Ontario

Capital Markets Tribunal | Tribunal des marchés financiers | 22nd Floor 20 Queen Street West Toronto ON M5H 3S8 | 22e étage 20, rue Queen ouest Toronto ON M5H 3S8

Citation: *Ontario Securities Commission v Emerge Canada Inc,* 2026 ONCMT 35
Date: 2026-11-09
File No. 2025-7

BETWEEN:

ONTARIO SECURITIES COMMISSION

(Applicant)

- and -

EMERGE CANADA INC., LISA LANGLEY, DESMOND ALVARES, MARIE ROUNDING, MONIQUE HUTCHINS AND BRUCE FRIESEN

(Respondents)

REASONS AND DECISION

(Subsection 127(1) and s. 127.1 of the *Securities Act*, RSO 1990, c S.5)

Adjudicator: Andrea Burke (chair of the panel)
James D.G. Douglas
Sandra Blake

Hearing: March 23, 24, 25, 26, 27, April 7, 8, 9, 10, 13, and August 5, 6, 7, 2026

Appearances:		
	Khrystina McMillan Matthew McMurray	For the Ontario Securities Commission
	Rikin Morzaria	For Lisa Langley and Emerge Canada Inc.
	Cheyenne Parsons	For Desmond Alvares
	Adam Chisholm Jennie Baek	For Marie Rounding and Monique Hutchins
	Rahul Shastri	For Bruce Friesen

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REASONS AND DECISION

1. OVERVIEW

[1] Emerge Canada Inc. was an investment fund manager. It withdrew money from the funds it managed and created a receivable. It characterized this practice as "expense absorption". Emerge Canada did not identify any related conflicts of interest. Concerns about the receivable were raised by numerous parties, including the Emerge Canada Independent Review Committee. Emerge Canada continued to grow the receivable despite providing assurances that it would cease the practice and repay the receivable. Ultimately, the funds were wound down and the receivable was never repaid.

[2] The Ontario Securities Commission alleges that Emerge Canada's withdrawals that created the receivable were improper and, in part used to help sustain its own business and that of its US affiliate, Emerge Capital Management Inc. (**Emerge US**). The Commission alleges that, by engaging in the practice, Emerge Canada breached numerous securities laws, including:(i) the requirements that an investment fund manager act in the best interests of the investment fund and exercise the requisite degree of care, diligence and skill, (ii) the prohibition against a portfolio manager causing a fund it manages to provide loans to itself and its associates, and (iii) the requirement that a fund manager refer conflict of interest matters to an Independent Review Committee (**IRC**). In addition, the Commission alleges that Emerge Canada breached the requirement to maintain an adequate system of controls and supervision to ensure compliance with securities laws and breached its obligations to prepare and maintain proper books and records.

[3] The Commission also alleges that Lisa Langley, as the Ultimate Designated Person (**UDP**) and the Chief Compliance Officer (**CCO**) of Emerge Canada, breached her duties to promote compliance with securities laws and to monitor and assess compliance with securities laws. It further alleges that Langley and Desmond Alvares, the Chief Financial Officer (**CFO**) of Emerge Canada, are deemed to have breached Ontario securities law as a consequence of having authorized, permitted or acquiesced in Emerge Canada's breaches.

[4] The Commission further alleges that Marie Rounding, Monique Hutchins and Bruce Friesen, the three members of the Emerge Canada Independent Review Committee, breached securities laws in connection with the Emerge Canada withdrawals from the funds by failing: (i) to provide a recommendation concerning a conflict of interest matter, (ii) to make disclosure to security holders, and (iii) to act honestly, in good faith and in the best interests of the funds or to exercise the requisite degree of care, diligence and skill. We use the term **Emerge Canada IRC** to refer to the committee itself as well as the three members of the Emerge Canada IRC, collectively.

[5] Finally, the Commission alleges that all of the respondents acted contrary to the public interest.

[6] As we explain below, we find that the Commission has established all of the breaches of securities laws it alleges against Emerge Canada. We also find that Langley breached her obligations as UDP and CCO and that Langley and Alvares each authorized, permitted or acquiesced in each of Emerge Canada's breaches of securities law.

[7] We do not find any breaches of securities law by the Emerge Canada IRC.

[8] We also decline to make any separate finding that any of the respondents engaged in conduct contrary to the public interest. The Commission's Application for Enforcement Proceeding (**AEP**) does not plead any allegations separate from the alleged breaches of securities law in support of such a finding. Further the Commission did not make any submissions in support of such a finding.

2. BACKGROUND

2.1 The Emerge Canada Respondents

[9] Emerge Canada is an Ontario corporation. Between June 14, 2019, and February 12, 2024, it was registered under the *Securities Act*[1] (**Act**) as an investment fund manager, a portfolio manager and an exempt market dealer.

[10] Between June 2019 and May 2023, Emerge Canada offered a brand of funds known as the "ARK Funds" (the **Funds**) which were listed on the NEO Exchange

[1] RSO 1990, c S.5

(now called Cboe). The Funds comprised six ARK exchange-traded funds (**ARK ETFs**) and matching mutual funds. The Funds held securities in the technology industry, with a stated focus on innovative and disruptive technologies. The Funds' total net asset value (**NAV**) grew from just over $10 million as of December 31, 2019, to just over $220 million as of December 31, 2021, but subsequently declined to just under $100 million as of December 31, 2022.

[11] Beginning in August 2022, Emerge Canada also offered the "EMPWR Funds", comprised of five ETFs and matching mutual funds. The EMPWR Funds offered portfolios with a focus on environmental, social and governance strategies, as well as investments by women-led investment managers.

[12] Langley was the founder, Chief Executive Officer and a director of Emerge Canada. She was registered in Ontario as the CCO and UDP of Emerge Canada.

[13] Alvares was the CFO, Director of Operations and a director of Emerge Canada. As CFO, Alvares reported to Langley.

[14] Langley was the sole shareholder of Emerge Canada. We heard evidence that Alvares was to be awarded a 5% equity position in Emerge Canada in exchange for forgiveness of loans he made to the company. Those shares were never issued.

[15] Langley was also the majority shareholder and founder of Emerge US, a US-based fund manager. Langley instructed Emerge US's accountant and was also the sole individual with signing authority over the Emerge US bank accounts and the only cardholder for the Emerge US credit card. Alvares had no role or responsibilities with Emerge US and did not have access to its accounting records or bank accounts.

2.2 Management of the Funds

[16] Emerge Canada was the trustee of the Funds pursuant to a Master Declaration of Trust.

[17] Emerge Canada was also the investment fund manager and the portfolio manager of the Funds pursuant to a management agreement (**Management Agreement**). As investment fund manager, Emerge Canada was responsible for the management and administration of the Funds, including ensuring the Funds'

compliance with securities laws, causing the Funds to maintain appropriate records, providing office facilities and personnel necessary to operate the Funds, and engaging with third party service providers on behalf of the Funds. As portfolio manager, Emerge Canada was responsible for portfolio advisory and investment management services, including investment decisions and monitoring the investment portfolios' performance. The Management Agreement contained a prescribed list of Emerge Canada's duties and responsibilities to the Funds.

[18] In consideration for its duties performed for the Funds under the Management Agreement, Emerge Canada was entitled to a management fee of 0.8% of each Funds' NAV per year, accrued daily and paid on the last valuation date of each month (**Management Fees**).

[19] The Management Agreement permitted Emerge Canada to delegate some or all of its responsibilities as portfolio manager. Emerge Canada entered into a sub-advisory agreement with Emerge US (**Emerge US Sub-Advisory Agreement**) that appointed Emerge US as a sub-advisor to make recommendations to Emerge Canada related to the purchase, sale or trading in securities and perform such other services as might be agreed from time to time. The Emerge US Sub-Advisory Agreement stated that for its services under the agreement, Emerge US was entitled to "such fees as may be agreed in writing" between Emerge Canada and Emerge US.

[20] The Emerge US Sub-Advisory Agreement also allowed Emerge US to delegate its services. Emerge US did so under a sub-advisory agreement with ARK Investment Management LLC (**ARK LLC**). Emerge US appointed ARK LLC as its sub-advisor in respect of Emerge Canada ETFs and funds, including the Funds. Under the Agreement, ARK LLC earned a sub-advisory fee of 0.45% of NAV per year for, among other things, providing recommendations relating to the purchase, retention or sale of investments held within the Funds and the EMPWR Funds.

[21] Emerge Canada and Emerge US also entered into a Consulting Services Agreement, dated July 1, 2019 (the **Emerge US Consulting Agreement**). This agreement stated that it was made pursuant to the Emerge US Sub-Advisory Agreement. Alvares signed the Emerge US Consulting Agreement on behalf of

Emerge Canada, and Langley signed on behalf of Emerge US. The consulting agreement set out the fees and services that would be provided as follows:

a. between $25,000 and $200,000 a month would be provided by Emerge Canada as the portfolio manager to Emerge US, the sub-advisor, for consulting services;

b. Emerge US would provide operational, support and reconciliation support; and

c. Emerge US would provide marketing collateral support, marketing advice and technical support.

[22] Although the Emerge US Sub-Advisory Agreement was disclosed to investors, the Emerge US Consulting Agreement was not.

2.3 The Emerge Canada IRC

[23] Emerge Canada established the Emerge Canada IRC in May 2019 to deal with conflict of interest matters that arose in the management of its funds. Rounding, Hutchins and Friesen were the three members of the Emerge Canada IRC between May 15, 2019, and June 30, 2023, when they resigned.

[24] Independent Review Inc. (**IRI**) was appointed as the secretariat for the Emerge Canada IRC effective May 15, 2019. It was the liaison between Emerge Canada and the Emerge Canada IRC, took the minutes of the Emerge Canada IRC meetings, and facilitated scheduling and running the meetings.

2.4 Third party service providers to Emerge Canada and the Funds

[25] BDO Canada LLP (**BDO**) was the auditor for Emerge Canada and the Funds, responsible for preparing financial statement audits of Emerge Canada and the Funds. Without providing a reason, BDO resigned as the auditor of both the Funds and Emerge Canada on November 3, 2022.

[26] RBC Investor Services Trust (**RBC**) was the custodian and fund administrator for the Funds and was responsible for calculating the NAV and preparing the semi-annual draft financial statements for the Funds. On February 23, 2023, RBC issued a notice to Emerge Canada, communicating its intent to terminate its relationship with Emerge Canada, for reasons including the resignation of BDO

and a significant growth in a receivable owing from Emerge Canada to the Funds (the **Receivable**).

[27] Grant Thornton Canada (**Grant Thornton**) was Emerge Canada's bookkeeper.

[28] Borden Ladner Gervais LLP (**BLG**) was legal counsel to Emerge Canada and the Funds.

2.5 The Funds were wound down by order of the Commission

[29] Emerge Canada reported BDO's resignation as auditor to the Commission on December 7, 2022.

[30] Emerge Canada was unable to engage a replacement auditor. Emerge Canada did not file any audited financial statements for the Funds or Emerge Canada with the Commission for fiscal 2022. On April 6, 2023, the Commission issued a cease trade order[2] for the Funds as a result of the failure to file audited financial statements and an annual management report of fund performance for the Funds for the year ended December 31, 2022.

[31] BDO's resignation also prompted a review by the Commission's Investment Management Division, which made inquiries of Emerge Canada regarding BDO's resignation, the Receivable and the working capital deficiency of Emerge Canada.

[32] Emerge Canada advised the Commission that its ability to repay the Receivable was linked to the collectability of a multi-million dollar receivable from Emerge US (**Emerge US Receivable**). According to Emerge Canada, repayment of the Emerge US Receivable would allow Emerge Canada to repay the Receivable owing to the Funds.

[33] Ultimately, Emerge Canada was unable to realize on the Emerge US Receivable and therefore was unable to repay the Receivable owing to the Funds, and was also unable to rectify its working capital deficiency. The Funds were delisted in October 2023 and terminated by the end of December 2023. Emerge Canada's registration as an investment fund manager, portfolio manager and exempt market dealer was suspended effective February 2024.

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[2] *Emerge ARK Global Disruptive Innovation ETF (Re),* Cease Trade Order of the Ontario Securities Commission dated April 6, 2023 (unreported)

3. PRELIMINARY ISSUES

3.1 Qualification of Langley's and Emerge Canada's expert witness

[34] Prior to the merits hearing, we considered a motion brought by the Commission concerning the admissibility of expert evidence proposed by Langley and Emerge Canada. The motion concerned general categories of proposed expert evidence. We were not provided with details of that proposed evidence.

[35] We permitted, subject to any party's ability to raise or renew objections (including about expert qualifications and admissibility) at the merits hearing, expert evidence only on the following categories:[3]

a. how governance, oversight, and internal-control frameworks are typically structured for investment fund managers of comparable size, strategy and operational complexity;

b. the role third party service providers typically play in oversight;

c. how investment fund managers customarily rely on service providers in fulfilling their operational and oversight responsibilities; and

d. how investment fund managers and auditors typically interact in relation to financial reporting.

[36] Langley and Emerge Canada sought to qualify Steven Rostowsky as an expert witness at the merits hearing. He was tendered as an expert in finance, compliance, compliance infrastructure and internal audit with more than 35 years of senior leadership experience in Canadian financial services, particularly fund management. His experience included roles as CFO and CCO and involvement with audits, which gave him a unique perspective on fund operations, governance, outsourcing, compliance systems, auditors, and service-provider oversight. Langley and Emerge Canada submitted that his experience with both large and small funds, outsourced and insourced operations, and

[3] *Ontario Securities Commission v Emerge Canada Inc*, 2026 ONCMT 14 at paras 34 and 37; *Ontario Securities Commission v Emerge Canada Inc,* (2026) 49 OSCB 1753; https://www.capitalmarketstribunal.ca/sites/default/files/2026-02/rad_20260220_emerge-canada.pdf

periods of market volatility made him particularly well-suited to be qualified as an expert witness.

[37] The Commission challenged Rostowsky's qualifications and advised that it had objections not only to his qualification as proposed by Emerge Canada and Langley, but also his qualification to opine on the particular categories of expert evidence permitted by our earlier order, as set out above in paragraph [35]. Specifically, the Commission opposed his qualification as an expert on the basis that:

a. he had never previously been qualified as an expert witness in any Ontario court or Tribunal proceeding;

b. his public-fund experience was relatively limited and dated;

c. the Funds were small startup ETFs, while many of the organizations in which he worked were larger and operationally different;

d. the proposed expertise was too broad, covering finance, compliance, compliance infrastructure, and internal audit simultaneously; and

e. his prior working relationship with Langley at the Investment Dealers Association of Canada raised concerns about independence.

[38] The respondents Rounding and Hutchins accepted that Rostowsky possessed expertise in finance and internal audits but submitted that his experience was insufficient to allow him to speak broadly regarding compliance and compliance infrastructure, including about how investment fund managers "customarily" rely on service providers in fulfilling their operational and oversight responsibilities, particularly under the framework of National Instrument 81-107- *Independent Review Committee for Investment Funds* (**NI 81-107**) because:

a. his experience with public funds operating under NI 81-107 was limited;

b. his most relevant experience was approximately ten years old; and

c. he lacked the breadth of experience necessary to opine on what investment fund managers "customarily" do across the industry.

[39] Friesen joined the position taken by Rounding and Hutchins. Alvares did not object to Rostowsky being qualified as an expert, as proposed.

[40] Rather than qualifying Rostowsky on the broad basis proposed by Emerge Canada and Langley, we focussed instead on the four categories of topics we permitted in our prior order. No party objected to this approach. We found that Rostowsky possessed sufficient specialized knowledge, expertise and experience to provide expert evidence on those four categories of topics. Accordingly, we qualified him to address those topics as an expert witness. He possessed both regulatory and fund management experience which was lengthy and broad–based. We were not concerned about Rostowsky's ability to give independent opinion evidence.

[41] However, we confirmed that our qualification of Rostowsky as an expert witness did not determine the admissibility, relevance, necessity, or weight of his evidence, or rule out any other grounds that might be advanced by any of the parties to exclude his evidence. The parties were free to raise objections as Rostowsky testified and also to make submissions in their closings about how we should consider and treat Rostowsky's evidence.

[42] Ultimately, we give little weight to Rostowsky's evidence. Although Rostowsky's expert report was made an exhibit at the merits hearing, it was not particularly reliable in many respects given that it was based on "information" Langley provided to Rostowsky that was not identified or tendered into evidence and it was established in cross-examination that Rostowsky did not have knowledge of key circumstances relevant to this matter. Rostowsky's evidence generally proved to be unhelpful (or neutral) to the Emerge Canada Respondents and, instead, was generally more helpful (or neutral) to the Commission.

3.2 Friesen's proposed opening statement

[43] At the outset of the merits hearing, we advised the respondents that, if they decided to make an opening statement, they could choose to do so immediately after the Commission's opening statement, or they could reserve until after the Commission closed its case. Friesen chose to reserve.

[44] After the Commission closed its case, Friesen advised that, although he was electing to call no evidence, he still wished to deliver an opening statement. In doing so, Friesen acknowledged that this request was unusual and sought direction. We heard submissions on this issue from the parties on April 13, 2026.

[45] The Commission objected to the request on the basis that an opening statement describes anticipated evidence. Since Friesen was not calling any evidence, his opening statement would be more in the nature of argument and would give him the opportunity to offer a preview of his closing submissions. The Commission was not aware of any Tribunal decisions considering this issue. However, it did note that, in the criminal context and subject to the trial judge's discretion, a defendant is sometimes allowed to give an opening statement even when they do not anticipate giving evidence. The other respondents took no position on Friesen's request.

[46] Friesen submitted that he should be allowed to make a brief opening statement because the Tribunal's *Guide to Capital Markets Tribunal Proceedings* (**Guide**) creates a legitimate expectation that that he would be permitted to do so. He pointed to the fact that the Guide provides that a respondent may deliver an opening statement, either at the beginning of the hearing or later when they start their case and does not condition an opening statement on an intention to call evidence. Friesen also submitted that the right to make submissions is codified under s. 10.1 of the *Statutory Powers Procedure Act*[4] (**SPPA**) and, given the quasi-judicial nature of these proceedings, natural justice and procedural fairness required that we permit him to make an opening statement. In addition, Friesen submitted that because the Commission would be reading into the record portions of Friesen's compelled testimony, it would be unfair to deny him the opportunity in an opening statement to, amongst other things, provide context for his compelled testimony.

[47] We decided that we would not permit Friesen to make an opening statement after the Commission closed its case, given his election not to call any evidence. Had we permitted Friesen's proposed opening statement, it would have been the last step in this proceeding prior to the parties' closing submissions. It would not have served the purpose of a typical opening statement, which is to preview the anticipated evidence that a party intends to call, outline the case a party expects to establish through the evidence, and provide a framework or lens through which the party urges an adjudicator to consider the evidence. Instead, we

[4] RSO 1990, c S.22

decided that any opening statement by Friesen would, in the circumstances, be akin to closing submissions. It would be inappropriate to give Friesen two opportunities to make closing submissions.

[48] Section 10.1 of the SPPA does not codify a right to make opening submissions, nor to make opening submissions in all circumstances. It speaks only to "submissions". The Tribunal's *Rules of Procedure* do not specifically address opening submissions. We also do not read the language in the Guide (i.e., "you can still make [an opening statement] later when [you] start [your] case") as either affirmatively authorizing or prohibiting an opening statement after the Commission closes and the respondent intends to call no evidence. The Tribunal has the authority to determine its own practices and procedures and also has the discretion to manage the hearing process to ensure that hearings are conducted justly, expeditiously and cost-effectively.[5]

[49] Further, we found that there was no unfairness to Friesen as he would have full right and opportunity to make closing submissions in the normal course. While "read-ins" of Friesen's compelled evidence tendered by the Commission form part of the evidence, this is so because Friesen elected not to testify, he consented to the "read-ins" being admitted into evidence and he would have full opportunity to address the content of these "read-ins" through closing submissions. In contrast, granting Friesen's request would be unfair to other parties, including the Commission, and would also unnecessarily extend the length of the hearing.

4. ISSUES AND ANALYSIS

4.1 Allegations against Emerge Canada

[50] We first consider the Commission's allegations against Emerge Canada. They are that Emerge Canada:

a. breached its duties owed to the Funds;

b. caused the Funds to make prohibited loans;

c. failed to refer a conflict of interest matter to the Emerge Canada IRC;

[5] Rules, rr 1 and 3; SPPA, s 25.0.1

d. failed to establish adequate systems of control and supervision; and

e. failed to maintain adequate books and records.

[51] The first three of these allegations relate to Emerge Canada's withdrawals of money from the Funds and the creation and growth of the Receivable. They require us to first review and consider the relevant evidence regarding the creation and growth of the Receivable.

4.1.1 Key evidence and factual findings about the creation and growth of the Receivable

4.1.1.a The creation and growth of the Receivable

[52] Based upon the largely unchallenged evidence of the Commission's single witness, Ivy Richmond, an investigator and forensic accountant employed by the Commission, we find that:

a. Between July 2019 and December 2022, Emerge Canada made multiple withdrawals by way of wire transfers from the Funds' bank accounts, totalling over $10 million, thus creating a receivable (previously referred to as the **Receivable**) owed by Emerge Canada to the Funds.

b. The details about the withdrawals comprising the Receivable in the Funds' general ledger accounts and in Emerge Canada's general ledger do not precisely match. The Funds' general ledger accounts show that the Receivable comprised 120 wire transfers to five different recipients (Emerge Canada, Emerge US, ARK LLC, BDO and BLG), totalling $2,483,634.28 and US$6,914,205.66. The Emerge Canada general ledger account shows that the Receivable comprised 117 wire transfers totalling $11,251,902.41 to three recipients: Emerge Canada, Emerge US and ARK LLC.

c. The Receivable increased with each successive withdrawal. The balance of the Receivable also increased and decreased as a result of numerous journal entries (the **Adjustment Entries**), although the overall effect of the Adjustment Entries was a net reduction in the Receivable. The amount of the Receivable at any particular point in time was the net amount of the total withdrawals, plus or minus the total Adjustment Entries.

d. The Funds' general ledgers contain more than 70,000 Adjustment Entries, including daily entries that reduced the Receivable for different types of fees and also entries for transfers among the various Funds' general ledger accounts for the Receivable.

e. There are just under 200 Adjustment Entries in the Emerge Canada general ledger for the Receivable, that include annual reduction journal entries for each of the Funds in 2019, and monthly reduction journal entries for 2020 into 2023. These Adjustment Entries do not have match the descriptions or amounts as the Adjustment Entries in the Funds' general ledgers. Also, the Emerge Canada general ledgers record other fees and expenses journal entries that increased the amount of the Receivable.

f. The Funds' general ledger accounts for the Receivable record interest-related entries for 2020 only, whereas the Emerge Canada general ledger account for the Receivable records interest-related entries for 2020 and 2021.

g. The net result of these accounting differences between the Funds' general ledgers for the Receivable and the Emerge Canada general ledger for the Receivable is that the amount of the Receivable as recorded in the Emerge Canada general ledger does not equal the amount of the Receivable as recorded in the Funds' general ledgers.

h. There is no accounting record or other evidence that Emerge Canada ever made any payment of money to the Funds that reduced the balance of the Receivable. Any reductions to the Receivable are solely attributable to the Adjustment Entries described above.

i. Between 2019 and 2023, the Funds' financial statements record the Receivable as a current asset called "Receivable from the Manager" which is described in the notes to the financial statements at different points either as amounts "pre-paid to the Manager for managing the ETFs" or as "amounts [that] were receivable from the Manager" that the ETFs or the Funds plan to "amortize" or "recover" in subsequent periods against future management fees and administration costs payable to the Manager (i.e., Emerge Canada). Consistent with these notes, the Receivable was reduced (or written down, or off set) by Adjustment Entries that appear to represent Management Fees earned by

Emerge Canada and other expenses incurred by Emerge Canada (purportedly on the Funds' behalf).

j. Beginning June 30, 2021, the Funds' financial statements' notes state that the Funds accrue interest income on the "Receivable from the Manager" at 2.5% annually, with interest accruing since 2020.

k. The Emerge Canada financial statements report the Receivable as a current liability called "Due to Emerge ETFs" and the accompanying notes describe the amount as unsecured and due on demand. The 2019 Emerge Canada financial statements describe the liability as non-interest bearing, whereas the notes in the 2020 and 2021 financial statements describe the liability as bearing interest at 2.5% annually.

l. The amount of the Receivable over the period between 2019 to 2022 as recorded in the Funds' financial statements is set out below. The amounts recorded in the Funds' records do not precisely match those recorded in the Emerge Canada records, but for purposes of quantifying the amount of the Receivable at given points in time, we accept the numbers in the Funds' financial statements that were posted to SEDAR:

	December 31, 2019	**June 30, 2020**	**December 31, 2020**	**June 30, 2021**	**December 31, 2021**	**June 30, 2022**	**December 31, 2022**
Funds' Financial Statements	$486,442	$1,130,752	$1,152,269	$1,165,013	$1,118,223	$2,539,235	$5,908,205

[53] According to Emerge Canada's Notice to Unitholders dated January 4, 2024, the Receivable owing from Emerge Canada to the Funds was $4,694,813.49 as of December 29, 2023. We saw no evidence of any repayments to reduce the Receivable owed to the Funds since that date.

4.1.1.b Emerge Canada's "expense absorption practice" does not explain the entirety of the Receivable

[54] Emerge Canada and Langley attribute the creation and growth of the Receivable to Emerge Canada's voluntary adoption of an "expense absorption practice". Expense absorption is when a fund manager pays some of a fund's operating expenses itself, rather than charging all of those expenses to the fund and,

ultimately, to fund investors. Expense absorption has the effect of reducing a fund's expenses, and therefore also its management expense ratio.

[55] The 2019 and 2020 prospectuses for the Funds disclosed that, at its sole discretion, Emerge Canada may from time to time absorb a portion of the operating expenses of one or more of the ARK ETFs. They also disclosed that Emerge Canada was under no obligation to absorb such operating expenses and could discontinue the practice at any time. The Funds' June 2021 preliminary and pro forma simplified prospectuses included the additional disclosure that:

a. Emerge Canada would *either* absorb the Funds' operating expenses by paying them directly *or* by reimbursing the ARK ETFs for such expenses after they had been paid by the ARK ETFs; and

b. reimbursement after they had been paid by the ARK ETFs could *either* occur "directly" *or* "by setting off such expense amount" against the Management Fees owed by the Funds to Emerge Canada "over time".

[56] It is this latter mechanism (i.e., reimbursement by setting off against Management Fees "over time"), referred to as Emerge Canada's "expense absorption practice", that Emerge Canada and Langley say created the Receivable. Specifically, the "expense absorption practice" involved Emerge Canada committing to reimburse the ARK ETFs for operating expenses paid by the ARK ETFs and "absorbed" by Emerge Canada by offsetting Management Fees to be owed in future by the Funds to Emerge Canada against the absorbed expenses that increased the Receivable.

[57] The Funds' financial statements reported that Emerge Canada absorbed a total of $2,633,552 of the Funds' operating expenses between 2019 and June 2023.

[58] In response to a summons during the Commission's investigation of this matter, Emerge Canada prepared and provided to the Commission a list of the Funds' operating expenses that it purportedly paid directly or "absorbed" (**Funds Expenses List**). This list indicates that Emerge Canada absorbed a greater amount of the Funds' operating expenses than the amount reported in the Funds' financial statements. No witness explained the discrepancy. We consider the Funds' financial statements to be the more reliable source.

[59] The aggregate amount of Fund operating expenses per the Funds' financial statements that Emerge Canada absorbed over the relevant period ($2,633,552) is significantly less than the more than $10 million of withdrawals comprising the Receivable. (It is also less, even considering the higher number for Fund operating expenses absorbed by Emerge Canada identified by Emerge Canada in the Funds Expenses List.) The amount of absorbed Fund operating expenses reported for the period of each of the Funds' financial statements was also significantly less than the amount of the Receivable that was reported for the corresponding period. Even if we assume that all of the Fund expenses that Emerge Canada absorbed were initially paid by the ARK ETFs (rather than by Emerge Canada directly) and corresponding amounts were added to the Receivable and treated as amounts to be reimbursed to the ARK ETFs by Emerge Canada in future by setting off future Management Fees earned by Emerge Canada, it is evident that the Emerge Canada expense absorption practice does not account for all of the withdrawals comprising the Receivable.

[60] We are satisfied that, contrary to Emerge Canada's and Langley's submissions, not all the withdrawals comprising the Receivable are attributable to Emerge Canada's expense absorption practice. Further, as explained below, we also find that a significant portion of the money Emerge Canada withdrew from the Funds to create the Receivable was used to pay for Emerge Canada's and Emerge US's operating expenses.

4.1.1.c Emerge Canada withdrew money from the Funds that was used to pay Emerge Canada's and Emerge US's operating expenses

[61] Other than Emerge Canada and Langley seeking to attribute the entirety of the Receivable to the expense absorption practice, none of Emerge Canada, Langley or Alvares seriously contests the Commission's submission, or challenges its evidence, that a portion of the withdrawals from the Funds was used to pay for Emerge Canada's and Emerge US's operating expenses. As detailed below, Langley acknowledged as much in her testimony.

[62] Our finding that Emerge Canada used a significant portion of the money it withdrew from the Funds to pay Emerge Canada's and Emerge US's operating expenses is based on the following evidence:

a. the difference between the total withdrawals comprising the Receivable (approximately $10 million) and total Fund operating expenses absorbed by Emerge Canada ($2,633,552), confirming that a significant portion of the withdrawals from the Funds comprising the Receivable was not attributable to the absorption of Fund operating expenses;

b. Richmond's source and use analysis (**Analysis**) of the inflows and outflows of money in bank accounts of Emerge Canada, Emerge US and Langley which was not challenged or contradicted in cross-examination or testimony and established, among other things, that in the period after the Funds were formed in June 2019:

i. $2,314,884.28 and US$5,438,166.18 of Funds' money went directly to Emerge Canada and US$1,082,538 of Funds money went directly to Emerge US. These amounts match almost identically to those withdrawals comprising the Receivable that were wired to Emerge Canada and Emerge US, respectively, and account for approximately 93% of the total wire transfers comprising the Receivable;

ii. Emerge Canada spent a total of $7,324,578.90 and US$4,116,220.92 in outflows on various identified categories of items and payees;

iii. Emerge US spent a total of US$27,943,893.41 in outflows on various identified categories of items and payees; and

iv. without the money from the Funds and Emerge Canada, Emerge US did not have enough money from other sources to pay all its expenses;

c. Richmond's evidence and Analysis confirming that:

i. after the Funds were formed, Emerge Canada received approximately $3 million and US$7 million from all sources, nearly 80% of which money (approximately $2.3 million and US$5.4 million) came from the Funds;

ii. although Emerge Canada spent all of the money it received from all sources, only an estimated maximum of 30.9% of its Canadian dollar expenses and 7.9% of its US dollar expenses were made for identifiable

Fund expenses, demonstrating that money that Emerge Canada received from the Funds was used to pay for expenses that were not Fund expenses;

iii. after the Funds were formed, Emerge US received approximately US$5.37 million from both Emerge Canada and the Funds, in circumstances where Emerge Canada could not have made the payments to Emerge US without using money taken from the Funds; and

iv. in the same period, Emerge US spent all the money it received from all sources, and only an estimated US$2.92 million was spent on potentially identifiable Funds' expenses;

d. Richmond's evidence that there were multiple transactions in which Funds' money was deposited into an Emerge Canada or Emerge US bank account and was followed almost immediately by expenditures from the account that had no apparent relation to the Funds' expenses, in circumstances where the account did not contain sufficient funds to cover those expenditures before the Funds' money was deposited; and

e. evidence (including Langley's testimony) establishing that consulting fees paid to Emerge US for significant marketing and promotional work for the ARK ETFs were charged to the Funds although they should have been covered by the Management Fees; and

f. Langley's testimony that confirmed that marketing and promotion expenses related to growing Emerge Canada's funds and related sales efforts (including for the launch of the EMPWR Funds in 2022) increased the Receivable in 2022, despite it being established that these expenses were not proper Fund expenses.

4.1.2 Did Emerge Canada breach its s. 116 duties to the Funds?

[63] As an investment fund manager, Emerge Canada owed a fiduciary duty or duty of loyalty to the Funds under s. 116(a) of the Act, requiring it to exercise its powers and discharge it duties honestly, in good faith and in the best interests of

the Funds.[6] It also had a duty under s. 116(b) of the Act to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.[7]

[64] As a fiduciary, Emerge Canada had an obligation to place the interests of the Funds ahead of its own, to protect the interests of the Funds and to treat the money invested in the Funds with the "utmost care".[8] It also had an obligation to generally avoid material conflicts of interest and transactions that give rise to material conflicts of interest, including self-interested and related party transactions.[9] Further, where a conflict of interest cannot be avoided, or where a material self-interested or related party transaction is proposed, it had a duty to ensure that the conflict of interest or transaction was appropriately addressed as a matter of good governance, including in compliance with NI 81-107.[10]

[65] The duty of care imposed under s. 116(b) is objective and a nefarious intent is not required to establish a breach.[11] The duty requires an investment fund manager to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.[12]

[66] The Commission submits that Emerge Canada breached its fiduciary duty, duty of loyalty and duty of care owed to the Funds under s. 116 of the Act by:

a. withdrawing money from the Funds to pay for Emerge Canada's and Emerge US's own operating expenses, which was self-dealing activity from which Emerge Canada derived a substantial benefit;

b. failing to handle the conflict of interest that was inherent in withdrawing money from the Funds and creating and growing the Receivable; and

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[6] Act, s. 116(a); *Crown Hill Capital Corporation (Re),* 2013 ONSEC 32 (***Crown Hill***) at paras 107–112

[7] Act, s. 116(b); *Crown Hill* at paras 117 and 143, aff'd *Pushka v Ontario Securities Commission*, 2016 ONSC 3041 (Div Ct) (***Pushka***)

[8] *Crown Hill* at paras 107–112

[9] *Crown Hill* at para 112

[10] *Crown Hill* at paras 106 and 112

[11] *Crown Hill* at para 117 aff'd *Pushka*; *Pro-Financial Asset Management Inc (Re),* 2017 ONSEC 9 (***Pro-Financial***) at para 143

[12] *Pro-Financial* at para 143

c. having no plan to repay the Receivable and failing to seize available opportunities to reduce the Receivable.

[67] The Commission's submissions do not offer separate reasons to support a finding that Emerge Canada breached each of s. 116(a) and s. 116(b) of the Act. Instead, they contemplate that the same Emerge Canada actions and failures result in a breach of both s. 116 obligations. As explained below, we find that Emerge Canada breached s. 116(a) for each of the reasons advanced by the Commission. In this case, each of those reasons also establishes that Emerge Canada failed to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances, in breach of s. 116(b) of the Act.

[68] Emerge Canada and Langley submit that Emerge Canada did not breach s. 116(a) of the Act because it did not subordinate the Funds' interests to its own or engage in self-dealing. They rely on the fact that the amounts Emerge Canada withdrew from the Funds were recorded as a receivable owing to the Funds, carried at full value in audited financial statements, and bore interest in the Funds' favour. They further submit that Emerge Canada expected to repay the Receivable and pursued financing and a sale transaction for that purpose, but that repayment was ultimately prevented by the market decline and the wind-down of the business, rather than by any decision to prefer Emerge Canada's interests over those of the Funds.

[69] Emerge Canada and Langley seek to distinguish *Crown Hill Capital Corporation (Re)* (***Crown Hill***), where the fund manager was found to have acted in bad faith and used fund assets for its own financial benefit. They submit that Emerge Canada's treatment of the Receivable and its efforts to repay it are inconsistent with such conduct and, in particular, with a manager treating fund property "as its own", enriching itself at the Funds' expense, or otherwise preferring its own interests to those of the Funds.

[70] Emerge Canada and Langley also submit that Emerge Canada met the standard of care under s. 116(b) because it retained and relied on qualified independent professionals, including RBC, BDO, Grant Thornton and BLG, to whom the treatment of the Receivable was disclosed and who carried, audited or advised

on it. They argue that this reliance was reasonable and informed, particularly because securities law did not prescribe how an emerging fund manager was to account for the absorption of fund expenses or the timing of its fees.

[71] Again, Emerge Canada and Langley seek to distinguish *Crown Hill* on the basis that the reliance there was on conflicted insiders who had not been adequately informed, whereas Emerge Canada relied on independent professionals with knowledge of the Receivable. In their submission, the recording of the Receivable in the Funds' favour, the accrual of interest, the clean audits and the efforts to obtain repayment demonstrate that Emerge Canada exercised the care, diligence and skill of a reasonably prudent investment fund manager, notwithstanding that the Receivable ultimately remained unpaid.

[72] Alvares makes submissions similar to those of Emerge Canada and Langley. Alvares also submits that he did not personally benefit from the Receivable or enrich himself at the Funds' expense and, to the contrary, he lent significant personal and family funds to Emerge Canada, which remain unpaid, and obtained a personal line of credit to ensure that Fund and Emerge Canada expenses, including payroll, were paid. These additional submissions are not relevant to the question of whether Emerge Canada breached s. 116 of the Act.

[73] The fact that Emerge Canada recorded its withdrawals from the Funds as part of the Receivable, disclosed them as a part of the Receivable, charged itself interest on the Receivable and expected or intended to repay the Receivable does not excuse or mitigate the fact that Emerge Canada withdrew money from the Funds to pay for its own and its affiliate Emerge US's business expenses. Emerge Canada's withdrawals of money from the Funds to pay for its own and Emerge US's business expenses is a clear example of self-dealing and a self-interested transaction that put Emerge Canada's interests ahead of those of the Funds, contrary to s. 116(a) of the Act.[13] Fund money was taken and used to benefit Emerge Canada and used for purposes other than Fund investments and proper Fund operating expenses, exposing the Funds to the risk (which actually materialized) that the money would not be repaid.

[13] *Crown Hill* at paras 106, 108, 112 and 113

[74] We reject Emerge Canada's and Langley's submission that the facts here are so different from those in *Crown Hill* that there is no breach of s. 116(a). *Crown Hill* makes clear that transactions that involve the advance of fund assets to a fund manager or where fund assets are used for the benefit of a fund manager (including by way of a loan) are self-interested or related party transactions and that s. 116 requires investment fund managers to generally avoid such transactions.[14]

[75] We also agree with the Commission that there is no question that Emerge Canada's creation of the Receivable (*both* by withdrawing money from the Funds to pay Emerge Canada's and Emerge US's business expenses *and* through Emerge Canada's expense absorption practice) raised a clear conflict of interest. NI 81-107 defines a "conflict of interest matter" in part as:

> (a) a situation where a reasonable person would consider a manager, or an entity related to a manager, to have an interest that may conflict with the manager's ability to act in good faith and in the best interests of the investment fund;...[15]

[76] As already noted, Emerge Canada's creation of the Receivable by withdrawing and using Fund money for its own and its affiliate's business purposes was an example of self-dealing and clearly a conflict of interest matter. Matters related to the allocation (or charging) of an investment fund manager's operating expenses to a fund are recognized to create an inherent conflict of interest, as supported by Staff Notices. Indeed, the Policies and Procedures for Emerge Canada Conflict of Interest Matters document approved by Emerge Canada and the Emerge Canada IRC (**COIM Manual**) itself recognized this inherent conflict of interest and stated that Emerge Canada managed this conflict by "clearly disclosing to investors the expenses which are charged to the Funds and ensuring that none of the Manager's general operating expenses are borne by the Fund".[16]

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[14] *Crown Hill* at paras 106, 108, 112, 113, 358-360, 367–370, 380–386, and 394–395

[15] NI 81-107, s. 1.2(a)

[16] Exhibit 4, Doc ID 13935_00002045.0014, Policies and Procedures for Emerge Canada Conflict of Interest Matters at p 16

[77] Furthermore, the creation and growth of the Receivable by way of Emerge Canada's expense absorption practice was also a related party transaction (between Emerge Canada and the Funds) that created a conflict of interest between the interests of the Funds and Emerge Canada. Both mechanisms through which the Receivable was created and grown resulted in an obligation on the part of Emerge Canada to the Funds (i.e. repayment).

[78] In addition, even Emerge Canada's decision not to initially charge itself interest on the Receivable and then, subsequently, to unilaterally fix the interest rate it was charged also raised a conflict of interest.

[79] Although the Receivable was disclosed in the Funds' financial statements, the fact that Emerge Canada created a significant part of the Receivable by withdrawing money to pay for its and its affiliate's business expenses was not. Further, although the Funds' prospectuses did disclose that Emerge Canada might decide to absorb some operating expenses of the Funds, Emerge Canada's expense absorption practice was not disclosed until June 2021. In any event, disclosure neither eliminates the existence of a conflict of interest, nor does it always satisfy the obligation of the investment fund manager to appropriately manage a conflict of interest and act in the best interests of the investment fund.[17]

[80] Emerge Canada failed to recognize and acknowledge that the creation and growth of the Receivable created conflicts of interest. As we find below in section 4.1.4, Emerge Canada breached NI 81-107 by failing to refer the conflicts of interest to the Emerge Canada IRC before creating and growing the Receivable. Emerge Canada also breached its duties under s. 116(a) of the Act by failing to ensure that the conflicts of interest were appropriately addressed.[18]

[81] We have considered the Commission's submission that Emerge Canada's failure to repay the Receivable when it had the opportunity to do so further demonstrates a breach of s. 116(a) of the Act by placing the expansion and profitability of its own business ahead of the Funds' interests. The Commission

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[17] *Crown Hill* at para 106, aff'd *Pushka*

[18] *Crown Hill* at paras 106 and 112, aff'd *Pushka* where the Divisional Court held that the "findings are all well grounded in the jurisprudence" at para 120

relies on Emerge Canada's decision to pursue the launch of the EMPWR Funds, despite requiring money from the Funds to do so. It also relies on Langley's evidence that there was no written strategy for repaying the Receivable and that she regarded the Receivable as essentially "self-solving" through increased future Management Fees that could be set off against the Receivable, a refinancing or a strategic partner, none of which materialized. According to the Commission, there were at least three opportunities for Emerge Canada to make some repayment against the Receivable.

[82] Whether or not the three opportunities for repayment were realistic, we find that the decision to prioritize expansion of the Emerge Canada business and increase the Receivable is a further example of Emerge Canada preferring its own interests over those of the Funds.

[83] Although Emerge Canada and Langley acknowledge that reliance on third party service providers is not, in itself, an answer to a contravention of Ontario securities law, they nevertheless argue that Emerge Canada met the standard of care under s. 116(b) of the Act because it retained and relied on qualified third party professionals (RBC, BDO, Grant Thornton and BLG) who were aware of the Receivable. They submit that because Ontario securities law did not prescribe a specific rule for how a fund manager was to account for the absorption of fund expenses or the timing of taking its management fees from an investment fund, it was reasonable for it to seek the guidance of qualified professionals on this point. They point to the fact that Emerge Canada's practice of creating the Receivable was visible to RBC as custodian and administrator, as it calculated the Funds' daily NAV which included the value of the Receivable. They also point to the fact that BDO audited the Funds for three years between 2019 and 2021 without questioning the Receivable or its classification.

[84] No party identified to us any cases where an investment fund manager successfully argued a defence to breaches of either s. 116(a) or s. 116(b) based on services received from third party providers. In any event, we conclude that we need not determine the availability of such a defence because the available evidence in this case does not support any finding that Emerge Canada sought, received or reasonably relied on advice from third parties about whether creating and growing the Receivable would breach its obligations under s. 116 of the Act.

Indeed, to the contrary, the evidence shows that both RBC and BDO, as well as the Emerge Canada IRC, raised significant questions and concerns beginning as early as 2020 about the Receivable that Emerge Canada essentially ignored by continuing to grow the Receivable.

[85] In addition to finding that the facts that support a breach of s. 116(a) of the Act also establish a breach of s. 116(b), we find that by creating and growing the Receivable in circumstances that so obviously raised conflicts of interest and self-interest and by so blatantly ignoring the repeated concerns about the Receivable expressed by third party service providers, Emerge Canada also failed to exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances, thereby also breaching s. 116(b) of the Act.

4.1.3 Did Emerge Canada cause the Funds to provide a prohibited loan?

[86] The Commission alleges that the Receivable constituted a prohibited loan and that Emerge Canada breached s. 13.5(2)(c) of NI 31-103 - *Registration Requirements, Exemptions and Ongoing Registrant Obligations* (**NI 31-103**), by causing the Funds to provide such loan to it. Section 13.5(2)(c) provides, in relevant part:

> **13.5 (2)** A registered adviser must not knowingly cause an investment portfolio managed by it, including an investment fund for which it acts as an adviser, to do any of the following:
>
> …
>
> (c) provide a guarantee or loan to a responsible person or an associate of a responsible person.

[87] The purpose of this provision is to prohibit and prevent self-dealing transactions between a portfolio manager and the fund that it manages.[19]

[88] We accept the Commission's submission that, as the portfolio manager for the Funds, Emerge Canada was prohibited from causing the Funds to provide a loan to Emerge Canada or to any of Emerge Canada's associates. Emerge Canada was

[19] *Crown Hill* at paras 148 and 358 (referring to s. 118 of the Act, the predecessor to s. 13.5(2)(c) of NI 31-103), aff'd *Pushka*

a "registered adviser" and the Funds were "investment funds" for which it acted as an "adviser" for purposes of the introductory language in s. 13.5(2) of NI 31-103. Emerge Canada was also a "responsible person" for purposes of s. 13.5(2)(c). Subsection 13.5(1) of NI 31-103 defines "responsible person" to include "the adviser" and a portfolio manager is a category of "adviser" registration under s. 26(6)(1) of the Act.

[89] Emerge Canada, Langley and Alvares submit that the Receivable was not a "loan" within the meaning of s. 13.5(2)(c) of NI 31-103. Emerge Canada and Langley further submit that, even if we find the Receivable to have been a "loan", the requisite knowledge element for a breach of s. 13.5(2)(c) of NI 31-103 has not been established by the Commission because any loan was not "knowingly caused". Emerge Canada and Langley also submit that a purposive reading of the section should not capture the Receivable, in this case.

[90] Neither the Act nor NI 31-103 defines the term "loan". No party took us to any Tribunal decisions that have considered the meaning of "loan" in s. 13.5(2) of NI 31-103.

[91] Emerge Canada and Langley submit that the Receivable was not a "loan", because it was not perceived to be, and in substance was not, a loan. They focus on the fact that the money Emerge Canada withdrew from the Funds was called a "receivable" and not a "loan". They also submit that the Receivable was not a loan because it was created as a part of the common industry practice of expense absorption and arose because of "fee timing", which we understand to be a reference to Emerge Canada pre-paying itself Management Fees out of the Funds. Even though they acknowledge that the Receivable was a debt owing by Emerge Canada to the Funds, they submit that Emerge Canada's expense absorption practice and borrowing are two mutually distinct concepts.

[92] We accept the Commission's submission that nothing turns on the fact that the balance owing from Emerge Canada to the Funds was called a "receivable" rather than a "loan". This would put form over substance and ignore that the economic characteristics of the Receivable clearly align with the defining features of a loan. A "loan" is a widely understood commercial concept, and the ordinary meaning of "loan" is a sum of money given temporarily on the condition that it be

returned.[20] The "essence of a loan" has been described as an obligation to repay, often with interest, whether or not the loan obligation specifies when it is to be repaid.[21]

[93] The Receivable arose as a result of money withdrawn by Emerge Canada from the Funds, and there is no dispute that Emerge Canada had an obligation to return or repay the amounts withdrawn, including interest accruing on such amounts from 2020. In our view, the fact that Emerge Canada intended or hoped that the Receivable could be fully repaid by offsetting against the Receivable Management Fees that would be earned in the future by Emerge Canada or other fees that would be owed in future by the Funds to Emerge Canada, does not change the fact that Emerge Canada caused the Funds to loan it money.

[94] We find that all of the amounts withdrawn and comprising the Receivable were loans from the Funds to Emerge Canada, regardless of whether the amounts were withdrawn by Emerge Canada and used to pay its and Emerge US's business expenses or were withdrawn as part of Emerge Canada's expense absorption practice. While we accept Emerge Canada's evidence that expense absorption by an investment fund manager is a common practice, we find that Emerge Canada's approach to expense absorption conflated the concept of the investment fund manager assuming and paying for certain Fund expenses with the mechanism of borrowing from the Funds to actually finance the expense absorption.

[95] Emerge Canada and Langley submit that even if we find that the Receivable was a loan, the Commission cannot establish that Emerge Canada "knowingly" caused the loan in breach of s. 13.5(2)(c) of NI 31-103 because Emerge Canada treated the withdrawals as "expense reimbursement and fee timing", recorded them as a receivable, and its external counsel, BLG, advised that the arrangement was not borrowing. Emerge Canada and Langley submit, in

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[20] *Abrametz v Law Society of Saskatchewan*, 2020 SKCA 81 at para 125 citing *Distribulite Ltd v Toronto Board of Education Staff Credit Union Ltd,* 1987 CanLII 4162 (ON HCJ), 45 DLR (4th) 161 at p 215

[21] *Heaman & Heaman v Schnurr*, 2011 ONSC 2661 (SCJ) at paras 25-26; *Connors v Gaffney*, 2014 ONSC 689 (SCJ) at paras 31–33

essence, that because Emerge Canada did not understand or perceive the Receivable to constitute a loan, the knowledge element is not made out.

[96] No party referred us to any cases interpreting "knowingly" caused under s. 13.5(2)(c) of NI 31-103. However, we accept the Commission's submission that we can take some guidance from the fact that the knowledge element for securities fraud under s. 126.1(1)(b) of the Act does not require proof that a respondent knew that an act was prohibited and perpetrated a fraud. Rather, the knowledge of the prohibited act is proven where the respondent knowingly understood the act.[22] Moreover, and quite apart from the knowledge requirements for fraud, registrants are expected to know their obligations under Ontario securities law and to know what conduct on their part is required in order to fulfill those obligations. Accordingly, we agree with the Commission that it is not necessary for us to find that Emerge Canada knew that the withdrawals comprising the Receivable were prohibited loans. A breach is established because Emerge Canada clearly knew about and caused the withdrawals comprising the Receivable.

[97] Emerge Canada and Langley refer to a statement made by a lawyer from BLG recorded in an unofficial transcript of a January 6, 2022, meeting of Emerge Canada, BLG and the Emerge Canada IRC, to the effect that the methodology that Emerge Canada was using for expense absorption was not, in her view, "borrowing".[23] Emerge Canada and Langley do not suggest that this amounts to legal advice or a legal opinion that could offer a potential defence to a breach, but suggest that it is evidence of Emerge Canada's good faith. In our view, the BLG lawyer's statement falls far short of legal advice that might offer a defence. In the absence of evidence regarding what Emerge Canada disclosed to BLG about the Receivable, and the communications between them concerning it, we do not accept that this single comment evidences good faith. The comment was

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[22] *First Global Data Ltd (Re)*, 2022 ONCMT 25 at paras 388 and 390; *Hogg (Re)*, 2024 ONCMT 15 at paras 142 and 147, aff'd *Hogg v Chief Executive Officer,* 2025 ONSC 6214 (Div Ct); *TeknoScan Systems Inc (Re)*, 2024 ONCMT 32 at para 210; *Mughal Asset Management Corporation (Re)*, 2023 ONCMT 39 at para 52; *Solar Income Fund Inc (Re)*, 2022 ONSEC 2 at para 178, aff'd *Kadonoff v OSC*, 2023 ONSC 6027 (Div Ct)

[23] Exhibit 19, Transcript of IRC Meeting on January 6, 2022, at time stamp 35:18-35:49

made nearly two and a half years after Emerge Canada had already created and grown the Receivable, including to fund its own business expenses.

[98] In any event, even if Emerge Canada acted in good faith, not believing the Receivable to be a loan, as we have concluded above, this would be irrelevant to finding a breach of s. 13.5(2)(c) of NI 31-103.

4.1.4 Did Emerge Canada breach NI 81-107 by failing to refer conflicts of interest to the Emerge Canada IRC related to creating and growing the Receivable?

[99] We concluded above that the creation and growth of the Receivable resulted in conflicts of interest between the interests of Emerge Canada and the interests of the Funds. The withdrawal of money from the Funds that created and grew the Receivable began in July 2019 and continued until December 2022. We find that Emerge Canada failed to refer these conflicts of interest to the Emerge Canada IRC before proceeding to create and grow the Receivable and therefore breached s. 5.1(1) and s. 5.3(1) of NI 81-107.

[100] The National Instrument is clear with respect to the sequencing of events:[24]

a. the investment fund manager must identify a conflict;

b. the investment fund manager must formulate a proposed action for dealing with the conflict *before* taking any action in the matter;

c. the investment fund manager must refer the conflict and its proposed action to the IRC;

d. the IRC must review the conflict and proposed action and make a recommendation to the investment fund manager approving (or not) the proposed action; and

e. the investment fund manager must consider the IRC's recommendation before proceeding with the proposed action.

[101] Emerge Canada and Langley do not dispute that Emerge Canada never referred the conflicts of interest relating to the Receivable to the Emerge Canada IRC.

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[24] NI 81-107, ss 5.1(1) and 5.3(1)

Instead, they submit that there was no conflict of interest, the Receivable was not "hidden" from the Emerge Canada IRC, and the Receivable was not viewed by them as a conflict of interest, in any event. They submit that Emerge Canada's judgment that the creation and growth of the Receivable did not raise a referable conflict of interest was reasonable and held in good faith. In support of this submission, they point to the evidence of Rostowsky, which we find is mischaracterized in their written submissions. Contrary to their submissions, Rostowsky did not give evidence suggesting or supporting the notion that Emerge Canada's approach to the absorption of Fund expenses was not an IRC referral matter. Instead, his evidence made clear that he had never before seen any case where an investment fund manager had approached the absorption of fund expenses in the way Emerge Canada did, namely by promising to reimburse the fund for the absorbed fund expenses at an unknown point in the future.

[102] Alvares makes no submissions about whether Emerge Canada breached NI 81-107 by failing to refer conflicts related to the Receivable to the Emerge Canada IRC.

[103] None of Emerge Canada's and Langley's submissions offers a defence or answer to the breach of NI 81-107 by Emerge Canada. In particular, the fact that Emerge Canada may have failed to identify the clear conflicts of interest in this case is no defence.

[104] We find that Emerge Canada failed to refer the conflicts of interest raised by the Receivable to the Emerge Canada IRC prior to first creating the Receivable in July 2019. It also failed to refer the related conflicts of interest at any point over the following years before continuing to grow the Receivable. This was in breach of both s. 5.1(1) and s. 5.3(1) of NI 81-107.

[105] Although Emerge Canada did bring the Receivable to the Emerge Canada IRC's attention in October 2021 at RBC's insistence, this did not, as explained below, constitute a referral to the Emerge Canada IRC under NI 81-107.

4.1.5 Did Emerge Canada fail to establish adequate systems of control and supervision?

[106] Subsection 32(2) of the Act and s. 11.1 of NI 31-103 require investment fund managers and registered firms such as Emerge Canada to establish and maintain

systems of control and supervision to ensure that the firm and individuals acting on its behalf comply with securities laws.

[107] The Commission submits that the facts surrounding the creation and growth of the Receivable establish that Emerge Canada failed to establish systems of control and supervision.

[108] Emerge Canada and Langley submit that policies and procedures need only be sufficient to provide reasonable assurance of compliance and to manage risk. Securities law does not require a guarantee against every failure. Emerge Canada adopted the COIM Manual and retained RBC, BDO and external counsel. Langley's expert witness, Rostowsky, testified that the framework developed by Emerge Canada met the standard expected of an emerging fund manager. Emerge Canada and Langley further submit that Emerge Canada's systems worked and the fact that the Receivable grew did not establish that Emerge Canada lacked adequate systems of control.

[109] The Commission submits that although Emerge Canada had policies and procedures pertaining to conflicts of interest matters such as the Receivable, namely the COIM Manual, Emerge Canada failed to implement and follow its own policies and procedures.

[110] The Commission submits that there are various examples of conduct that establish that Emerge Canada failed to implement and maintain an effective compliance system. We agree that the following establishes that Emerge Canada's systems of control and supervision related to conflicts were inadequate:

a. Langley's testimony established that Langley was unable to identify potential conflicts of interest and did not understand the role of an IRC, thus confirming that Emerge had no real or effective system to monitor for compliance with its COIM Manual. As a result, Emerge Canada breached various requirements under securities law which were set out in the COIM Manual. For example, the COIM Manual required that Emerge Canada act honestly, in good faith and in the best interests of the Funds. Without any monitoring or controls, Emerge Canada acted contrary to its obligations at law and contrary to its policies and procedures described in the COIM Manual. It used Fund Assets to

sustain Emerge Canada's and Emerge US's operations, thereby putting its own interests ahead of the Funds.

b. The COIM Manual also required Emerge Canada to identify potential conflicts, determine and propose appropriate action in respect thereof, and refer such matters to the Emerge Canada IRC in a timely manner. While the COIM Manual set out a process, we find that Emerge Canada did not follow that process largely due to Langley's inability to identify potential conflicts of interest. As a result, Emerge Canada did not refer any conflict of interest matters related to the Receivable to the Emerge Canada IRC, either at the time the Receivable was created, or at anytime thereafter.

[111] The Commission provides further examples of Emerge Canada's failure to implement and maintain an adequate system of controls and supervision, unrelated to conflict issues. For instance, it submits that Langley was able to disburse money from Emerge Canada, including money from the Funds, to Emerge US with no or insufficient controls to monitor such disbursements and the propriety thereof. Alvares testified that he authorized withdrawals from the Funds even though he was not aware of how the money was being spent by Emerge US and despite not being able to justify the amounts that were withdrawn, confirming that there was an inadequate system of checks and balances on withdrawals to restrict, monitor or validate the use of the money and to prevent misuse.

[112] Accordingly, we make no findings with respect to these control breaches because the Commission did not plead these non-conflict related compliance breaches in the AEP. We find that Emerge Canada lacked adequate systems of control and supervision related to conflicts. A COIM Manual is not helpful if it is not understood and applied. While policies and procedures (i.e., a framework) are essential, they do not make an acceptable compliance system on their own. An effective compliance system includes controls, monitoring, and supervision and reporting. Similarly, an IRC cannot serve its function if the fund manager does not understand what constitutes a conflict and how a conflict must be effectively managed.

4.1.6 Did Emerge Canada fail to maintain adequate books and records?

[113] The Commission submits that Emerge Canada failed to maintain adequate books and records contrary to s. 19(1) of the Act and s. 11.5 of NI 31-103. Recordkeeping is vital for the proper, transparent maintenance of a fund and proper participation in the capital markets.[25] A failure to maintain adequate records of significant transactions involving the use of investors' funds runs contrary to the record keeping obligations.[26] Adequate records are a core regulatory requirement because they allow regulators, auditors, and firms themselves to assess compliance with applicable securities law.

[114] The Commission submits that the evidence adduced establishes that:

a. deficiencies and discrepancies in Emerge Canada's books and records make it impossible to track its use of the investor money that was withdrawn from the Funds and recorded as a Receivable;

b. Emerge Canada's books and records do not match Emerge US's, and cash transfers between the two entities are sometimes recorded differently; and

c. Emerge Canada's records do not accurately or adequately record compensation arrangements with Langley.

[115] Emerge Canada and Langley submit that the books and records of Emerge Canada demonstrate compliance with its obligations, and the requirement is not a forensic allocation of every dollar. Gaps in the granularity of particular entries are not an absence of books and records.

[116] Emerge Canada and Langley further submit that every withdrawal from the Funds was recorded through a signed "Notification to Pay" form. The Receivable was recorded in the general ledger and in three years of audited financial statements. The Funds' accounting records were maintained by RBC as administrator. As for Langley's remuneration, she was not paid by Emerge Canada, but by Emerge US and disclosure was made to Emerge US's accountants.

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[25] *Juniper Fund Management Corporation (Re)*, 2013 ONSEC 17 at para 156

[26] *Norshield Asset Management (Canada) Ltd (Re)*, 2010 ONSEC 4 at paras 258 and 264

[117] Alvares' position is that the books and records relating to the Receivable were sufficiently complete and reliable to satisfy the applicable requirements. He submits that the receivable was reflected daily in the Funds' NAV and was supported by records maintained through RBC and Grant Thornton, together with three BDO audits covering 2019 to 2021. Transactions were subject to established controls, including dual-signature authorization and callback verification for external wires, and were recorded either as amounts receivable from Emerge Canada or as expenses charged directly to the Funds. The Receivable was also reduced through a daily recovery process administered by RBC. According to Alvares, these records and processes enabled the Receivable and the underlying transactions to be identified, reconciled and, where applicable, recovered, including before each year-end.

[118] Alvares acknowledges that there were difficulties in reconciling particular transactions and allocations across the various entities, ledgers and accounting systems, and that he could not quantify every allocation with precision. He contends, however, that these difficulties reflected the mechanics of cross-entity accounting, differing accounting treatments, third party bookkeeping and limitations on access to certain Emerge US records, rather than an absence of underlying records or inadequate controls. He further submits that some supporting materials maintained by Grant Thornton were not considered in Richmond's analysis and that some payments properly appeared as direct Fund expenses rather than receivables in Emerge Canada's accounts. Alvares argues that the discrepancies identified by the Commission do not show problems with the required books and records or internal controls. He relies mainly on the RBC and Grant Thornton records, the procedures used to authorize and reconcile transactions, and BDO's audits for the relevant periods.

[119] We find that the evidence establishes that deficiencies and discrepancies in Emerge Canada's books and records make it impossible to track its use of the money that was withdrawn from the Funds and recorded as a Receivable. None of Emerge Canada's, Langley's and Alvares' submissions adequately responded to this evidence, which includes:

a. the vast majority of the "Notification to Pay" forms that Emerge Canada completed to arrange for the wire transfer withdrawals from the Funds

comprising the Receivable contained unhelpful and meaningless information about the reason for the withdrawal, simply referencing "Processing of Receivable" in the box titled "Details of Payment";

b. the Receivable amount owing to the Funds recorded in Emerge Canada's general ledger was reduced by almost $7.4 million through a series of Adjustment Entries with no explanation or records explaining the reasons for the Adjustment Entries, including whether they were on account of off-setting Management Fees or other expenses incurred or paid by Emerge Canada on behalf of the Funds and, if for other expenses, what those other expenses were;

c. the Emerge Canada general ledgers do not indicate what portions of the reductions to the Receivable relate to each Fund (except for 2019) or indicate what portion of the Receivable is owed to each Fund;

d. although Emerge Canada began allocating a portion of its operating expenses to the Funds in 2021, impacting the Receivable, Emerge Canada's general ledgers do not contain journal entries indicating or particularizing which Emerge Canada expenses were charged to the Funds; and

e. although it appears that some of the Emerge Canada expenses it charged to the Funds may be included as "Operation Administration" and "Operation Support" expenses in the Funds Expenses List, such amounts greatly exceed the 2021 total amount of Emerge Canada operating expenses allocated to the Funds according to the BDO working papers.

[120] We also find that the evidence establishes that some cash transfers from Emerge Canada to Emerge US were intentionally recorded improperly in Emerge Canada's books and records as transfers that increased the Emerge US Receivable rather than as payments of consulting and sub advisory fees. Alvares testified that, on Langley's instructions, this was done in order to manage Emerge Canada's working capital (as the Emerge US Receivable was an asset in Emerge Canada's books) and avoid being offside securities law capital requirements.

[121] We find that as a result of the foregoing, Emerge Canada breached s. 19 of the Act and s. 11.5(1) of NI 31-103.

[122] Relying in particular on s. 11.5(2) of NI 31-103, which lists the types of records a registered firm must maintain to satisfy its obligations under s. 11.5(1) of NI 31-103, the Commission also submits that Emerge Canada breached its obligation to maintain records documenting its compensation and incentive arrangements with Langley. It points to the following in support of this submission:

a. there is no evidence of any contract or agreement memorializing any remuneration arrangements between Langley, Emerge Canada or Emerge US;

b. there are no salary payments to Langley recorded in either Emerge Canada's or Emerge US's general ledgers;

c. the Emerge Canada financial statements do not disclose any salary or compensation to Langley;

d. during the Commission's investigation, Langley produced a summary of the dividends and salary she received from Emerge US (totalling less than US $2 million) between 2019 and 2023, whereas Richmond's Analysis established that Emerge US sent Langley US$5.3 million in that period;

e. without money from the Funds, Emerge US would not have had enough money to pay all its outflows, including the money Emerge US sent to Langley;

f. Richmond's Analysis also established that Langley received over $81,000 from Emerge Canada, as follows:

i. between May 2019 and October 2020, Langley received $33,982.65 from Emerge Canada that was recorded in the Emerge Canada general ledgers as "Consulting Fees" ($15,100), part of the Emerge US Receivable ($10,250) and as "Contractors" payments ($8,632.65); and

ii. between February 2022 and December 2022, Emerge Canada paid approximately $47,000 to Langley's residential landlord and recorded the payments in its Emerge US Receivable and Emerge US Consulting fees general ledger accounts.

[123] Regarding the US$5.3 million that Emerge US sent to Langley and the reported less than US$2 million of salary and dividends paid by Emerge US to Langley, we are not satisfied that the Commission established that Emerge Canada had any

obligation to maintain books and records documenting Emerge US's compensation and incentive arrangements with Langley. Regarding the $81,000 in payments to, or of for the benefit of, Langley from Emerge Canada, we find that the Commission did not establish that the amounts that were recorded by Emerge Canada as Emerge US Consulting Fees and as part of the Emerge US Receivable ($10,250 and $47,000) were on account of undocumented compensation arrangements between Emerge Canada and Langley, as Emerge Canada's accounting treatment suggests otherwise.

[124] However, the payments that Emerge Canada made to Langley that were classified in its books as "consulting" ($15,100) or "contracting" ($8,632.65) do appear to have been compensation payments made to Langley without corresponding documentation of the arrangement under which the payments were made, contrary to s. 11.5 of NI 31-103. Langley did not make any particular submissions, or provide any particular evidence, to dispute this characterization by the Commission.

4.2 Did Langley breach her duties as UDP and CCO?

[125] Sections 5.1 and 5.2 of NI 31-103 impose compliance-related obligations on the UDP and CCO of a registered firm. The CCO is responsible for establishing and maintaining policies and procedures to assess compliance with securities law and monitor and assess compliance by the firm. The UDP must not only promote compliance but also supervise the activities of the firm that are directed towards ensuring compliance with securities law.

[126] The Commission submits that Langley operated as though her roles as CCO and UDP were merely incidental to her role as CEO of Emerge Canada without due regard for her duty to ensure compliance with securities regulation.

[127] The Commission submits that Emerge Canada's various breaches of securities law demonstrates Langley's failure to meet her obligations as UDP and CCO. The Commission also cites numerous examples of Langley's conduct that it says demonstrate that she did not possess or exercise the level of competence, awareness or diligence required of her and showed a lack of concern toward Emerge Canada's compliance obligations.

[128] Langley submits that she built and relied on a professional compliance structure by retaining experts. Langley further submits that she adopted documented policies, identified issues as they arose, and acted on the advice she received. However, the Commission submits that a CCO and UDP should also "be familiar with the regulations and the compliance policies and procedures of his or her own firm in order to adequately monitor registerable activities".[27]

[129] We find that Langley was not familiar with the regulations and the compliance policies and procedures of her own firm. She had a complete misapprehension about what was a conflict, the nature of conflicts in fund management and the process for managing conflicts, including the purpose of an IRC. As a result, she failed to identify the creation and growth of the Receivable as a conflict and prohibited loan and failed to manage the conflict appropriately. She also misunderstood the nature and permissibility of expenses charged to the Funds. The fact that she prioritized the launching of new funds using money borrowed from the Funds and thereby significantly growing the Receivable, after committing to paying down the Receivable in the face of concerns expressed by RBC and the Emerge Canada IRC, is a glaring example that she did not possess or exercise the level of competence, awareness, or diligence required of her roles.

4.3 Did Langley and Alvares authorize, permit or acquiesce in Emerge Canada's breaches of securities law?

[130] We find that each of Langley and Alvares authorized, permitted or acquiesced in each of Emerge Canada's breaches of securities law.

[131] Pursuant to s.129.2 of the Act*,* a director or officer is deemed to be liable for a breach of securities law by a company where the director or officer authorizes, permits or acquiesces in the company's non-compliance. The threshold for liability is low.[28]

[132] The Commission submits that as directors and officers of Emerge Canada, Langley and Alvares were actively involved in its operations and were aware of

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[27] *Sterling Grace & Co Ltd (Re)*, 2014 ONSEC 24 at para 256

[28] *Momentas Corporation (Re)*, 2006 ONSEC 15 at para 118; *Nova Tech Ltd (Re)*, 2024 ONCMT 18 at para 53; *Cartu (Re)*, 2022 ONSEC 4 at para 38

and participated in Emerge Canada's conduct that is the basis for all Emerge Canada's breaches of securities law.

[133] The Commission submits that therefore Langley and Alvares clearly met the threshold for a finding that they authorized, permitted or acquiesced in Emerge Canada's non-compliance.

[134] Other than disputing that Emerge Canada breached securities laws, Langley submits that she did not knowingly authorize, permit or acquiesce in any breaches by Emerge Canada because, based on professional advice of Emerge Canada's accountant, auditor and counsel she reasonably believed that Emerge Canada's conduct was compliant. Langley acknowledges that her reasonable reliance on professional advice is not a defence, but she submits that it is evidence that she acted in good faith.

[135] We are not aware of any authority supporting Langley's submission that s. 129.2 of the Act requires a finding that the person knew that the corporation's conduct in issue (which the person authorized, permitted or acquiesced to) was unlawful. Indeed, there is no such "knowledge of unlawfulness" requirement built into s. 129.2 of the Act. Further, we do not accept that Langley established that she (or Emerge Canada) received professional advice from Emerge Canada's accountant, auditor or counsel that Emerge Canada's conduct was compliant with securities laws. Setting aside the question of whether advice from an accountant or auditor could ever be a defence to a breach of securities laws where a registrant has primary responsibility to ensure compliance, no respondent adduced evidence sufficient to establish, as a factual matter, that Emerge Canada received any advice that its conduct in relation to each of the breaches of securities law was compliant.

[136] Alvares submits that:

a. he had a subordinate role to Langley;

b. he did not have authority over the conduct constituting Emerge Canada's breaches of securities laws;

c. Langley was the individual who requested and directed all of the transfers of money out of the Funds and despite raising concerns with Langley, Alvares

signed off on the transfers because corporate processes (i.e., the necessity for dual signatures on all withdrawals above certain limits) "required" that he to do so;

d. he had no visibility regarding the use of funds that went to Emerge US (as he had no role with Emerge US) and despite his concerns about the number of requests for funds to be sent to the US in 2022, he relied on Langley's directions;

e. Langley assured him that money from the Funds that went to Emerge US was used for the Funds' benefit, and based on the Emerge US Sub-Advisory Agreement and the Emerge US Consulting Agreement;

f. Langley told him that she was responsible for all transactions and assured him that the Receivable would be repaid by the end of 2022;

g. Langley directed him about what to communicate to the Emerge Canada IRC;

h. he was not the architect of the increases to the Receivable that he was not able to justify, but instead "a concerned CFO under CEO control";

i. he did not personally benefit from the Receivable or enrich himself out of the Funds; and

j. the Receivable was properly tracked and supported by clear audits.

[137] We agree with the Commission's submission and find that each of Langley and Alvares authorized, permitted or acquiesced in each of Emerge Canada's breaches of securities law. In particular, this is established by the following:

a. both Langley and Alvares authorized each of the withdrawals from the Funds that comprise the Receivable;

b. they both signed the Funds' prospectuses that detailed the types of Fund operating expenses that could be charged to the Funds, as well as the items covered by the Management Fee that were the responsibility of Emerge Canada to provide to the Funds;

c. Alvares was responsible for Emerge Canada's accounting records and took input and direction from Langley on the recording of transactions;

d. they both approved and signed the Funds' and Emerge Canada's financial statements that documented and disclosed the Receivable;

e. they were both aware of the mechanics of Emerge Canada's "expense absorption practice" and what the money withdrawn from the Funds and comprising the Receivable was used for (except that Alvares did not have knowledge of how funds directed to Emerge US were ultimately used); and

f. they were both engaged and involved in the communications about the Receivable with the Emerge Canada IRC, discussed below in section 4.4.1, where Emerge Canada confirmed to the Emerge Canada IRC that it was not referring the Receivable to the Emerge Canada IRC as a conflict of interest matter.

[138] Although we find that Langley was the primary decision-maker at Emerge Canada and Alvares was her subordinate who took direction from her, we disagree with his submission that he should not be held responsible under s. 129.2 of the Act because of what he characterizes as his limited role and authority. He was the CFO and a director of Emerge Canada. It is not a defence that he deferred, or may have felt he had to defer, to Langley's direction. This Tribunal has previously considered, and rejected, similar arguments about the limited role and authority from directors and officers.[29] Alvares occupied a position of authority, responsibility and trust within Emerge Canada, and ought not to have simply deferred to Langley's (the CEO's) decisions.[30] In our view, Alvares' explanation that he signed off on the Notifications to Pay that initiated the wire transfers out of the Fund comprising the Receivable because internal corporate processes "required" his sign-off, is a clear example of Alvares permitting or acquiescing to the conduct that was occurring.

[139] Alvares' lack of visibility (despite his acknowledged concern) about why money from the Funds was sent to Emerge US does not, in our view, impact our conclusion that he authorized, permitted or acquiesced in any of Emerge Canada's breaches of securities laws.

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[29] *Sino-Forest Corporation (Re),* 2017 ONSEC 27 at para 1191; *Andrea Lee McCarthy (Re),* 2014 ONSEC 1 at paras 15–20, 33, 36–37; *Rezwealth Financial Services Inc (Re)*, 2013 ONSEC 28 at paras 10, 15, 143, 277; *York Rio Resources Inc (Re)*, 2013 ONSEC 10 at para 620

[30] *Rex Diamond Mining Corporation (Re)*, 2008 ONSEC 18 at paras 240–241

[140] We agree with the Commission's submission that Alvares' admission that he had and raised concerns to Langley about the Receivable is actually inculpatory, rather than exculpatory. It demonstrates that Alvares was aware of concerning conduct relating to the creation and growth of the Receivable. However, he did not outright object to the conduct and continued to actively participate therein despite any concerns he may have harboured or expressed. Accordingly, at the very least, Alvares acquiesced in Emerge Canada's non-compliance with Ontario securities law.

[141] The fact that the Receivable may have been properly tracked and documented, and also the subject of clean audits, is not a defence to our conclusion that Alvares is deemed liable under s. 129.2 for Emerge Canada's securities law breaches. Nor is the issue of whether Alvares personally benefitted from Emerge Canada's breaches of securities law relevant to our analysis of his breach of s. 129.2 of the Act.

4.4 Allegations relating to the Emerge Canada IRC

[142] The Commission alleges that the Emerge Canada IRC committed three breaches of NI 81-107, specifically they failed to:

a. provide a recommendation concerning a conflict of interest matter, contrary to s. 4.1(1) and s. 5.3(1)(a) of NI 81-107;

b. disclose the conflict of interest matter in their March 2022 annual report to securityholders, contrary to s. 4.4(1) of NI 81-107; and

c. act honestly, in good faith and in the best interests of the Funds, and exercise the degree of care, diligence, and skill that a reasonably prudent person would exercise in the circumstances, contrary to s. 3.9(1) of NI 81-107.

4.4.1 Did the Emerge Canada IRC fail to provide a recommendation concerning a conflict of interest matter?

[143] All parties agree that it is a referral of a conflict of interest matter to an IRC by an investment fund manager that triggers the IRC's obligation to review and consider the matter and make a recommendation to the manager. As we explain below, we find that Emerge Canada did not make a referral of a conflict of

interest matter to the Emerge Canada IRC, and therefore the Emerge Canada IRC's obligation to make a recommendation was not triggered.

[144] The Commission submits that Emerge Canada referred the Receivable to the Emerge Canada IRC as a conflict of interest matter and that the Emerge Canada IRC treated it as a conflict referral, but made no recommendation. According to the Commission, that failure of the Emerge Canada IRC to recommend whether Emerge Canada's proposed action or conduct in relation to the conflict of interest matter was fair and reasonable for the Funds breached ss. 4.1(1) and 5.3(1)(a) of NI 81-107.

[145] The Emerge Canada IRC submit that Emerge Canada did not refer a conflict of interest matter to them, because Emerge Canada denied both the existence and referral of a conflict of interest matter, and also never provided the information necessary for a referral, including, notably, Emerge Canada's proposed course of action in relation to the matter.

[146] The relevant facts are largely undisputed. Instead, the Commission and the Emerge Canada IRC differ on whether the facts establish that Emerge Canada referred a conflict of interest matter to the IRC.

[147] There is no dispute that Emerge Canada brought the Receivable (and in particular its "expense absorption practice") to the Emerge Canada IRC's attention in October 2021 at RBC's request. Langley testified that initially Emerge Canada believed that it was making a conflict of interest matter referral, but later realized that it had not. At the time Emerge Canada first brought the Receivable to the Emerge Canada IRC's attention, and for some time after, both Emerge Canada and the Emerge Canada IRC (or IRI in communications on its behalf) described the matter in emails and in a PowerPoint presentation as a conflict referral.

[148] The day after the Receivable was first brought to the Emerge Canada IRC's attention, IRI wrote to Emerge Canada on the Emerge Canada IRC's behalf stating that if the Receivable was being brought forward as a conflict of interest matter, Emerge Canada should complete and forward the conflict referral template from the COIM Manual to provide details to the Emerge Canada IRC. Such details would include: a description of the conflict, the manager's proposed

action in relation to the matter, how the conflict is mitigated by the proposed action, the impact of the matter on securityholders and alternative courses of action that were considered by the manager. Emerge Canada never did so.

[149] Between October 2021 and January 2022, IRI and the Emerge Canada IRC engaged with Emerge Canada to obtain information about the Receivable. IRI prepared and sent a November 22, 2021, memorandum to Emerge Canada and the Emerge Canada IRC that identified and discussed potential conflict of interest issues in relation to the Receivable and the expense absorption practice.

[150] Emerge Canada later told the Emerge Canada IRC in emails and at a January 6, 2022, meeting that the matter was brought to the IRC's attention "for informational purposes only". At the January meeting, the Emerge Canada IRC explained that the manner in which Emerge Canada had implemented expense absorption was not "best practice", identified matters in relation to the Receivable that could give rise to conflicts of interest and asked Emerge Canada to consider referring a conflict of interest. Emerge Canada advised the Emerge Canada IRC that it did not believe that the Receivable raised any conflict of interest matters, but it would further consider the question and make a referral if needed. Emerge Canada and BLG also asserted that Emerge Canada was not borrowing from the Funds. Also at the January meeting, Emerge Canada confirmed that it would pay back the Receivable.

[151] Emerge Canada subsequently maintained the position that there was no conflict of interest matter to refer and, on March 4, 2022, it advised the Emerge Canada IRC that it had ceased the expense absorption practice and the Receivable would be paid by the end of 2022. On March 25, 2022, Emerge Canada advised the Emerge Canada IRC that it had made limited progress in paying the Receivable, but reconfirmed that it would be repaid by year-end.

[152] Contrary to Emerge Canada's assurances and representations to the Emerge Canada IRC about ceasing the expense absorption practice and paying the Receivable, Emerge Canada continued to significantly grow the Receivable in 2022. The Emerge Canada IRC only learned about this after they learned in December 2022 that BDO had resigned as auditor.

[153] The Commission submits that the terms "refer" or "referral" in NI 81-107 must be interpreted broadly and purposively, governed by substance, not form, and keeping in mind the investor protection purposes of the instrument.[31] The Commission further submits that while NI 81-107 may limit the role of an IRC, there is no reason to discard a broad and purposive approach to interpreting undefined terms in the instrument, such as "refer" and "referral". Conversely, the Emerge Canada IRC submit that the interpretation of "referral" cannot override the text, context and purpose of NI 81-107.

[154] Despite the diverging positions of the Commission and the Emerge Canada IRC about whether there was a referral, all parties accept the importance of s. 2.4(1) of NI 81-107 to establish that a conflict referral has been made. Indeed, the Commission's as well as the Emerge Canada IRC's submissions all address the elements of s. 2.4(1) NI 81-107 and whether Emerge Canada provided the requisite information to the Emerge Canada IRC to constitute a referral of a conflict of interest matter.

[155] Subsection 2.4(1) of NI 81-107 provides that when a fund manager refers a conflict of interest matter (as well as other non-conflict of interest matters) to the IRC, the fund manager *must* provide information sufficient for the IRC to carry out its obligations, including:

a. a description of the facts and circumstances giving rise to the matter;

b. the manager's policies and procedures with respect to the matter;

c. the manager's proposed course of action, if applicable; and

d. all further information the IRC reasonably requests.

The fund manager must also make knowledgeable officers available to meet or answer questions about the matter and provide to the IRC any other assistance it reasonably requests concerning the matter.

[156] Subsections 5.1(1) and 5.3(1) of NI 81-107 both reinforce the importance of a fund manager advising the IRC of its proposed course of action regarding the

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[31] *Pacific Coast Coin Exchange v Ontario Securities Commission*, 1977 CanLII 37 (SCC) at 127. See also *Piekut v Canada (National Revenue)*, 2025 SCC 13 at paras 42–49; *VRK Forex & Investments Inc (Re)*, 2022 ONSEC 1 at paras 22, 24, 33.

conflict of interest matter, as an integral part of the conflict referral process. Subsection 5.1(1) requires the fund manager to refer the conflict of interest matter "along with its proposed action" to the IRC for its review and decision. Subsection 5.3(1) makes clear that the IRC's recommendation is about whether the fund manager's proposed action in relation to the conflict of interest matter is fair and reasonable.

[157] The Commission urges us to adopt its broad approach to whether a referral was made. The Commission submits that we should find that, in substance, a conflict of interest matter was referred to the Emerge Canada IRC because:

a. Emerge Canada initially believed it was referring a conflict of interest matter;

b. the matter was repeatedly referred to as a conflict referral;

c. the Emerge Canada IRC conducted themselves as though there had been a referral, by gathering relevant information, and convening the January 6, 2022, meeting with Emerge Canada; and

d. the Emerge Canada IRC collected sufficient information, including the information listed in s. 2.4(1) of NI 81-107, between October 2021 and March 2022 to carry out their obligation to make a recommendation.

[158] Regarding the sufficiency of the information available to the Emerge Canada IRC, the Commission submits that, in addition to the initial information about the Receivable and expense absorption practice that Emerge Canada provided to the Emerge Canada IRC in October 2021, the remaining criteria to constitute a referral were also met because the balance of the information in s. 2.4(1) of NI 81-107 was provided in substance and in some fashion to the Emerge Canada IRC between October 2021 and the end of March 2022. In particular, the Commission submits that Emerge Canada's "proposed course of action" in response to the referred conflict was conveyed to the Emerge Canada IRC, and consisted of:

a. continuing the action that Emerge Canada had already taken for more than two years of absorbing Fund expenses by accruing Fund operating costs

paid by the Funds as a receivable to the Funds to be set off against future Management Fees;

b. continuing to disclose the methodology for the Receivable in the Funds' prospectus;

c. updating its fees and expenses policy; and

d. ceasing to grow the Receivable and repaying it by year end.

[159] Rounding and Hutchins, two of the Emerge Canada IRC members, submit that we should find that no referral was made to the Emerge Canada IRC because:

a. the Commission's submissions (i.e., that a referral to the Emerge Canada IRC was made based on information received by the IRC between October 2021 and March 2022) deviate from the allegations pleaded by the Commission in its **AEP** (i.e., that a referral was made in October 2021 and subsequently withdrawn by Emerge Canada);

b. we should only consider the Commission's conflict referral case as pleaded, and that requires the Commission to establish that a conflict of interest matter was referred in October 2021 and subsequently withdrawn, which the Commission has failed to do;

c. the information mandated by s. 2.4(1) of NI 81-107 was not provided to the Emerge Canada IRC in October 2021, and this is a sufficient basis to dispose of the Commission's conflict referral case as pleaded;

d. in any event, the information requirements mandated by s. 2.4(1) were never met, even after October 2021, particularly because Emerge Canada never identified a particular conflict of interest, nor did it identify a "proposed action" in relation to a conflict of interest, for the Emerge Canada IRC to consider and recommend;

e. a referral to the Emerge Canada IRC in the form of the written template required by the COIM Manual was never made, despite Emerge Canada's knowledge that the Emerge Canada IRC expected a conflict referral to be made in this way; and

f. the documentary evidence and also the testimony of Hutchins, Alvares and Langley confirms that none of the parties involved understood that a conflict of interest referral had been made either in October 2021 or at any time thereafter, and any reasonable review of the transcript of the January 6, 2022, meeting establishes that none of those involved in the meeting believed that a conflict of interest referral had been made.

[160] Rounding and Hutchins submit that the IRC has a narrow role with no power over, authority to direct or responsibility for the failure of the fund manager. In elaborating on that failure, Friesen, the third Emerge Canada IRC member, submits that Emerge Canada failed to refer the Receivable for two years, did not complete a referral and made misleading statements to the Emerge Canada IRC. These are Emerge Canada's failures for which it, and not the Emerge Canada IRC, should be held responsible.

[161] Friesen submits that the Commission's approach should be rejected as it would create an impossible standard for IRC members. Circumstances where a fund manager provides incomplete information, denies that a conflict or need for a conflict referral exists, provides no proposed action for IRC consideration, and fails to disclose the information required by s. 2.4(1) of NI 81-107 should not be sufficient to trigger an IRC's obligation to make a recommendation. Friesen also submits that the purpose of the January 6, 2022, meeting was to determine whether a conflict existed. The Emerge Canada IRC asked questions and pressed Emerge Canada to make a conflict referral by following the process and completing the template provided in the COIM Manual.

[162] We find that on a purposive reading of the NI 81-107, a conflict of interest matter referral may take place over a period of time. In other words, not all of the information elements required under s. 2.4(1) of NI 81-107 need be provided to the IRC at the same time or in a particular format. For example, the section contemplates future meetings to discuss the conflict of interest matter and respond to potential questions.

[163] We also find that NI 81-107 does not establish a requirement to use a particular written template to make a referral. That said, we do not find the COIM Manual's requirement of a template for a conflict referral to be irrelevant. We accept that

the COIM Manual template essentially operationalized s. 2.4(1), to the extent that it largely specified that information matching the information identified in s. 2.4(1) should be submitted in writing to the Emerge Canada IRC. Emerge Canada knew that the Emerge Canada IRC expected a conflict referral to follow the established and agreed process in the COIM Manual to refer a conflict. While not conclusive of whether Emerge Canada referred a conflict, we find Emerge Canada's choice not to complete and submit a conflict referral template as required under its own policy is nevertheless relevant to our consideration of whether a referral occurred.

[164] As well, while the involved parties' beliefs about whether there has been a conflict referral is not necessarily determinative of the question, in this case we do find that the contemporaneous beliefs of all involved parties that there had not been a conflict referral, particularly as established through the transcript of the January 6, 2022, meeting, but also through other communications in the timeframe, are also relevant to our consideration of whether a referral occurred.

[165] The Commission submits that the Emerge Canada IRC conducted themselves, throughout, as though a conflict referral had been made. We find, instead, that the Emerge Canada IRC's behaviour was more consistent with an understanding that no referral had been made in circumstances where they were seeking information to better understand the Receivable and expense absorption practice and they were attempting to educate Emerge Canada regarding the conflict referral process.

[166] The limited mandate of an IRC arises under NI 81-107, its written charter and any other functions required by securities legislation.[32] There is nothing in these materials that in any way suggests or supports the notion that the fact that an IRC may have concerns about an issue somehow creates a referral. Nor is there anything that gives an IRC authority or triggers an obligation for it to make a recommendation in the absence of a referral to it of a conflict and a related proposed course of action from the fund manager. Indeed, the Canadian Securities Administrators' (**CSA**) responses to comments received during the

[32] *Crown Hill* at para 164; NI 81-107, ss 3.6(1), 3.9 (commentary section 1), 4.1(2)

consultation on NI 81-107 make clear that an IRC is only required to consider conflict matters that the manager refers to it.[33]

[167] We also find that NI 81-107 clearly specifies the elements of a conflict referral and the associated process. The fund manager bears the obligation to identify the conflict of interest, provide a proposed course of action for dealing with the conflict and the other information required by the IRC to carry out its obligations, and to make the referral. The instrument limits the role of the IRC until these initial obligations are satisfied by the fund manager. There is nothing in NI 81-107 that make it the IRC's responsibility to identify a conflict or devise a proposal or proposed action for dealing with a conflict.

[168] We find that any referral of a conflict was far from crystallized, regardless of whether we assess the circumstances as they existed in October 2021, at the time of the January 6, 2022, meeting, or at the end of March 2022. Some of the information elements of a referral were undeniably present. Although the Emerge Canada IRC and IRI had gathered information about the Receivable and the expense absorption practice and identified potential conflicts, the Emerge Canada IRC was faced with a fund manager that refused to identify any aspects of the Receivable or expense absorption practice as a conflict of interest, denied that a conflict referral was made after the initial disclosure about the Receivable and the expense absorption practice, refused to complete the COIM Manual template for a conflict referral, and advised that it would come back with a referral, if warranted. The Emerge Canada IRC was effectively told that "there is nothing to see here" and was left confused about the matter.

[169] We find that there was no express (written or verbal) identification to the Emerge Canada IRC of a conflict nor a corresponding proposed course of action by Emerge Canada. While IRI and the Emerge Canada IRC may have identified potential conflicts in connection with the Receivable and expense absorption practice and pressed Emerge Canada to make a conflict referral, that does not convert Emerge Canada's inaction into the identification and referral of a conflict.

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[33] Exhibit 37, Notice of National Instrument 81-107 Independent Review Committee for Investment, Funds. See Appendix B – Summary pf Public Comments and CSA Responses and List of Commenters at page 36 of the Exhibit PDF.

Similarly, neither the fact that in early communications Emerge Canada referred to a "conflict referral", nor the fact that IRI requested information of Emerge Canada in emails with "conflict" in the reference lines, is sufficient to establish that there was, in fact, a conflict referral. Emerge Canada never identified any proposed course of action in relation to a conflict, let alone the items that the Commission now seeks to characterize after the fact as substantively amounting to a proposed course of action. An IRC should not have to guess at what the proposed action is that it is expected to consider and make a recommendation upon.

4.4.2 Did the Emerge Canada IRC fail to disclose the Receivable and its related activities in its March 2022 annual report to securityholders?

[170] The Commission alleges that the Emerge Canada IRC failed "to include a description of the Receivable and the Emerge Canada IRC's activities relating to the Receivable" and to disclose the related conflict referral in its 2021 Annual Report to Security Holders (**March 2022 report**), as required in s. 4.4(1) of NI 81-107. For the reasons below, we find that the Emerge Canada IRC did not breach any disclosure obligation as alleged because no conflict referral was made upon which the Emerge Canada IRC could make a recommendation and there was no broader-based disclosure obligation.

[171] We also find that the Commission's closing submission that there was a similar failure to disclose in the 2022 Emerge Canada IRC Annual Report to Security Holders (**March 2023 report**) need not be addressed because this was not pleaded in the Commission's AEP and is not properly a part of the Commission's enforcement proceeding against the Emerge Canada IRC.

[172] Subsection 4.4(1) of NI 81-107 provides that an IRC must prepare an annual report to security holders that describes the IRC and its activities. The section specifically contemplates three potential reporting triggers for an IRC based on the type of action taken by the fund manager in response to a recommendation made by the IRC related to a referred conflict of interest matter, as follows:

a. where the IRC did not give a positive recommendation about dealing with a conflict, provide a summary of the recommendation and, if known, the manager's reasons for proceeding without following the recommendation;[34]

b. where the manager did not meet a condition imposed by the IRC in its recommendation or approval about dealing with a conflict, provide the nature of the condition and, if known, the manager's reasons for not meeting the condition and whether the IRC is of the view that the manager has taken, or proposes to take, appropriate action to deal with the matter;[35] and

c. where during the period the manager relied upon any recommendations and approvals about dealing with a conflict, provide a brief summary of such recommendations and approvals.[36]

[173] The Commission submits that after the Emerge Canada IRC was referred a conflict related to the Receivable and expense absorption practice in October 2021, they had an obligation to report the matter in their March 2022 report. Instead, the March 2022 report stated "there were no referrals considered by the IRC during the Reporting Period".

[174] We have concluded above that the requirements for a conflict referral to the Emerge Canada IRC were never met. Because there was no referral to the Emerge Canada IRC and no IRC recommendation, there was nothing for the Emerge Canada IRC to report in their March 2022 report under s. 4.1(1)(g), (h) or (i) of NI 81-107.

[175] The Commission also submits that, even if there was no conflict referral made in 2021, the introductory language of s. 4.4(1) of NI 81-107 requires that the Emerge Canda IRC report more broadly on its "activities for the financial year", even if those activities are not enumerated in the s. 4.4(1) list. It submits that the Emerge Canada IRC ought to have described their communications with Emerge Canada about the Receivable, as well as their review of the information about the Receivable and the January 6, 2022, meeting in their March 2022 report. We reject this submission. The limited role of the IRC relates solely to

[34] NI 81-107, s 4.4(1)(g)
[35] NI 81-107, s 4.4(1)(h)
[36] NI 81-107, s 4.4(1)(i)

conflict of interest matters and other specified matters. Given that there was no referred conflict of interest matter before the Emerge Canada IRC, the provision cannot possibly require that the Emerge Canada IRC report more broadly. The instrument only contemplates reporting related to conflict of interest matters where there has been a conflict referral.

4.4.3 Did the Emerge Canada IRC breach their duties to the Funds?

[176] Section 3.9 of NI 81-107 states:

> (1) Every member of an [IRC], in exercising his or her powers and discharging his or her duties related to the investment fund, and, for greater certainty, not to any other person, as a member of the [IRC] must:
>
> > (a) act honestly and in good faith, with a view to the best interests of the investment fund; and
> >
> > (b) exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

[177] The Commission submits that, as a result of s. 3.9 of NI 81-107, IRCs owe a broad and standalone fiduciary duty, duty of loyalty and duty of care to funds that are substantively similar to the duties owed by a corporate director or by a fund manager, respectively, as codified by statute. It argues that the IRC's duties under s. 3.9 of NI 81-107 are not limited to circumstances where a conflict of interest matter is referred to the IRC or to the way the IRC exercises its prescribed powers and duties under NI 81-107. Instead, the Commission submits that, even where there is no referral of a conflict of interest matter to an IRC, if the IRC becomes aware of a conflict of interest matter by whatever means, their s. 3.9 duties are engaged.

[178] The Commission submits that the Emerge Canada IRC breached their s. 3.9 duties by taking no action to address their concerns about the Receivable and expense absorption practice. For example, the Emerge Canada IRC remained confused about the treatment of the Funds' start-up costs, were concerned about Emerge Canada's use of the word "absorb" in its disclosure potentially misleading investors and also had concerns that there were unaddressed conflicts of interest. Despite these concerns, the Emerge Canada IRC failed to take any

meaningful steps to escalate the matter and failed to act in the best interests of the Funds. The Commission's position is that what the Emerge Canada IRC was required to do to satisfy their s. 3.9 duties depends on the situation, but that "something" rather than "nothing" should have been done.

[179] No party referred us to any prior decisions that have considered the scope of an IRC's obligations under s. 3.9 of NI 81-107 in any detail. We were referred to *Crown Hill* where there is some consideration about an IRC's obligations under s. 3.9, but the decision only speaks to s. 3.9 obligations applying in circumstances where a conflict matter has been referred to the IRC and the IRC is engaged in considering and addressing the conflict.[37]

[180] We begin with a consideration of the language of s. 3.9 of NI 81-107. The relevant heading to this section is "Standard of Care". The obligations of IRC members set out in s. 3.9(1) arise where IRC members are *"exercising [their] powers and discharging [their] duties related to the investment fund"*. Thus, the scope of IRC members' obligations under s. 3.9(1) is circumscribed by this language. We therefore conclude that the s. 3.9(1) obligations are not "broad" or "standalone" or otherwise untethered from an exercise of the IRC's powers and or a discharge of its duties, as the Commission submits. An IRC has no general oversight or investor protection duties writ large, as submitted by the Commission. Its role and responsibilities are clearly delineated in NI 81-107, and most of these are only triggered by the referral of a conflict of interest matter.

[181] There is no definition in NI 81-107 of IRC members' "powers" and "duties" related to the investment fund. The Commission did not make any submissions about what these powers and duties encompass although, as noted above, we accept that the mandate of an IRC is limited and arises under NI 81-107, its written charter and any other functions required by securities legislation.[38] The Commission disagreed that IRC members' s. 3.9(1) obligations are only engaged where they are exercising their powers or discharging their duties related to the investment fund. However, it did not make any alternate submission seeking to establish that the Emerge Canada IRC were somehow exercising their powers or

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[37] *Crown Hill* at paras 159–160 and 164

[38] *Crown Hill* at para 164; NI 81-107, ss 3.6(1), 3.9 (commentary section 1), 4.1(2)

discharging their duties where no conflict of interest matter was referred to them. We accept that an IRC's duties are triggered and engaged upon referral of a conflict. But that is not what occurred here.

[182] Not having received submissions from any party seeking to identify all of an IRC's "powers" and "duties", we need not make any exhaustive findings about what those are. However, we are not satisfied (nor did the Commission assert) that the Emerge Canada IRC members were exercising their powers or discharging their duties by virtue of their expressed concerns about the Receivable and the expense absorption practice. We therefore conclude that the Emerge Canada IRC members' s. 3.9 obligations were not engaged in the circumstances.

[183] We are also persuaded by the submission of Rounding and Hutchins that it was the intent of the CSA to limit the IRC's powers and duties. Specifically, Rounding and Hutchins point out that, based on stakeholder feedback the CSA revised NI 81-107 to emphasize the limited scope of the IRC's mandate, which in turn should limit the IRC's corresponding fiduciary duty and duty of care. In its responses to the comments on NI 81-107, the CSA stated that they drafted NI 81-107 with the intent that it "appropriately limits" an IRC's fiduciary duty and duty of care "based upon the unique and limited role that it will serve" and that by "clearly specif[ying] the requirements of the members of the IRC, including that the IRC is only required to consider conflict matters that the manager refers to it", the liability of IRC members would be limited.[39]

[184] Having found that the Emerge Canada IRC's obligations under s. 3.9 of NI 81-107 were not triggered by their concerns related to the Receivable and the expense absorption practice, there is no need for us to consider the Commission's arguments respecting what steps the Emerge Canada IRC could or should have taken in the circumstances of this case to discharge their obligations under s. 3.9.

[39] Exhibit 37, Notice of National Instrument 81-107 Independent Review Committee for Investment, Funds. See Appendix B – Summary pf Public Comments and CSA Responses and List of Commenters at page 36 of the Exhibit PDF.

5. CONCLUSION

[185] For the reasons set out above, we conclude that:

a. Emerge Canada breached ss. 116(a) and (b) of the Act by failing to act honestly, in good faith and in the best interests of the Funds, and failing to exercise the degree of care, diligence, and skill that a reasonably prudent person would exercise in the circumstances;

b. Emerge Canada breached s. 13.5(2)(c) of NI 31-103 by knowingly causing an investment portfolio managed by it (i.e., the Funds) to provide a guarantee or loan (the Receivable) to a responsible person or an associate of a responsible person (Emerge Canada);

c. Emerge Canada breached ss. 5.1(1) and 5.3(1) of NI 81-107 by failing to comply with its obligations respecting conflicts of interest;

d. Emerge Canada breached s. 32(2) of the Act and s. 11.1 of NI 31-103 by failing to establish, maintain and apply policies and procedures that establish an adequate system of controls and supervision;

e. Emerge Canada breached s. 19(1) of the Act and s. 11.5 of NI 31-103 by failing to keep and maintain books, records and other documents as required under Ontario securities law;

f. Langley breached her duties as UDP and CCO as prescribed by ss. 5.1 and 5.2 of NI 31-103; and

g. Langley and Alvares, as directors and officers of Emerge Canada, each authorized, permitted or acquiesced in each of Emerge Canada's breaches and are therefore liable for Emerge Canada's breaches pursuant to s. 129.2 of the Act.

[186] Also, for the reasons above, we find that the Commission failed to establish that a conflict of interest matter referral was made by Emerge Canada to the Emerge Canada IRC, and we find that the Commission failed to establish that:

a. Rounding, Hutchins and Friesen breached ss. 4.1(1) and 5.3(1)(a) of NI 81-107 by failing to provide a recommendation to Emerge Canada;

b. Rounding, Hutchins and Friesen breached s. 4.4(1) of NI 81-107 by failing to make proper disclosure in the March 2022 report; and

c. Rounding, Hutchins and Friesen breached s. 3.9(1) of NI 81-107 by failing to act honestly, in good faith and in the best interests of the Funds, and/or failing to exercise the degree of care, diligence, and skill that a reasonably prudent person would exercise in the circumstances.

[187] Also as set out above in paragraph [8], we decline to make any separate finding that any of the respondents engaged in conduct contrary to the public interest because the Commission's AEP does not plead any allegations separate from the alleged breaches of securities law in support of such a finding and the Commission did not make any submissions in support of such a finding.

[188] We therefore require that the Commission, Langley, Emerge Canada and Alvares contact the Registrar by 4:30 p.m. on November 20, 2026, to arrange for a case management hearing for the purpose of scheduling a hearing regarding sanctions and costs and the delivery of materials in advance of that hearing. The case management hearing is to take place on a mutually convenient date that is fixed by the Registrar, and that is no later than December 11, 2026.

[189] If the parties to the sanctions and costs hearing are unable to provide a mutually convenient date for the case management hearing to the Registrar, each party may submit to the Registrar, for consideration by a panel of the Tribunal, a one-page written submission regarding a date for the hearing. Any such submission shall be submitted by 4:30 p.m. on November 20, 2026.

Dated at Toronto this 9th day of November, 2026.

"Andrea Burke"

Andrea Burke

"James D.G. Douglas"

James D.G. Douglas

"Sandra Blake"

Sandra Blake