving, on a balance of probabilities, that Bassingdale engaged or participated in dishonest acts which he knew or reasonably ought to have known would result in York Rio and Brilliante investors being deprived of their investments.

[732] We find that Bassingdale engaged or participated in acts, practices or courses of conduct relating to securities that he knew or ought to have known perpetrated a fraud on York Rio and Brilliante investors, contrary to section 126.1(b) of the Act and contrary to the public interest.

4. Conclusion

[733] We find that Bassingdale traded in York Rio and Brilliante securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest.

[734] We find that Bassingdale distributed York Rio and Brilliante securities without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest.

[735] We find that Bassingdale made prohibited representations that Brilliante securities would be listed on a stock exchange, contrary to subsection 38(3) and contrary to the public interest.

[736] We find that Bassingdale engaged or participated in acts, practices or courses of conduct relating to securities that he knew or ought to have known perpetrated a fraud, on York Rio and Brilliante investors, contrary to section 126.1(b) of the Act and contrary to the public interest.

IX. CONCLUSION

[737] For the reasons given, we make the following findings against each of the Respondents:

(a) We find that York Rio:

(i) traded in its own securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest;

(ii) distributed its securities without filing a prospectus or a preliminary prospectus with the Commission and obtaining receipts for them from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest; and

(iii) engaged or participated in acts, practices or courses of conduct relating to securities that it knew or reasonably ought to have known perpetrated a fraud on York Rio investors, contrary to section 126.1(b) of the Act, contrary to the public interest.

(b) We find that Brilliante:

(i) traded in its own securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest;

(ii) distributed its own securities without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest; and

(iii) engaged or participated in acts, practices or courses of conduct relating to securities that it knew or reasonably ought to have known perpetrated a fraud on Brilliante investors, contrary to section 126.1(b) of the Act, contrary to the public interest.

(c) We find that York:

(i) traded in securities of York Rio and Brilliante, without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest;

(ii) distributed securities of York Rio and Brilliante without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest;

(iii) made prohibited representations that York Rio securities would be listed on a stock exchange, contrary to subsection 38(3) of the Act and contrary to the public interest;

(iv) engaged or participated in acts, practices or courses of conduct relating to securities that he knew or reasonably ought to have known perpetrated a fraud on York Rio and Brilliante investors, contrary to section 126.1(b) of the Act and contrary to the public interest; and

(v) being a director and officer of York Rio and Brilliante, authorized, permitted or acquiesced in the contraventions of subsections 25(1)(a) and 53(1), subsection 38(3), and section 126.1(b) of the Act by York Rio and Brilliante, contrary to section 129.2 of the Act and contrary to the public interest.

(d) We find that Runic:

(i) traded in York Rio and Brilliante securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) and contrary to the public interest;

(ii) distributed York Rio and Brilliante securities without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest;

(iii) engaged or participated in acts, practices or courses of conduct that he knew or should have known perpetrated a fraud on York Rio and Brilliante investors, contrary to section 126.1(b) of the Act and contrary to the public interest; and

(iv) being an officer of York Rio and Brilliante, during the Runic Period, authorized, permitted or acquiesced in the contraventions of subsections 25(1)(a) and 53(1), subsection 38(3), and section 126.1(b) of the Act by York Rio and Brilliante during the Runic Period, contrary to section 129.2 of the Act and contrary to the public interest.

(e) We find that Schwartz:

(i) traded in York Rio securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest;

(ii) distributed York Rio securities without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest;

(iii) engaged or participated in a course of conduct relating to securities that he knew or reasonably ought to have known perpetrated a fraud on York Rio investors, contrary to section 126.1(b) of the Act and contrary to the public interest;

(iv) being a *de facto* officer of York Rio during the Schwartz Period, authorized, permitted or acquiesced in York Rio's non-compliance with subsections 25(1)(a) and 53(1), subsection 38(3), and section 126.1(b) of the Act during the Schwartz Period, contrary to section 129.2 of the Act and contrary to the public interest; and

(v) contravened Ontario securities law, contrary to subsection 122(1)(c) of the Act and contrary to the public interest, by trading in York Rio securities at a time when the Euston Order prohibited him from trading in any securities.

(f) We find that Demchuk:

(i) traded in York Rio and Brilliante securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest;

(ii) distributed York Rio and Brilliante securities, without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest;

(iii) made prohibited representations that York Rio securities would be listed on a stock exchange, contrary to subsection 38(3) of the Act, and contrary to the public interest; and

(iv) engaged or participated in acts, practices or courses of conduct relating to securities that he knew or reasonably ought to have known perpetrated a fraud on York Rio and Brilliante investors, contrary to section 126.1(b) of the Act and contrary to the public interest.

(g) We find that Oliver:

(i) traded in York Rio securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest;

(ii) distributed York Rio securities without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest;

(iii) made prohibited representations that York Rio securities would be listed on a stock exchange, contrary to subsection 38(3) of the Act and contrary to the public interest; and

(iv) engaged or participated in acts, practices or courses of conduct relating to securities that he knew or reasonably ought to have known perpetrated a fraud on York Rio investors, contrary to section 126.1(b) of the Act and contrary to the public interest.

(h) We find that Valde:

(i) traded in York Rio and Brilliante securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest;

(ii) distributed York Rio and Brilliante securities, without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest;

(iii) made prohibited representations that York Rio and Brilliante securities would be listed on a stock exchange, contrary to subsection 38(3) of the Act and contrary to the public interest; and

(iv) engaged or participated in acts, practices or courses of conduct relating to securities that he knew or ought to have known perpetrated a fraud on York Rio and Brilliante investors, contrary to section 126.1(b) of the Act and contrary to the public interest.

(i) We find that Bassingdale:

(i) traded in York Rio and Brilliante securities without registration, in circumstances where no registration exemption was available, contrary to subsection 25(1)(a) of the Act and contrary to the public interest;

(ii) distributed York Rio and Brilliante securities without filing a preliminary prospectus or prospectus with the Commission and receiving a receipt for it from the Director, in circumstances where no prospectus exemption was available, contrary to subsection 53(1) of the Act and contrary to the public interest;

(iii) made prohibited representations that Brilliante securities would be listed on a stock exchange, contrary to subsection 38(3) and contrary to the public interest; and

(iv) engaged or participated in acts, practices or courses of conduct relating to securities that he knew or ought to have known perpetrated a fraud on York Rio and Brilliante investors, contrary to section 126.1(b) of the Act and contrary to the public interest.

[738] An order will be issued as follows:

(i) Staff shall file and serve written submissions on sanctions and costs by April 15, 2013;

(ii) each Respondent shall file and serve written submissions on sanctions and costs by April 29, 2013; and

(iii) Staff shall file and serve reply submissions on sanctions and costs by May 6, 2013.

(iv) the hearing to determine sanctions and costs will be held at the offices of the Commission at 20 Queen Street West, 17th floor, Toronto, on May 14, 2013, 2013, at 10:00 a.m., or such further or other dates as agreed by the parties and set by the Office of the Secretary; and

(v) upon failure of any party to attend at the time and place aforesaid, the hearing may proceed in the absence of that party, and such party is not entitled to any further notice of the proceeding.

DATED at Toronto this 25th day of March, 2013.

"Vern Krishna"	*"Edward P. Kerwin"*
Vern Krishna, QC	Edward P. Kerwin