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

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

**AND**

**IN THE MATTER OF GOLDPOINT RESOURCES CORPORATION,**
**PASQUALINO NOVIELLI also known as Lee or Lino Novielli,**
**BRIAN PATRICK MOLONEY also known as Brian Caldwell, and**
**ZAIDA PIMENTEL also known as Zaida Novielli**

# REASONS AND DECISION

| | | |
|---|---|---|
| **Hearing:** | September 21, 22, 23, 24, 25, 28 and 30, 2009<br>October 1, 2009<br>December 16, 2009 | |
| **Decision:** | May 5, 2011 | |
| **Panel:** | Mary G. Condon | - Commissioner and Chair of the Panel |
| | David L. Knight, FCA | - Commissioner |
| **Appearances:** | Matthew Boswell | - For the Ontario Securities Commission |
| | Pasqualino Novielli | - For himself |
| | Brian Patrick Moloney | - For himself |
| | Zaida Pimentel | - For herself |
| | | -No one appeared for Goldpoint Resources Corporation |

**TABLE OF CONTENTS**

## REASONS AND DECISION

## I. BACKGROUND

### A. History of the Proceeding

[1] This was a hearing before the Ontario Securities Commission (the "**Commission**") pursuant to section 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**"), to consider whether Pasqualino Novielli ("**Novielli**"), Brian Patrick Moloney ("**Moloney**"), Zaida Pimentel ("**Pimentel**") (collectively, the "**Individual Respondents**") and Goldpoint Resources Corporation ("**Goldpoint**") (collectively, the "**Respondents**"), breached the Act and acted contrary to the public interest.

[2] On April 30, 2008, the Commission issued a temporary cease trade order (the "**Temporary Order**"), pursuant to subsections 127(1) and (5) of the Act, which ordered that: all trading in securities by Goldpoint shall cease; all trading in Goldpoint securities shall cease; and Novielli and Moloney, among others, shall cease trading in all securities.

[3] On May 1, 2008, the Commission issued a Notice of Hearing for a hearing to be held on May 14, 2008 to consider, among other things, whether it was in the public interest to extend the Temporary Order pursuant to subsections 127(7) and (8) of the Act. The Temporary Order was extended on May 14, 2008, July 18, 2008, September 16, 2008 and November 28, 2008.

[4] On December 19, 2008, the Commission issued a Notice of Hearing, pursuant to sections 37, 127 and 127.1 of the Act, in connection with the Amended Statement of Allegations issued by Staff of the Commission ("**Staff**") on December 18, 2008 with respect to the Respondents (the "**Allegations**"). Staff alleges that the Respondents engaged in a fraudulent illegal distribution between August 2007 and May 2008 (the "**Material Time**").

[5] The Commission further extended the Temporary Order on January 6, 2009, February 17, 2009, and March 23, 2009. On May 14, 2009, following a pre-hearing conference, the Commission ordered that the hearing on the merits (the "**Merits Hearing**") would commence on September 21, 2009. On June 15, 2009, the Temporary Order was extended until the conclusion of the Merits Hearing.

[6] The Merits Hearing took place on September 21, 22, 23, 24, 25, 28 and 30, 2009 and October 1, 2009. Staff and the Respondents made closing submissions on December 16, 2009.

### B. The Respondents

#### 1. Goldpoint

[7] Goldpoint was incorporated in Ontario on August 31, 2007, with a registered office address of 2 Bloor Street West, Suite 100, Toronto, Ontario. The Corporation Profile Report lists Novielli as its President and sole director. No other individuals are listed.

[8] There is no record of Goldpoint having been registered under the Act. In Ontario, Goldpoint has never been a reporting issuer as defined by the Act, nor has it filed a prospectus or preliminary prospectus with the Commission.

### 2. Novielli

[9] Novielli, a resident of Woodbridge, Ontario, was registered with PFSL Investments Canada Ltd. as a salesperson in the category of mutual fund dealer from May 5, 2006 to June 26, 2008.

### 3. Moloney

[10] Moloney was a resident of Toronto, Ontario. There is no record of Moloney having been registered under the Act in any capacity.

### 4. Pimentel

[11] Pimentel, a resident of Woodbridge, Ontario, is Novielli's spouse. There is no record of Pimentel having been registered under the Act in any capacity.

## II. ISSUES

## A. The Allegations

[12] Staff alleges that:

(a) During the Material Time, the Respondents engaged or participated in acts, practices or courses of conduct relating to Goldpoint securities that the Respondents knew or reasonably ought to have known perpetrated a fraud on persons or companies, contrary to subsection 126.1(b) of the Act and contrary to the public interest;

(b) During the Material Time, the Respondents traded in securities of Goldpoint without being registered to trade in securities, contrary to subsection 25(1)(a) of the Act and contrary to the public interest;

(c) During the Material Time, the Respondents traded in securities of Goldpoint when a preliminary prospectus and a prospectus had not been filed and receipts had not been issued for them by the Director, contrary to subsection 53(1) of the Act and contrary to the public interest;

(d) During the Material Time, Novielli, Moloney, Pimentel and employees, agents or representatives of Goldpoint made representations, without the written permission of the Director, with the intention of effecting a trade in securities of Goldpoint, that the Goldpoint securities would be listed on a stock exchange or quoted on any quotation and trade reporting system, contrary to subsection 38(3) of the Act and contrary to the public interest;

(e) During the Material Time, Novielli, Moloney, Pimentel and employees, agents or representatives of Goldpoint gave undertakings, with the intention of effecting a trade in securities of Goldpoint, as to the future value or price of the securities of Goldpoint, contrary to subsection 38(2) of the Act and contrary to the public interest;

(f) During the Material Time, Novielli, Moloney, and Pimentel, being directors or officers of Goldpoint, did authorize, permit or acquiesce in

the commission of the violations of sections 126.1, 25, 53 and 38 of the Act, as set out above, by Goldpoint or by the employees, agents or representatives of Goldpoint, which constitute offences under subsection 122(1)(c) of the Act, contrary to subsection 122(3) and section 129.2 of the Act and contrary to the public interest; and

(g) On or about September 9, 2008, Pimentel made statements to Staff appointed to make an investigation or examination under the Act, during an examination conducted by Staff, that she had never worked for Goldpoint, that, in a material respect and at the time and in the light of the circumstances under which they were made, were misleading or untrue, contrary to subsection 122(1)(a) of the Act and contrary to the public interest.

### B. Roadmap

[13] The order in which we will address the allegations is as follows:

(a) During the Material Time, did the Respondents trade without registration, contrary to subsection 25(1)(a) of the Act and contrary to the public interest?

(b) During the Material Time, did the Respondents engage in a distribution without a prospectus, contrary to subsection 53(1) of the Act and contrary to the public interest?

(c) During the Material Time, did the Respondents give prohibited undertakings, contrary to subsection 38(2) of the Act and contrary to the public interest?

(d) During the Material Time, did the Respondents make prohibited representations, contrary to subsection 38(3) of the Act and contrary to the public interest?

(e) During the Material Time, did the Respondents engage in fraud, contrary to subsection 126.1(b) of the Act and contrary to the public interest?

(f) During the Material Time, were the Individual Respondents directors or officers of Goldpoint who authorized, permitted or acquiesced in Goldpoint's alleged non-compliance with Ontario securities law, contrary to section 129.2 or subsection 122(3) of the Act and contrary to the public interest?

(g) On or about September 9, 2008, did Pimentel make materially untrue statements to Staff in a compelled examination, contrary to subsection 122(1)(a) of the Act and contrary to the public interest?

## III. THE EVIDENCE

[14] During the course of the hearing, we heard from thirteen witnesses called by Staff. These included two Staff investigators, four employees of Goldpoint who worked as "qualifiers" (the "**Qualifiers**"), one employee of Goldpoint who worked as a

bookkeeper (the "**Bookkeeper**") and six individuals who invested in Goldpoint (the "**Investors**". In these reasons, we will identify the investor witnesses as Investors One to Six).

[15] Two Staff investigators, Scott Boyle ("**Boyle**") and Wayne Vanderlaan ("**Vanderlaan**"), testified with respect to their investigation of the Respondents' conduct. They testified about the operations of Goldpoint and the conduct of the Individual Respondents and explained the documentary evidence led by Staff. They also testified about the compelled examinations of the Individual Respondents that were conducted by Staff pursuant to section 13 of the Act.

[16] The Qualifiers who testified were Armine Khudinyan ("**Khudinyan**"), Oliver MacIntosh ("**MacIntosh**"), Farzaneh "Julia" Jamalian ("**Jamalian**") and Ivana Tonello ("**Tonello**"). The Qualifiers were Goldpoint employees who phoned individuals from call lists and offered them information about Goldpoint. The Qualifiers testified about their interaction with investors or prospective investors and about certain aspects of Goldpoint's operations with which they were familiar.

[17] The Bookkeeper, Gugun "Grace" Huang ("**Huang**"), testified about her work with Novielli and Moloney and about Goldpoint's accounting system.

[18] The Investors testified about their financial circumstances during the Material Time, their interaction with Goldpoint and its representatives, primarily by telephone, and the documents they received from Goldpoint.

[19] The Respondents did not testify or lead evidence, although they introduced documentary evidence regarding Goldpoint's operations in Ghana in the course of their cross-examination of Staff witnesses. The Respondents made submissions on the evidence led by Staff at the end of the Merits Hearing.

## IV. ANALYSIS

### A. The Commission's Mandate

[20] The Commission's mandate is found in section 1.1 of the Act, which states:

> **1.1 Purposes** – The purposes of this Act are,
>
> (a) to provide protection to investors from unfair, improper or fraudulent practices; and
>
> (b) to foster fair and efficient capital markets and confidence in capital markets.

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

> **2.1 Principles to consider** – In pursuing the purposes of this Act, the Commission shall have regard to the following fundamental principles:
>
> …
>
> 2. The primary means for achieving the purposes of this Act are,
>
> i. requirements for timely, accurate and efficient disclosure of information,

ii. restrictions on fraudulent and unfair market practices and procedures, and

iii. requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.

…

[22] The Commission's exercise of its public interest jurisdiction is framed by this mandate and these guiding principles.

## B. The Standard of Proof

[23] The standard of proof that must be met by Staff in Commission proceedings is the civil standard of the balance of probabilities (*Re Limelight Entertainment Inc*. (2008), 31 O.S.C.B. 1727 ("***Limelight***") at paragraphs 125-126).

[24] In *F.H. v. McDougall*, [2008] 3 S.C.R. 41 ("***McDougall***"), the Supreme Court of Canada reaffirmed that "there is only one civil standard of proof at common law and that is proof on a balance of probabilities", which requires the trier of fact to decide "whether it is more likely than not that the event occurred" (*McDougall*, *supra*, at paragraphs 40 and 44). The Court noted that "the evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*McDougall*, *supra*, at paragraph 46).

[25] Staff must prove its allegations on a balance of probabilities.

## C. Does the Commission have jurisdiction over the Respondents?

[26] The majority of investors involved in this matter were located outside of Ontario, primarily in the province of Alberta. Other investors were located in British Columbia, Saskatchewan and Manitoba. However, we find there is a sufficient nexus to Ontario for the Commission to have jurisdiction over the conduct of the Respondents.

[27] In *Gregory & Co. v. Quebec (Securities Commission)*, [1961] S.C.R. 584 ("***Gregory***"), the Supreme Court of Canada held that the fact that securities were sold to customers outside of Quebec did not support a conclusion that the appellant was not trading in securities in Quebec (See also *Libman v. The Queen*, [1985] 2 S.C.R. 178 at paragraphs 3-5; *R. v. Stucky* (2009), 256 O.A.C. 4; *Re Lett* (2004), 27 O.S.C.B. 3215 at paragraph 69; and *Re Allen* (2005), 28 O.S.C.B. 8541 at paragraphs 20-21).

[28] In this case, we find that there is sufficient evidence before us to conclude that there is a significant connection to Ontario. The Individual Respondents resided in Ontario during the Material Time. Goldpoint is an Ontario corporation with a registered address of 2 Bloor Street West, Toronto. Its physical office was located in Ontario, at 40 Wellesley Street East, Toronto, following its relocation from 232 Merton Street, Toronto, in January 2008. Marketing materials were sent to investors from Goldpoint's Ontario offices. Investors sent their completed and signed subscription agreements to Goldpoint's office in Ontario. Goldpoint Share Certificates were mailed from Ontario under the direction of the Respondents. Finally, investor funds were deposited in bank accounts

located in Ontario. We find that the Commission has jurisdiction over the conduct of the Respondents in this matter.

## D. Did the Respondents trade Goldpoint shares without registration, contrary to subsection 25(1)(a) of the Act and contrary to the public interest?

[29] Staff introduced certificates prepared under section 139 of the Act, which state that Goldpoint, Moloney and Pimentel had never been registered under the Act, and were not registered in any capacity during the Material Time. Although Novielli was registered as a mutual fund dealer during the Material Time, his registration did not permit him to sell Goldpoint shares.

### 1. The Law

[30] Subsection 25(1)(a) of the Act, as it read during the Material Time, provided that:

> **25. (1) Registration for trading** – No person or company shall,
>
> (a) trade in a security or act as an underwriter unless the person or company is registered as a dealer, or is registered as a salesperson or as a partner or as an officer of a registered dealer and is acting on behalf of the dealer;
>
> …
>
> and the registration has been made in accordance with Ontario securities law and the person or company has received written notice of the registration from the Director and, where the registration is subject to terms and conditions, the person or company complies with such terms and conditions.

[31] The registration requirement is an essential element of Ontario securities law. As the Commission stated in *Limelight*, *supra*, at paragraph 135:

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

[32] The Supreme Court of Canada has emphasized the importance of the registration requirement for investor protection, one of the objects of the Act. In *Gregory*, the Supreme Court stated:

> The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the province or elsewhere, from being defrauded as a

> result of certain activities initiated in the province by persons therein carrying on such a business...
>
> (*Gregory, supra*, at 588; see also: *Re First Global Ventures, S.A.* (2007), 30 O.S.C.B. 10473 ("***First Global***") at paragraph 122)

[33] For a breach of subsection 25(1)(a) of the Act to occur, a trade in securities is required. As such, it is necessary to turn to subsection 1(1) of the Act for the definition of a trade:

[34] "trade" or "trading" includes,

> (a) any sale or disposition of a security for valuable consideration, whether the terms of payment be on margin, instalment or otherwise, but does not include a purchase of a security or, except as provided in clause
>
> …
>
> (d) a transfer, pledge or encumbrance of securities for the purpose of giving collateral for a debt made in good faith,
>
> (e) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the foregoing;

[35] Whether an act is an act in furtherance of a trade is a question of fact. A guiding consideration is the proximity of the impugned act to an actual trade:

> There is no bright line separating acts, solicitations and conduct indirectly in furtherance of a trade from acts, solicitations and conduct not in furtherance of a trade. Whether a particular act is in furtherance of an actual trade is a question of fact that must be answered in the circumstances of each case. A useful guide is whether the activity in question had a sufficiently proximate connection to an actual trade.
>
> (*Re Costello* (2003), 26 O.S.C.B. 1617, at paragraph 47)

[36] In determining whether a person or company has engaged in acts in furtherance of a trade, the Commission has taken "a contextual approach" that examines "the totality of the conduct and the setting in which the acts have occurred" (*Limelight*, *supra*, at paragraph 131). The Commission in *Limelight* stated:

> The primary consideration is, however, the effect of the acts on investors and potential investors. The Commission considered this issue in *Re Momentas Corporation* (2006), 29 O.S.C.B. 7408, at paragraphs 77-80, noting that "acts directly or indirectly in furtherance of a trade" include (i) providing promotional materials, agreements for signature and share certificates to investors, and (ii) accepting money; a completed sale is not necessary. In our view, depositing an investor cheque in a bank account is an act in furtherance of a trade.
>
> (*Limelight*, *supra*, at paragraph 131)

[37] Other activities that have been considered by the Commission to be acts in furtherance of a trade include, but are not limited to, setting up a website that offers

securities or information to investors over the internet (see, for example, *Re First Federal Capital (Canada) Crop.* (2004), 27 O.S.C.B. 1603 at paragraph 45 and *Re American Technology Exploration Corp*. (1998), L.N.B.C.S.C. 1 (B.C.S.C.)).

## 2. Analysis

### (a) Goldpoint

[38] The Investors testified about their purchases of Goldpoint shares. Investor One, for instance, testified that he and his spouse purchased 10,000 Goldpoint shares (5,000 shares each) for $7,500 on March 4, 2008, as evidenced by a Subscription Agreement and a cheque dated the same day, as well as Goldpoint Share Certificates issued to him and his spouse.

[39] Other Investors gave similar evidence, namely, that Investor Two purchased 6,667 shares for $5,000 on February 10, 2008, Investor Three purchased 6,667 shares for $5,000 on January 18, 2008, Investor Four purchased 13,334 shares for $10,000 on November 1, 2007, Investor Five purchased 33,334 shares for $25,000 on November 27, 2007 and Investor Six purchased 13,334 shares for $10,000 on November 28, 2007. As in the case of Investor One, their testimony is supported by copies of Goldpoint Subscription Agreements, cheques and Goldpoint Share Certificates which were entered into evidence.

[40] During the hearing, we were also provided with documents prepared by Capital Transfer Agency Inc. ("**Capital Transfer**"), the transfer agent retained by Goldpoint to issue share certificates and to keep a ledger on behalf of Goldpoint. These documents include:

- A contract entitled "Transfer Agency and Registrarship Agreement" between Capital Transfer and Goldpoint dated November 13, 2007;
- Copies of directions given by Goldpoint to Capital Transfer authorizing the issuance of shares from Goldpoint's treasury;
- Copies of Goldpoint Share Certificates issued by Capital Transfer; and
- Summary documents related to Goldpoint shares, such as a Certified Shareholder List and a List of Certificates issued.

[41] In considering documentary evidence obtained from Capital Transfer, we take note of Vanderlaan's testimony that the Capital Transfer records could not be used to generate a comprehensive list of investors. However, Moloney conceded during the hearing that he took no issue with the Capital Transfer evidence. No other Respondents raised this issue in cross-examination.

[42] We also received as evidence banking records pertaining to Goldpoint's account at the Royal Bank of Canada ("**RBC**") into which investor funds were deposited (the "**Goldpoint RBC Account**"). These banking records include cheques and account statements evidencing various transfers of funds.

[43] The Capital Transfer documents establish that 1,939,067 Goldpoint shares were issued to more than 110 investors during the period from November 16, 2007 to April 28, 2008. In consideration for its shares (issued and to be issued), Goldpoint received

$1,696,750, which was deposited into Goldpoint bank accounts from October 18, 2007 to May 1, 2008, as evidenced by various banking records. The vast majority (and perhaps all) of the shares were purchased by investors at $0.75 per share. It appears that, of the total proceeds of $1,696,750, approximately $240,000 was in respect of shares still to be issued at May 1, 2008. The evidence establishes that Goldpoint sold its shares for valuable consideration.

[44] Goldpoint had a website located at www.goldpointresources.com (the "**Goldpoint Website**"). The Goldpoint Website contained descriptions of Goldpoint's purported operations in Ghana, a representation about the company's accountants and a news release dated March 15, 2007 announcing a "non-brokered private placement of 12 million units" (the "**News Release**"). The content of the Goldpoint Website is discussed in more detail below at paragraph 147.

[45] Elia Pandeli ("**Pandeli**") gave evidence relating to the Goldpoint Website in an examination conducted by Staff on June 27, 2008. Staff introduced the transcript of this examination into evidence through Vanderlaan because Pandeli was out of the country at the time and was unable to testify *viva voce*.

[46] In the examination, Pandeli stated that:

- he and his company, Edit Undo Design, were contacted by Novielli some time around September 2007 to provide design services to create the Goldpoint Website;
- he was provided with the News Release to be posted on the Goldpoint Website;
- his arrangement with Goldpoint was that he must be contacted if any of the information on the website was to be changed;
- he was never contacted to edit the website's information; and
- the original version of the Goldpoint Website, created in late 2007, was at no point changed or modified.

[47] While the Respondents did not have the opportunity to cross-examine Pandeli, his statements are supported by the evidence that Staff adduced during the hearing from Boyle and Vanderlaan. According to Boyle and Vanderlaan, Staff's investigation of the Goldpoint Website included a search of Goldpoint's office at 40 Wellesley Street on May 1, 2008, pursuant to a search warrant. During the search, Staff investigators seized, among other things, a computer from the premises. Staff investigators located on this computer a PDF document of the News Release found on the Goldpoint Website.

[48] Boyle testified that he investigated the Goldpoint Website using the "Who is" domain tool, a website that enables users to identify when a website is set up. The report generated by the "Who is" domain tool shows that the website was created on September 24, 2007 and last modified on October 27, 2007. Boyle also testified that he investigated the electronic "properties" of the News Release and determined that the document was created on October 27, 2007. The evidence is consistent with Pandeli's testimony that he was contacted by Goldpoint to create the Goldpoint Website some time around

September 2007 and that the information on the Goldpoint Website had not been changed since the News Release was created and uploaded onto the website on October 27, 2007.

[49] Case law has established that a website need not specifically offer securities in order for its creation and maintenance to constitute an act in furtherance of a trade. Where a website is designed to excite the reader about the company as an investment prospect, the material on the website is considered an advertisement or solicitation to investors to purchase the company's shares (*American Technology*, *supra*, at 9). Given the content of the Goldpoint Website, as described at paragraphs 44 and 147, there is no doubt that the Goldpoint Website was designed to excite the reader about the company's prospects and to solicit investments.

[50] For the reasons above, we find that Goldpoint engaged in trading and acts in furtherance of trading Goldpoint securities.

**(b) Novielli**

[51] During the hearing, Investor Six testified that after his initial purchase of 13,334 Goldpoint shares, Novielli called him and solicited him to purchase a further 50,000 Goldpoint shares. Investor Six recalled Novielli saying in the course of their conversation that Goldpoint had done some more drilling and was ready to start mining if enough money could be raised. As a result of Novielli's solicitation, Investor Six purchased a further 30,000 Goldpoint shares.

[52] Vanderlaan's investigation also located investors who were contacted by Novielli for the purpose of soliciting purchases of Goldpoint shares. For example, an investor informed Vanderlaan that Novielli called him and tried to convince him to change his mind after the investor declined to purchase more Goldpoint shares subsequent to his initial investment. Novielli did not address this issue during his cross-examination of Vanderlaan.

[53] Based on the evidence, we find that Novielli was personally involved in soliciting further purchases of Goldpoint shares by investors who had already invested in Goldpoint. He therefore engaged in trading or acts in furtherance of trades.

[54] Staff presented evidence to show that Novielli's involvement also included the development of the Goldpoint Website. Staff referred to the transcript of its examination of Pandeli to show that Pandeli met with both Novielli and Moloney to discuss the creation of the Goldpoint Website. In the examination, Pandeli stated that Novielli and Moloney discussed the content of the Goldpoint Website. In particular, Pandeli stated that Novielli approved the content of the website and signed off on each page.

[55] We further note that Pandeli's statements are supported by Staff's evidence described at paragraphs 47 to 48 above. Novielli had the opportunity to cross-examine Vanderlaan on the Pandeli transcript, but did not do so. We accept Pandeli's statements about Novielli's contribution to the Goldpoint Website.

[56] At paragraph 49, we found that the Goldpoint Website was designed to excite the reader about the company as an investment prospect. We find that, by providing content for the website and authorizing its release, Novielli engaged in acts in furtherance of trades.

[57] We received evidence that the Goldpoint Share Certificates bear Novielli's signature and that an account opening statement from RBC shows that Novielli was one of the two signatories on the Goldpoint RBC Account where investor funds were deposited. The evidence establishes that Novielli signed share certificates and accepted funds for the purpose of an investment, acts that have been found by the Commission in *Limelight* to be acts in furtherance of a trade.

[58] To summarize, we find that Novielli engaged in trades or acts in furtherance of trades by soliciting investors, developing the Goldpoint Website, signing Goldpoint Share Certificates and accepting funds for the purpose of an investment.

**(c) Moloney**

[59] During the hearing, we heard evidence that Moloney spoke to investors on the phone, albeit using the alias Brian Caldwell ("**Caldwell**"). Specifically, Investor Four testified that he received calls from an individual who identified himself as Caldwell. According to Investor Four, Caldwell told him that he had missed out on previous opportunities that Caldwell had previously called him about. Caldwell then told him that Goldpoint had a big gold property in Africa, and the shares were being sold at 75 cents per share with a minimum investment of $10,000. Caldwell's call resulted in Investor Four investing $10,000.

[60] The evidence establishes that Caldwell was an alias used by Moloney. Khudinyan, a Qualifier who testified, identified Moloney, who was present in the hearing room, as "Caldwell". Staff also introduced documentary evidence showing that Moloney used the name "Caldwell" in renting the premises on Merton Street which Goldpoint occupied prior to its relocation to Wellesley Street in January, 2008.

[61] Staff also submits that Moloney engaged in acts in furtherance of trades by authorizing the issuance of Goldpoint shares and being a signatory on the Goldpoint RBC Account. Documentary evidence from Capital Transfer shows that Moloney was responsible for directing the issuance of Goldpoint shares to investors. An account statement pertaining to the Goldpoint RBC Account shows that Moloney was a signatory on the Goldpoint RBC Account, the account in which investor funds were deposited.

[62] Further, Staff submits that Moloney was involved in the creation of the Goldpoint Website and provided content for the website. As discussed at paragraph 54, Pandeli gave evidence in his examination that he had met with Moloney and received instructions regarding the Goldpoint Website from Moloney.

[63] Moloney cross-examined Vanderlaan on the transcripts of Pandeli's examination. More specifically, Moloney cross-examined Vanderlaan on Pandeli's statements concerning the identity of the person who "signed off" on the content to be created for the Goldpoint Website, the nature of the input given by Moloney, the source of the photographs on the Goldpoint Website, and the statements made by Pandeli about Moloney and Novielli being "equal partners".

[64] As Moloney was unable to cross-examine Pandeli directly, we are reluctant to make findings on the extent of Moloney's role in approving the content of the website. However, we find that Moloney's cross-examination was not sufficient to undermine Staff's evidence that Moloney met with Pandeli and that he discussed the content of the

website with Pandeli. We are prepared to accept Pandeli's statements that he and Moloney met and discussed the content of the website. Based on the evidence, we find that Moloney was aware of the content of Goldpoint Website.

[65] Considering all the evidence, we find that Moloney engaged in trading or acts in furtherance of trades by soliciting investors, authorizing the issuance of Goldpoint shares, accepting investor funds and participating in the creation of the Goldpoint Website.

**(d) Pimentel**

[66] Staff alleges that Pimentel engaged in trading or acts in furtherance of trading securities of Goldpoint. More specifically, Staff alleges that Pimentel called investors and prospective investors as a Goldpoint qualifier, was the "supervisor" or "manager" of the Goldpoint qualifiers, and generally managed the Goldpoint office.

[67] Pimentel did not testify, but in her closing submissions, she denied that she sold Goldpoint shares. She characterized her involvement in Goldpoint's operations as minimal and administrative in nature:

> MS PIMENTEL: Goldpoint was a company of which my spouse was an officer and director. I never entered into a written or oral employment or consulting contract with Goldpoint. I did not recognize that there was any harm in my helping out at the Goldpoint office, for example, making photocopies, answering the phone, going for coffees, et cetera. I did not attend at the Goldpoint office on any regular basis, for example, an eight-hour work day. I only attended at the Goldpoint office on an infrequent basis, often to meet my spouse for coffee or lunch.
>
> …
>
> I never engaged in the sale of Goldpoint shares. I never signed any Goldpoint documents as an officer or director. On one occasion only, I executed a document as a witness to the signature of my spouse in this capacity as an authorized signing officer of Goldpoint. I never contributed any content or comment to Goldpoint's website or business plan. I never acted as a directing mind of Goldpoint. I never advised any consultant of Goldpoint that I was representing the company in a supervisory role.
>
> With respect to the $250 cheques that were issued to me, it was my understanding that it was a proportionate amount of my spouse's consulting fees. I occasion [*sic*] attended at the Goldpoint office to ask my spouse for money for groceries or household expenses. I understood that the cheques issued to me were to be a charge-back to his draw on this consulting fees. The notations on the cheques as to wages, consulting fees or time periods are in reference to my spouse's compensation.
>
> (Hearing Transcript, December 16, 2009, pp. 37-39)

[68] Contrary to Pimentel's submissions, we were presented with evidence that Pimentel was actively involved in the solicitation of investors. All of the Qualifiers identified Pimentel while she was in the hearing room, or from a photograph, as "Diane" or "Diana". One of the Qualifiers, Khudinyan, observed that Pimentel attended the

Goldpoint office "almost everyday" (Hearing Transcript, September 24, 2009, p. 37). According to Khudinyan, Pimentel's initial role was "just calling people" as a qualifier (Hearing Transcript, September 24, 2009, p. 26), but "after they got more stuff, she was just providing us with lists and more or less supervising, making sure we were doing it right" (Hearing Transcript, September 24, 2009, p. 38).

[69] Pimentel's supervisory role was confirmed by all of the Qualifiers. They testified that they viewed Pimentel as their manager or supervisor. In their testimony, they described tasks undertaken by Pimentel on a daily, or near daily, basis:

- Two of the Qualifiers, Kyudinyan and Jamalian, testified that Pimentel explained or showed them what they would be doing as a qualifier;
- Two of the Qualifiers, Kyudinyan and Jamalian, testified that Pimentel showed them the script that the qualifiers were to read from when talking to prospective investors (the "**Script**");
- Three of the Qualifiers, Jamalian, MacIntosh and Tonello, testified that Pimentel provided them with lists of prospective investors to call daily and collected lead sheets from the qualifiers; and
- Two of the Qualifiers, Khudinyan and Jamalian, testified that after the Goldpoint office was shut down, Pimentel answered their inquiries concerning when they would return to work.

[70] The Qualifers' testimony is supported by documentary evidence adduced by Staff, which includes Goldpoint documents obtained during a search of the Goldpoint office and cheques payable to Pimentel. For example, some of the cheques payable to Pimentel had writing in the memo line:

- "Contract Work For Feb 9 to 16";
- "wages"
- "Feb 24 March 1"
- "wage March 16 – 22"
- "wages Mar 29 – April 5"
- "wage Apr 6 – 12"
- "wage April 13 – 19"

[71] These documents are consistent with the statements made by the Qualifiers about Pimentel working at Goldpoint with the qualifiers, and her use of the name "Diane" or "Diana".

[72] We do not accept Pimentel's claim that her involvement in Goldpoint was minimal and administrative in nature. We find that the testimony from the Qualifiers and the documentary evidence establish that Pimentel, also known as Diane or Diana, attended Goldpoint's office on a regular basis and that she initially called prospective investors as a qualifier and later took on a supervisory or managerial role. As a supervisor or manager, she provided qualifiers with lists of prospective investors to call as well as the Script the qualifiers were to read from when talking to investors. She addressed

various concerns of the qualifiers. She also collected the qualifiers' lead sheets, which contained information about prospective investors.

[73] We find that Pimentel's involvement in directly soliciting investors and supervising the sales process constituted trading or acts in furtherance of trading under the definition found in subsection 1(1) of the Act.

### 3. Conclusion: Trading without Registration

[74] For the reasons given at paragraphs 29, 50, 58, 65 and 73 above, we find that Goldpoint, Moloney and Pimentel, who have never been registered under the Act in any capacity, traded Goldpoint securities during the Material Time, and that Novielli traded Goldpoint securities, although his registration in the category of mutual fund dealer did not allow him to do so.

[75] For the reasons set out at paragraphs 86 to 110 below, we find that the Respondents cannot avail themselves of the accredited investor exemption from the registration requirement. We conclude, therefore, that by trading Goldpoint shares without registration, no exemption being available, the Respondents contravened subsection 25(1)(a) of the Act and acted contrary to the public interest.

## E. Did the Respondents engage in the distribution of Goldpoint shares without a prospectus, contrary to subsection 53(1) of the Act and contrary to the public interest?

[76] The section 139 certificate filed by Staff establishes that Goldpoint is not and has never been a "reporting issuer" in Ontario, as defined by the Act, and has never filed a prospectus or preliminary prospectus with the Commission.

### 1. The Law

[77] Subsection 53(1) of the Act sets out the prospectus requirement:

> **53. (1) Prospectus required** – No person or company shall trade in a security on his, her or its own account or on behalf of any other person or company if the trade would be a distribution of the security, unless a preliminary prospectus and a prospectus have been filed and receipts have been issued for them by the Director.

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

[79] The prospectus requirement plays an important role in the protection of investors. It is integral to ensuring that prospective investors have sufficient information to ascertain the risk level of their investment and to make informed investment decisions (*First Global, supra*, at paragraph 145).

### 2. Analysis

[80] As stated at paragraph 74 above, we find that the Respondents traded Goldpoint shares. We find further that the shares were previously unissued shares.

[81] At paragraph 43, we found, based on the Capital Transfer documents, that 1,939,067 Goldpoint shares were issued to more than 110 investors during the period

from November 16, 2007 to April 28, 2008. We further found that in consideration for its shares (issued and unissued), Goldpoint received $1,696,750 from October 18, 2007 to May 1, 2008.

[82] The Capital Transfer documents also show that the Goldpoint shares issued by Capital Transfer were previously unissued shares from Goldpoint's treasury.

[83] We therefore find that previously unissued shares of Goldpoint were sold to investors, and those trades were a distribution within the meaning of the Act.

### 3. Conclusion: Distribution without a Prospectus

[84] For the reasons given at paragraphs 76 to 83 above, we find that the Respondents distributed Goldpoint securities without a prospectus. For the reasons set out at paragraphs 86 to 110 below, we find that the accredited investor exemption from the prospectus requirement is not available to the Respondents.

[85] We conclude, therefore, that the Respondents engaged in a distribution of Goldpoint shares without a prospectus, contrary to subsection 53(1) of the Act and contrary to the public interest.

## F. Were Registration and Prospectus Exemptions Available to the Respondents?

### 1. The Law

[86] Once Staff has established that the Respondents traded Goldpoint shares without registration and engaged in a distribution without a prospectus, the onus shifts to the Respondents to prove that an exemption from those requirements was available in the circumstances (*Limelight, supra*, at paragraph 142). In this case, the Respondents relied on the accredited investor exemption.

[87] Section 2.3 of *National Instrument 45-106 – Prospectus and Registration Exemptions* ("**NI 45-106**") provides an exemption from the registration and prospectus requirements otherwise applicable pursuant to subsections 25(1)(a) and 53(1) of the Act. Section 2.3 of *NI 45-106* states:

> 2.3(1) The dealer registration requirement does not apply in respect of a trade in a security if the purchaser purchases the security as principal and is an accredited investor.
>
> (2) The prospectus requirement does not apply to a distribution of a security in the circumstances referred to in subsection (1).

[88] The term "accredited investor" is defined in section 1.1 of *NI 45-106*, the relevant portion of which is as follows:

> "accredited investor" means
>
> …
>
> (j) an individual who, either alone or with a spouse, beneficially owns, directly or indirectly, financial assets having an aggregate realizable value that before taxes, but net of any related liabilities, exceeds $1,000,000,

> (k) an individual whose net income before taxes exceeded $200,000 in each of the 2 most recent calendar years or whose net income before taxes combined with that of a spouse exceeded $300,000 in each of the 2 most recent calendar years and who, in either case, reasonably expects to exceed that net income level in the current calendar year,
>
> (l) an individual who, either alone or with a spouse, has net assets of at least $5,000,000,
>
> …

[89] For ease of reference, paragraph (j) of the accredited investor definition will be referred to as the "**Net Financial Assets Test**" and paragraph (k) will be referred to as the "**Net Income Test**".

[90] Guidance with respect to the interpretation of the accredited investor exemption is provided in *Companion Policy 45-106CP – Prospectus and Registration Exemptions* ("***45-106CP***").

[91] Section 1.10 of *45-106CP* confirms that the burden of compliance with the accredited investor exemption is upon the Respondents: "A person trading securities is responsible for determining when an exemption is available".

[92] Further, section 1.10 of *45-106CP* provides guidance with respect to what is required of the seller of securities in determining the availability of the accredited investor exemption:

> … In determining whether an exemption is available, a person may rely on factual representations by a purchaser, provided that the person has no reasonable grounds to believe that those representations are false. However, the person trading securities is responsible for determining whether, given the facts available, the exemption is available. Generally, a person trading securities under an exemption should retain all necessary documents that show the person properly relied upon the exemption.
>
> For example.…under the accredited investor exemption, the seller must have a reasonable belief that the purchaser understands the meaning of the definition of "accredited investor". Prior to discussing the particulars of the investment with the purchaser, the seller should discuss with the purchaser the various criteria for qualifying as an accredited investor and whether the purchaser meets any of the criteria.
>
> It is not appropriate for a person to assume an exemption is available. For instance an [*sic*] seller should not accept a form of subscription agreement that only states that the purchaser is an accredited investor. Rather the seller should request that the purchaser provide the details on how they fit within the accredited investor definition.

[93] Pursuant to subsection 6.1(a) of NI 45-106, an issuer that relies on an exemption from the prospectus requirement is required to file a Form 45-106F1 – Report of Exempt Distribution ("**Form 45-106F1**") with the Commission.

**2. Analysis**

[94] Based on the section 139 certificate adduced by Staff, we find that Goldpoint did not file Forms 45-106F1.

[95] However, the Goldpoint Subscription Agreement, a form prepared by Goldpoint to be signed by investors, contains a number of clauses indicating that the company sought to rely on an exemption provided by NI 45-106.

[96] Clause 1(c)(iv) of the Goldpoint Subscription Agreement is as follows:

> The Shares are being sold by the Corporation only by way of private placement and only under the statutory exemptions from the registration and prospectus requirements contained in Section 2.3 of the National Instrument 45-106 implemented in Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland & Labrador, Northwest Territories, Nova Scotia, Nunavut, Ontario, Quebec, Prince Edward Island and Saskatchewan, or contained in the laws, rules and regulations of any other state or country in which the Subscriber resides or to which the Subscriber is otherwise subject. The Corporation is not currently issuing a prospectus, offering memorandum or other document in respect of the offering of Shares, and, as a consequence of acquiring Shares pursuant to this exemption, certain protections, right to rescission or damages, will not be available to the Subscriber. The Subscriber may not receive certain information that would otherwise be required to be provided to it under applicable securities legislation and the Corporation is herein relieved under statutory exemption from certain obligations that would otherwise apply under applicable securities legislation;
>
> [emphasis added]

[97] Clause 2 of the Goldpoint Subscription Agreement, which is captioned "Certification of Investor Accreditation for Individuals and Corporate Entities", effectively seeks a representation from prospective investors that they meet either the Net Financial Assets Test or the Net Income Test:

> 2. The Subscriber certifies to the Corporation (and acknowledges that the Corporation, and its counsel, are relying thereon) that:
>
> - It beneficially own [*sic*] (either individually or with a spouse) financial assets having an aggregate realizable value that, before taxes net of any related liabilities, exceeds one million dollars; or
> - It has had a net income before taxes in each of the two most recent years in excess of two hundred thousand dollars, or have [*sic*] had a joint income with his or her spouse in excess of three hundred thousand dollars in each of those two years, and reasonably expect [*sic*] such income to exceed two hundred thousand dollars (three hundred thousand dollars in the case of joint income) in the current year; or

- If it is a company, limited partnership, limited liability partnership, trust or estate, other than mutual fund or non-redeemable investment fund, each of the owners, partners or equity holders is an accredited investor under the other definitions above.

[98] Testimony from Investors and Qualifiers regarding telephone conversations between representatives of Goldpoint (the "**Goldpoint Representatives**") and investors also indicates that Goldpoint was seeking to rely on the accredited investor exemption. More specifically, Qualifiers testified that they were instructed to ask prospective investors whether they were accredited, and if not, follow-up phone calls would not be made to solicit purchases of Goldpoint shares.

[99] However, we find that Investors Two, Three, Four, Five and Six were not accredited investors at the time they purchased Goldpoint shares, based on their evidence about their net income, net assets and net financial assets.

[100] In addition, the steps taken by the Respondents were insufficient to comply with the accredited investor exemption. Clause 2 of the Goldpoint Subscription Agreement, excerpted above, is insufficient to establish that a particular investor was an accredited investor for the purpose of relying on the accredited investor exemption. Goldpoint should have determined whether each investor was in fact accredited based upon facts provided by that investor about his or her financial position in relation to the Net Assets Test or the Net Income Test. The clause as it stands is a mere representation that the purchaser qualifies as an accredited investor.

[101] Further, while there is evidence that Goldpoint Representatives in some cases made efforts to ascertain an investor's status as an accredited investor, these efforts were insufficient for two reasons. First, not every investor contacted by Goldpoint Representatives was asked about his or her financial position or whether he or she was an accredited investor. Of the six Investors who testified, only Investors Two, Three and Six testified that they had conversations with Goldpoint regarding either their financial status or the accredited investor exemption. Investor One testified that he was not asked about his financial position or whether he was an accredited investor. Investor Four did not recall having a conversation with Goldpoint regarding either his financial status or the accredited investor exemption.

[102] Second, even if investors were asked about either their financial status or the accredited investor exemption, the information they were given with respect to the term "accredited investor" was deficient. For instance, Investors Two and Six testified about the definition of accredited investor with which they were provided. We find that these definitions were not accurate. When Investor Three told a Goldpoint Representative that he did not qualify as an accredited investor, the Goldpoint Representative stated that the investor was "close enough" (Hearing Transcript, September 28, 2009, p. 114).

[103] The evidence of the Qualifiers is consistent with that of the Investors. According to all of the Qualifiers, the steps taken by Goldpoint's qualifiers at the initial phone calls made to prospective investors were as follows:

1) The qualifiers would call individuals, whose names and numbers were on lists provided by Goldpoint;

2) They would introduce themselves and Goldpoint to prospective investors by reading from a Script provided by the company;

3) They would tell prospective investors, in accordance with the Script, that the prospective investor had previously been contacted with respect to an investment in Petrolifera, in which the prospective investor had chosen not to invest and which had subsequently performed particularly well as an investment;

4) They would ask prospective investors if Goldpoint could send the prospective investors materials regarding the investment; and

5) If an investor was interested, they would ask if the investor was an "accredited investor".

[104] The definition of "accredited investor" that the Qualifiers would provide to prospective investors was a definition provided by Goldpoint. Three of the four Qualifiers who testified (Khudinyan, Jamalian and Tonello) stated they recalled the definition of "accredited investor" provided to them by Goldpoint as including significant non-financial assets such as real estate and vehicles in calculating whether the individual had sufficient assets to qualify as an "accredited investor" pursuant to the Net Financial Assets Test. Another of the Qualifiers (McIntosh) stated that he was unsure as to whether the definition of "accredited investor" provided by Goldpoint included real estate.

[105] If the Qualifiers deemed that the prospective investor was accredited under the definition provided to them by Goldpoint, the Qualifiers would ask the individual if he or she was "liquid". More specifically, two of the Qualifiers testified that they would ask the prospective investor if he or she had $10,000 in liquid assets.

[106] Prospective investors who were deemed by Goldpoint to be accredited and who were interested in receiving information about Goldpoint would be sent materials and would be told that a "senior consultant" would contact them to discuss the investment further. Prospects who were deemed to be accredited investors and interested in investing would then have their information recorded on a "lead sheet" which would be used by the "senior consultant" in a subsequent phone call to the individual.

[107] Qualifiers were told to adhere to the Script. For instance, Khudinyan testified that "…the first thing that I was really told and it was stressed to keep as close to the [S]cript as possible, to not improvise" (Hearing Transcript, September 24, 2009, p. 21). MacIntosh also stated in his testimony that "we were pretty much told to stick to the script" by Novielli and Moloney (Hearing Transcript, September 24, 2009, p. 95).

[108] The Qualifiers' testimony establishes that the initial process for qualifying individuals as "accredited investors" was flawed and unreliable. It is also clear from the evidence that Goldpoint exerted considerable control over how the Qualifiers interacted with prospective investors.

[109] Three of the Qualifiers testified that they were provided with a written document that contained a materially inaccurate definition of "accredited investor". This definition inappropriately included real estate in calculating whether an investor met the Net Financial Assets Test.

[110] In summary, we find that five of the six Investors were not accredited investors during the Material Time, that Goldpoint did not take the required steps to comply with the accredited investor exemption, and that Goldpoint did not file Forms 45-106F1. We therefore find that the accredited investor exemption, pursuant to section 2.3 of *NI 45-106*, was not available for sales of Goldpoint shares during the Material Time.

### 3. Conclusion: Unregistered Trading and Illegal Distribution

[111] Accordingly, as stated at paragraph 74 above, we find that the Respondents traded Goldpoint shares without registration. As stated at paragraph 83 above, we find that the shares were previously unissued shares and therefore the trades constituted a distribution for which a prospectus was required. At paragraph 110 above, we found that although the Respondents relied on the accredited investor exemption from the registration and prospectus requirement, that exemption was not available to them.

[112] We conclude, therefore, that the Respondents engaged in unregistered trading and an illegal distribution of Goldpoint shares, contrary to subsections 25(1)(a) and 53(1) of the Act and contrary to the public interest.

## G. Did the Respondents make prohibited undertakings relating to the future value of a security, contrary to subsection 38(2) of the Act and contrary to the public interest?

### 1. The Law

[113] Subsection 38(2) of the Act prohibits undertakings relating to the future value of a security that are made with the intention of effecting a trade in that security:

> **(2) Future value** – No person or company, with the intention of effecting a trade in a security, shall give any undertaking, written or oral, relating to the future value or price of such security.

[114] In *Limelight*, the Commission addressed the difference between a "representation" and an "undertaking" in the following terms:

> We agree that something less than a legally enforceable obligation can be an "undertaking" within the meaning of subsection 38(2), depending on the circumstances. We also accept Staff's submission that we should not take an overly technical approach to the interpretation of subsection 38(2) and that we should consider all of the surrounding circumstances and the Commission's regulatory objectives in interpreting the meaning of that section.
>
> We found the decision in *National Gaming Corp., Re* (2000), 9 A.S.C.S. 3570 (Alta. Securities Comm.) ("*National Gaming*") to be helpful on this issue. The Alberta Securities Commission (the "ASC") stated:
>
> > ... an undertaking is a promise, assurance or guarantee of a future price or value of securities that can be reasonably interpreted as providing the .purchaser with a contractual right against the person giving the undertaking if, for any reason, the value or price is not achieved.

> (*Re National Gaming Corp.* (2000), 9 A.S.C.S. 3570, at p. 16)

In the same decision, the ASC also stated:

> In interpreting subsection 70(3)(a), we are mindful of the fact that predictions relating to the future value or price of securities are commonplace in the securities industry, and are not prohibited by the Act. Predictions encompass a broad spectrum. They range from very general predictions about the entire market, to very specific predictions about the value or price of a particular security within a particular time frame. Some predictions are developed with extreme care, based on rigorous, professional research and scientific analysis based on sophisticated market theory. Other predictions may be based on no more than wishful thinking or guesswork. In our view, the shared element of all predictions is that they are merely opinions.
>
> (*Re National Gaming Corp.* (2000), 9 A.S.C.S. 3570, at p. 16)

Finally, the ASC stated that in determining whether a representation amounted to an undertaking, the context of the statement must be considered, and the "undertaking" must be given a "functional interpretation" in keeping with the objective of protecting investors. Accordingly, the ASC held it was not necessary to show that all the elements of an enforceable contract existed. The ASC concluded in *National Gaming Corp.* that no undertaking with respect to future value was given in the circumstances.

(*Limelight*, *supra*, at paragraphs 164-167)

[115] In *Limelight*, the Commission was not persuaded that the respondents' representations were "undertakings":

> In our view, a mere representation as to future value is not an "undertaking" within the meaning of subsection 38(2) of the Act. Prohibiting all representations as to the future value of securities would ignore the reality of the marketplace.
>
> … The words used by the Limelight salespersons did not suggest that something more than a representation was being made or an opinion given. There is no evidence of any promise or assurance given to repurchase the securities or refund the purchase price if a certain value was not achieved…
>
> (*Limelight*, *supra*, paragraphs 170-171)

[116] Staff cites *Re Aatra Resources Ltd. et al.* (1990), 13 O.S.C.B. 5109 ("***Aatra***") as providing an example of when the Commission has found that certain statements constituted undertakings with respect to the future value of a security. In that case, the

Commission summarized the evidence it relied upon in finding that the respondent breached subsection 38(2) of the Act:

> And, despite the express prohibitions of section 37 of the Act, Mr. Kronis made express representations as to the future price of Aatra and Bayridge stock. On June 29, 1989, he told Mr. Carducci that "you'll probably be well over the $4.00 hump" in Bayridge "over the next 90 days", and that "that could be, you know, could take two days to go to $4.00". On August 16, 1989, he told Mr. Carducci that:
>
> > I would assure you, I will practically guarantee you that within the week you will see the stock one week from today I would say anywhere from twenty cents ($0.20) to fifty cents ($0.50) higher.
>
> And he told another investor that if his stock did not go up by 10¢ to 15¢ in the following 2 to 3 weeks, he did not have to pay for it – again, in breach of the express provisions of section 37. Once again, "over-enthusiastic" or not, Mr. Kronis was clearly acting in breach both of the Act and of his obligationsas a registrant under the Act.
>
> (*Aatra*, *supra*, at paragraph 22)

[117] We accept and adopt the analysis set out in *Limelight*, *National Gaming* and *Aatra*.

**2. Analysis**

[118] In closing submissions, Staff conceded that there is not enough evidence to prove that Novielli, Moloney and Pimentel made prohibited undertakings to investors with the intention of effecting a trade in a security. However, Staff submits that the evidence before the Panel establishes that the employees, agents or representatives of Goldpoint made prohibited undertakings contrary to subsection 38(2) of the Act.

[119] The Investors testified that Goldpoint Representatives made representations relating to the future value or price of Goldpoint shares as part of a pattern of high pressure sales tactics. For instance, Investor Four was told by a Goldpoint Representative that Goldpoint was going to be bought out by Dow Chemicals and the shares would reach a value of $20. The Goldpoint Representative further told him that if he did not buy more shares, he would be put on the "back burner" in relation to the buyout.

[120] Similarly, Investor Five testified that a Goldpoint Representative who identified himself as "Robert Black" telephoned him in late 2007:

> He [Robert Black] had mentioned that the target was approximately six months where either the TSX listing would come about or that a -- or a takeover would happen, and he was throwing the numbers five to seven dollars a share around for that.
>
> He told me that this initial offering was almost sold out and that I had to act fairly quick.
>
> (Hearing Transcript, September 30, 2009, p. 69)

[121] We find that the representations described by Investor Four and Investor Five lack the firmness and specificity we would expect of a "promise or assurance". We are not persuaded they amount to "undertakings" relating to the future value or price of Goldpoint shares.

[122] Staff also adduced evidence that a Goldpoint Representative "guaranteed" an investor interviewed by Vanderlaan that Goldpoint shares would at least double and would likely go as high as fifteen times their current value once the shares were listed on a stock market. This statement was introduced through Vanderlaan's affidavit, and it was untested by cross-examination and uncorroborated. Although hearsay evidence is admissible in Commission proceedings (*Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended, subsection 15(1); *Re Sunwide Finance Inc.* (2009), 32 O.S.C.B. 4671, at paragraphs 20-22), we are not persuaded we should rely on it in this circumstance because the exact words used by the Goldpoint Representative are important in determining whether any statement made amounted to a prohibited undertaking.

### 3. Conclusion: Prohibited Undertakings

[123] We are not, therefore, persuaded that Goldpoint contravened subsection 38(2) of the Act. However, we consider that the representations made by the Respondents with respect to the future value of Goldpoint shares, together with their use of high pressure sales tactics, were improper and contrary to the public interest (*Limelight*, *supra*, at paragraph 180).

## H. Did the Respondents make prohibited representations that Goldpoint would be listed on a stock exchange, contrary to subsection 38(3) of the Act and contrary to the public interest?

### 1. The Law

[124] Subsection 38(3) of the Act provides that:

> **(3) Listing** – Subject to the regulations, no person or company, with the intention of effecting a trade in a security, shall, except with the written permission of the Director, make any representation, written or oral, that such security will be listed on any stock exchange or quoted on any quotation and trade reporting system, or that application has been or will be made to list such security upon any stock exchange or quote such security on any quotation and trade reporting system, unless,
>
> > (a) application has been made to list or quote the securities being traded, and securities of the same issuer are currently listed on any stock exchange or quoted on any quotation and trade reporting system; or
> > (b) the stock exchange or quotation and trade reporting system has granted approval to the listing or quoting of the securities, conditional or otherwise, or has consented to, or indicated that it does not object to the representation.

[125] Whereas subsection 38(2) of the Act requires an "undertaking", subsection 38(3) only requires a "representation" with respect to the future listing of securities. The policy

reason for this prohibition is that a stock exchange listing offers investors some level of comfort that they can liquidate their investments, which may induce them to invest.

**2. Analysis**

[126] In closing submissions, Staff conceded that there is not sufficient evidence before the Panel to establish that Novielli, Moloney and Pimentel made prohibited representations to investors with the intention of effecting a trade in a security. However, Staff submits that the evidence before the Panel establishes that the employees, agents or representatives of Goldpoint made representations prohibited by subsection 38(3) of the Act.

[127] Investor Five testified that he was told by a Goldpoint Representative that Goldpoint was very close to being listed on the TSX. More specifically, he was told that in about six months, Goldpoint would be either listed on the TSX or taken over by another company. In either case, the representative indicated a price range of $5 to $7 per share. After his initial purchase of Goldpoint Shares, Investor Five was contacted by another Goldpoint Representative who said that "things were progressing very well" with respect to the TSX listing (Hearing Transcript, September 30, 2009, p. 76).

[128] During the hearing, we heard further evidence from Vanderlaan about interviews conducted with, and statements made by, certain Goldpoint investors who did not testify. The following is a summary of the evidence put forth by Vanderlaan with respect to various investors who did not testify:

- an investor Vanderlaan interviewed stated that he was told by a Goldpoint Representative that it would take about nine months before Goldpoint would be listed on the TSX Venture Exchange;
- a second investor Vanderlaan interviewed stated that he was told by a Goldpoint Representative that Goldpoint would be listed on the stock market in a couple of months;
- a third investor Vanderlaan interviewed stated that he was told by a Goldpoint Representative that Goldpoint would be listed on a public stock exchange in the spring or summer of 2008;
- a fourth investor Vanderlaan interviewed stated that he was told by a Goldpoint Representative that Goldpoint was about to be listed and that the entire investment horizon was no more than six months;
- a fifth investor sent a statement about his interaction with a Goldpoint Representative, along with documents related to his investment in Goldpoint, to Staff which stated, "I was told that the company shares would soon be listed on the Toronto Stock Exchange and when they were they would open in the $5.00 to $10.00/share range".

[129] We are prepared to rely on the evidence from Vanderlaan about statements made by investors, having regard to the fact that the evidence of those investors was consistent and supported by the direct testimony of another investor who did testify. We are also mindful that a representation is defined more broadly than an undertaking. Based on the evidence from Investor Five and Vanderlaan, we find that Goldpoint made statements

that its shares would be listed on a stock exchange and provided a specific time horizon for that listing. Considering all the circumstances, we find that these statements qualify as representations with respect to the future listing of Goldpoint securities.

[130] We received no information that the Director had provided written permission with respect to any representation of listing on any stock exchange or quoting on any quotation and trade reporting system. Subsection 38(3) of the Act also provides an exemption from the prohibition against making such representations if the Respondents have made an application to list or quote the securities in question, or if a stock exchange or quotation and trade reporting system has indicated that it consents to such representations. In this case, there is no evidence that Goldpoint was seeking listing or quoting, nor had an exchange or quotation and trade reporting system provided consent for Goldpoint's representations.

### 3. Conclusion: Prohibited Representations

[131] Therefore, we find that Goldpoint through its employees, agents or representatives acted contrary to subsection 38(3) of the Act and contrary to the public interest.

## I. Did the Respondents engage in fraud, contrary to subsection 126.1(b) of the Act and contrary to the public interest?

### 1. The Law

[132] Subsection 126.1(b) of the Act states:

> **126.1 Fraud and market manipulation** – A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities or derivatives of securities that the person or company knows or reasonably ought to know,
>
> (a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security or derivative of a security; or
>
> (b) perpetrates a fraud on any person or company.

[133] Fraud is "one of the most egregious securities regulatory violations" and is both "an affront to the individual investors directly targeted" and something that "decreases confidence in the fairness and efficiency of the entire capital market system" *(Re Capital Alternatives Inc.*, 2007 ABASC 79 ("***Capital Alternatives***") at paragraph 308, citing D. Johnston & K.D. Rockwell, *Canadian Securities Regulation*, 4th ed., Markham: LexisNexis, 2007 at 420).

[134] The term "fraud" is not defined in the Act. Subsection 126.1(b) is a relatively recent addition to the Act and has been considered in several decisions of the Commission (including *Re Al-Tar Energy Corp. et al.* (2010), 33 O.S.C.B. 5535 ("***Al-Tar***"), *Re Lehman Cohort Global Group Inc. et al.* (2010), 33 O.S.C.B. 7041 ("***Lehman Cohort***"), and *Re Global Partners Capital et al.* (2010), 33 O.S.C.B. 7783 ("***Global Partners***"). In applying subsection 126.1(b), the Commission has drawn guidance from decisions of the courts and other securities commissions in Canada. In particular, we follow the reasoning of these decisions in outlining the legal issues.

[135] The Supreme Court of Canada discussed the elements necessary to establish fraud in *R. v. Théroux*, [1993] 2 S.C.R. 5 ("***Théroux***"). McLachlin J. (as she then was) stated that fraud will be established upon proof of a dishonest act, proof of deprivation caused by the dishonest act, and proof of the mental element required (*mens rea*).

[136] The first element, the dishonest act, is established by proof of deceit, falsehood or other fraudulent means. As to deceit and falsehood, the Court stated that "all that need be determined is whether the accused, as a matter of fact, represented that a situation was of a certain character, when, in reality, it was not" (*Théroux, supra,* at paragraph 18).

[137] As to "other fraudulent means," the Supreme Court of Canada held that the issue is "determined objectively, by reference to what a reasonable person would consider to be a dishonest act" (*Théroux, supra,* at paragraphs 17 and 18). The concept is intended to encompass all other means, other than deceit or falsehood, which can be properly characterized as dishonest. "Other fraudulent means" may include the non-disclosure of important facts, the unauthorized diversion of funds and the unauthorized arrogation of funds or property (*Théroux, supra,* at paragraph 18).

[138] The second element of fraud, deprivation, is established by proof of detriment, prejudice or risk of prejudice to the economic interests of the victim caused by the dishonest act (*Théroux, supra,* at paragraphs 16 and 27). In establishing deprivation, it is not necessary to prove that an accused ultimately profited or received an economic benefit or gain from the conduct or that actual deprivation occurred (*Théroux, supra,* at paragraph 19).

[139] In order to establish fraud, there must also be proof of the necessary mental element (*mens rea*) on the part of the accused. In *Théroux*, the Supreme Court of Canada held that the mental element required is established by proof of:

1. subjective knowledge of the prohibited act; and
2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).

(*Théroux, supra,* at paragraph 27)

[140] The Court in *Théroux* observed that subjective intention may be inferred from the acts themselves (*Théroux, supra,* at paragraph 23) and that it is not necessary to show precisely what was in the mind of the accused at the time of the fraudulent acts. The Court stated in *Théroux* that:

> [t]he accused must have subjective awareness, at the very least, that his or her conduct will put the property or economic expectations of others at risk. As noted above, this does not mean that the Crown must provide the trier of fact with a mental snapshot proving exactly what was in the accused's mind at the moment the dishonest act was committed. In certain cases, the inference of subjective knowledge of the risk may be drawn from the facts as the accused believed them to be… [W]here the accused tells a lie knowing others will act on it and thereby puts their property at

> risk, the inference of subjective knowledge that the property of another would be put at risk is clear.
>
> (*Théroux, supra*, at paragraph 29)

[141] The Alberta Court of Appeal, in affirming *Capital Alternatives*, held that one can draw an inference as to the requisite mental element for fraud from the totality of the evidence (*Alberta (Securities Commission) v. Brost*, 2008 ABCA 326 ("***Brost CA***") at paragraph 48).

[142] The operative language of subsection 126.1(b) of the Act is identical to the language of subsection 57(b) of the British Columbia *Securities Act*, R.S.B.C. 1996, c. 418, as amended (the "**BC Act**"). The British Columbia Court of Appeal addressed the application of subsection 57(b) of the BC Act in *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7 ("***Anderson***"). The Supreme Court of Canada denied leave to appeal the *Anderson* decision ([2004] S.C.C.A. No. 81). The Court in *Anderson* applied the legal test for fraud established in *Théroux*.

[143] In interpreting subsection 57(b) of the BC Act, the British Columbia Court of Appeal stated in *Anderson* that:

> … s. 57(b) does not dispense with proof of fraud, including proof of a guilty mind … Section 57(b) simply widens the prohibition against participation in transactions to include participants who know or ought to know that a fraud is being perpetrated by others, as well as those who participate in perpetrating the fraud. It does not eliminate proof of fraud, including proof of subjective knowledge of the facts constituting the dishonest act, by someone involved in the transactions. [emphasis in original]
>
> (*Anderson*, *supra*, at paragraph 26)

[144] The Court in *Anderson* also stated that:

> Fraud is a very serious allegation which carries a stigma and requires a high standard of proof. While proof in a civil or regulatory case does not have to meet the criminal law standard of proof beyond a reasonable doubt, it does require evidence that is clear and convincing proof of the elements of fraud, including the mental element.
>
> (*Anderson*, *supra*, at paragraph 29)

[145] The legal test for fraud applied by the Court in *Anderson* was adopted in *Capital Alternatives*, which was affirmed in *Brost CA.*

**2. Analysis**

**(a) Goldpoint**

**(i) Dishonest Acts**

[146] The first element of the fraud analysis is consideration of whether a dishonest act was committed. Staff takes the position that Goldpoint committed a series of dishonest acts, which included (i) misrepresentations to investors in its promotional materials, (ii)

misleading statements made in the course of soliciting investors to purchase Goldpoint shares, (iii) unauthorized diversion of investor funds and (iv) removal of documents from Goldpoint's office on the day Staff executed a search warrant at Goldpoint's office. Each will be addressed in turn.

***Promotional Materials***

[147] As discussed at paragraph 44, Goldpoint had a website located at www.goldpointresources.com. The Goldpoint Website contained descriptions of Goldpoint's operations in Ghana, some examples of which are:

- "Goldpoint's major concessions – Nchiadi – covering 15 km of stike [*sic*] length along the prolific Ashanti Trendand [*sic*] is in the process of acquiring a second contiguous concession";
- "Anglo/Ashanti Goldfields, +40 million ounce Obuasi Mine is located 50 km to the southwest along this trend and Newmont Mining recently announced that their Akyem property (+8 million ounce), which is located approximately 25 km to the southeast will be in production by 2008. Goldpoint's concession covers approximately 60 square kilometers within this trend and is referred to as the South Ashanti Project";
- "Goldpoint has spent large amounts of capital to date exploring and developing this project. This intensive and ongoing exploration activity included soil geochemistry, magnetic survey, trenching and drilling. Results to date have been extremely encouraging…"; and
- "[Goldpoint] owns 100% of the South Ashanti project subject to a 10% carried interest by the Ghanaian Government. This project consists of one Government granted license being the Nchiadi concession and another being the future concession project which is in its final stages of acquisition".

[148] Goldpoint had a Summary Business Plan that was provided to potential investors in order to convince them to invest in Goldpoint. The Summary Business Plan contains statements about Goldpoint's operations in Ghana, some of which are:

- "The company has the mineral rights to an area 60 square kilometres known as the Nchiadi concession";
- "The license allows for the prospecting, mining and exporting of precious metals"; and
- "Security is very strict at the mine site. All shipments are guarded. All overseas shipments are bonded and insured in the event of loss";

[149] The Summary Business Plan contains a Projected Income Statement. The projected profits (losses) for 2007, 2008 and 2009 as set out in the Projected Income Statement are ($32,000), $7,503,616 and $9,209,600, respectively.

[150] The Goldpoint Website and the Summary Business Plan both listed Millard, Deslauriers, Shoemaker, LLP ("**MDS**") as the company's accountants.

[151] The Goldpoint Website and the Summary Business Plan made extensive reference to Goldpoint's operations in Ghana. The most important of these assertions are that Goldpoint had ownership interests in a gold mine in Ghana and a licence that allowed for the prospecting, mining and exporting of precious metals. As such, the existence of the gold mine and the prospecting licence are central to the truth of these promotional materials.

[152] Staff's evidence on this issue is that Staff investigators uncovered no documents that would support the assertion that Goldpoint had any interest in an existing mine or a prospecting licence. The only interest that Goldpoint had in Ghana that Staff investigators were able to find was an application for a reconnaissance licence which "confers on the holder the right to search for a specific minerals (or commodity) within the licence area by geochemical and photo-geological surveys or other remote sensing techniques" (Hearing Transcript, September 25, 2009, pp. 158-159). Unlike a licence for the prospecting, mining and exporting of precious metals, a reconnaissance licence does not allow for drilling, excavation or other sub-surface techniques unless specified.

[153] Novielli introduced various pieces of documentary evidence during his cross-examination of Vanderlaan in an attempt to prove the existence of the gold mine and the prospecting licence. Some of these documents already formed part of Staff's evidence; they were provided to Staff in response to undertakings given during Staff's compelled examination of Novielli and questions put to him by Staff in an email. Others were not already in evidence, but were additional documents concerning the purported existence of a prospecting licence to which Novielli referred during his cross-examination of Vanderlaan. These documents are titled "Option Agreement", "List of Companies Which Had Been Granted Mineral Rights", and "Package of documents re agreement between Government of Republic of Ghana and Ano South Goldfields Limited".

[154] Although these documents appear to relate to Goldpoint's interests in Ghana, Novielli was unable to produce the original versions of these documents. No evidence was provided to authenticate the source and legitimacy of these documents. We place limited weight on this evidence. We note that even if we take the reliability of these documents at its highest, these documents are not sufficient to establish that Goldpoint had any interest in mines or prospecting licences in Ghana.

[155] Given the centrality of the question of Goldpoint's interest in a gold mine and a prospecting licence in Ghana, the Respondents' inability to produce persuasive evidence that would support their existence creates a strong inference that the statements made to investors regarding the gold mine and the prospecting licence were false.

[156] However, these are not the only false and misleading statements found in Goldpoint's promotional materials.

[157] First, during his testimony, Vanderlaan demonstrated that the website of another issuer with mining operations contained text that is virtually identical to the contents to the Goldpoint Website. The only differences between the two websites are the names of the companies and the properties involved.

[158] Second, the Goldpoint Website and the Summary Business Plan both indicated that MDS were Goldpoint's accountants. This statement is false. Vanderlaan investigated

this claim and was advised by a letter from MDS, dated August 25, 2008, that MDS had "no engagement letter for services to be rendered and to date [had] not performed any services on behalf of this corporation [Goldpoint]".

[159] Third, the Goldpoint Website included a News Release dated March 15, 2007 announcing a "non-brokered private placement of 12 million units", as mentioned at paragraph 44. The News Release was signed by Novielli "on behalf of Directors". As discussed at paragraph 48 above, Boyle investigated the electronic "properties" of the News Release and determined that the document was created on October 27, 2007 rather than March 15, 2007. In fact, Goldpoint was not even incorporated in Ontario until August 31, 2007, some five months after the News Release was allegedly issued. As well, the telephone numbers and address that were on the News Release were the address and telephone numbers of Regus Business Center ("**Regus**"). However, the Regus Business Center contract for services, which Staff introduced into evidence through Boyle, shows that Goldpoint did not contract with Regus until September of 2007. The evidence indicates that the News Release was backdated to mislead investors as to the history of the company.

[160] In summary, Staff presented ample evidence that Goldpoint made many false or misleading statements to create a false impression that the company was engaged in a legitimate business in order to entice investors to invest in Goldpoint. These misrepresentations were dishonest and fraudulent.

***Solicitations to Investors***

[161] The process of soliciting the purchase of Goldpoint shares began with a qualifier cold-calling prospective investors to arouse their interest in Goldpoint shares. As discussed at paragraphs 103 to 108, we heard testimony from the Qualifiers about their use of Scripts. One Qualifier, Khudinyan, was able to recite from memory the Script that she read to prospective investors when she was working as a qualifier at Goldpoint:

> Yes. Good morning, sir or madam. I'm calling you from Goldpoint Resources. Goldpoint Resources is a gold mining company and it is developing a very exciting opportunity. Your name was brought to this database as a person who was contacted back in 2005 with Petrolifera project. Petrolifera was a Canadian oil and gas company which started trading -- which started at $1.25 and went up to more than $23 within just a week of the trade. So it was a blockbuster in terms of profit for investors, and back then you didn't want to get involved, something like that, and would you like to receive the information about Goldpoint Resources with no cost or obligation to you?
>
> (Hearing Transcript, September 24, 2009, pp. 18-19)

[162] A prospective investor who expressed an interest in purchasing Goldpoint shares would then be referred internally to salespeople employed by Goldpoint. In soliciting investors to purchase Goldpoint shares, the salespeople also made a number of statements about the company. Testimony from the Investors reveals that Goldpoint Representatives made the following representations:

- Investor Four was told that Goldpoint had active gold mines in Ghana;

- Investor Four was also told that there was a company in negotiations to purchase Goldpoint;
- Investor Two was told that Goldpoint was mining out large amounts of gold and platinum and making a huge profit;
- Investor Five was told that Goldpoint was a possible target takeover by some of the larger surrounding companies in approximately six months' time; and
- Investor Five was also told that the salespeople were being paid in Goldpoint shares.

[163] The Script that the qualifiers followed in arousing prospective investors' interest made reference to a company called Petrolifera. It claimed that the salespeople employed by Goldpoint were previously involved in Petrolifera's distribution. However, Staff presented evidence to show that neither Novielli nor Moloney had been involved in the distribution of Petrolifera shares. We agree with Staff's submissions that Goldpoint was using the name of a company with ongoing operations to create a false appearance of legitimacy and, in doing so, committed dishonest acts.

[164] As in the case of Goldpoint's promotional materials, the salespeople made representations about Goldpoint's operations, and more specifically, Goldpoint's interests in a gold mine, when soliciting prospective investors. However, as the analysis at paragraphs 151 to 155 demonstrates, there is no persuasive evidence that Goldpoint had any active gold mines in Ghana or was producing gold or platinum.

[165] Goldpoint's salespeople also claimed that several companies were looking to purchase or take over Goldpoint. We received no evidence that Goldpoint was the subject of a purchase or a takeover attempt.

[166] With respect to the claim made by Goldpoint's salespeople concerning their compensation, the evidence shows that the salespeople were not being paid in Goldpoint shares. Vanderlaan testified that he found no evidence of Goldpoint share ownership by the salespeople, identified as Jack Anderson, Richard Wylie, Novielli, Moloney or Pimentel. He further testified that he found no evidence of shares in Goldpoint being issued to anyone other than investors who provided funds to Goldpoint for those shares. His testimony is supported by the documentary evidence from Capital Transfer.

[167] In summary, we find that Goldpoint's qualifiers and salespeople, acting under the direction of Goldpoint's directing minds, made many false and misleading statements in their solicitation of investors.

***Diversion of Funds***

[168] In the Supreme Court of Canada decision *Théroux*, the court acknowledged that dishonest acts could be committed by way of "other fraudulent means". These may include the unauthorized diversion of funds and the unauthorized arrogation of funds or property (*Théroux*, *supra*, at paragraph 18).

[169] Staff maintains that the strongest evidence of fraud in this case is the flow of funds, which points to the unauthorized diversion of investor funds.

[170] As discussed at paragraph 40, we received documentary evidence obtained from Capital Transfer in relation to the issuance of Goldpoint shares. We also received banking records of accounts in the names of the Respondents from various financial institutions, including RBC, TD Canada Trust, and HSBC Bank Canada ("**HSBC**"). These banking records include copies of cheques and account statements evidencing various transfers of funds.

[171] The evidence described above establishes that Goldpoint received $1,696,750 from more than 110 investors from October 18, 2007 to May 1, 2008. Paragraphs 38 and 39 refer to several investors who purchased Goldpoint shares for varying sums.

[172] The majority of investment funds that were deposited into the Goldpoint RBC Account were withdrawn and could be traced to various accounts in the names of the Respondents. Only a small portion of the funds were used to pay expenses related to Goldpoint or Goldpoint's purported operations in Ghana. A breakdown of the flow of funds follows:

1) $52,465 was directly attributable to overhead and expenses related to utilities, including rent, bank charges, phone bills, utilities and other expenses incurred for the operations of Goldpoint's offices;

2) From March 20, 2008 to April 2, 2008, US $50,000 was transferred to Neo Mining Ltd. ("**Neo**"), resulting in CAD $51,823,50 debit to the Goldpoint RBC Account;

3) From October 26, 2007 to April 24, 2008, $513,260 was transferred through a series of 24 transactions to an account at TD Canada Trust in the name of 1112086 Ontario Inc., a company of which Moloney was administrator and the sole director (the "**Moloney TD Account**");

4) On February 28, 2008 and March 7, 2008, $25,000 and $40,000, respectively, were transferred to an HSBC account controlled by Moloney (the "**Moloney HSBC Account**");

5) From November 2, 2007 to April 29, 2008, $311,879 was withdrawn in a series of 53 transactions by way of cheques made payable to "Cash" and signed by Moloney on behalf of Goldpoint;

6) From November 6, 2007 to May 5, 2008, $584,562 was transferred in a series of 32 transactions to an account jointly held by Novielli and Pimentel at TD Canada Trust (the "**Novielli-Pimentel Joint Account**");

7) On January 16, 2008, $4,500 was withdrawn by a cheque payable to "Cash" and signed by Novielli; and

8) From February 22, 2008 to April 21, 2008, $2,000 was paid to Pimentel and deposited in two Royal Bank Accounts controlled solely by her (the "**Pimentel Accounts**").

[173] The evidence establishes that, of the $1,681,750 that was deposited into the Goldpoint RBC Account, only $104,288, or approximately 6% of the funds, could be traced to Goldpoint's projects or operating expenses – and this amount *includes* $51,823.50 related to the transfer to Neo, a company about which we know essentially

nothing. A total of $1,481,201, or approximately 88% of the funds, was withdrawn by the Respondents or transferred to accounts controlled directly or indirectly by them. Of that $1,481,201, banking records show that the funds were withdrawn in the form of cash, transferred to other accounts, or used by the Respondents to fund their personal expenditures.

[174] With respect to the funds that were withdrawn in cash, there are indications in this case as to where some of the cash ultimately went. Through Vanderlaan, Staff introduced evidence obtained from the RCMP that Novielli and Moloney were stopped by US Customs agents when they were attempting to cross the border to the USA on February 7, 2009. After Novielli and Moloney were returned to Canada, the Canadian Border Services found $100,000 of undeclared cash in their possession and seized the funds. Vanderlaan noted that the cash was in $10,000 bundles, and the bundles were banded with paper bands that could only be obtained from a bank, some with HSBC markings. The $100,000 is currently frozen pursuant to a direction issued by the Commission on February 17, 2009.

[175] On April 30, 2008, pursuant to subsection 126(1) of the Act, the Commission issued freeze directions to RBC and TD Canada Trust to preserve the funds in bank accounts associated with Novielli, Moloney and Pimentel. On May 29, 2008, the Commission issued another freeze direction to National Bank of Canada to preserve the funds in an account in the name of Moloney (the "**Moloney NBC Account**"). The following funds were frozen:

- there is $96,259.97 remaining in the Goldpoint RBC Account;
- there is US $11,420.34 remaining in an account in the name of Novielli (the "**Novielli USD Account**");
- there is $239,472.34 remaining in the Moloney TD Account;
- there is $65,841.35 remaining in the Novielli-Pimentel Account; and
- there is $53,991.46 remaining in the Moloney NBC Account.

A further $15,000 is held in the trust account of a Canadian lawyer who has agreed to treat the funds as being subject to a freeze order.

[176] During the hearing, Novielli attempted to explain the flow of funds, arguing that funds withdrawn from the Goldpoint RBC Account were ultimately used for corporate purposes on behalf of Goldpoint. During his cross-examination of Vanderlaan, he pointed to documents in Staff's evidence and introduced the additional documentary evidence listed at paragraph 153 in support of his argument. However, as discussed at paragraph 154, we place limited weight on these documents.

[177] We note that one piece of evidence that may support Novielli's claim above is that investor funds could be traced to Vito Novielli, Novielli's father. There is evidence in the banking records that a sum of $210,000 was transferred from accounts in the names of Novielli and/or Pimentel to accounts in the name of Vito Novielli, who in turn transferred $120,000 to the Ophe-Ocean Company in Ghana. More specifically:

- From November 16, 2007 to April 4, 2008, the Novielli-Pimentel Account transferred $30,000 through a series of bank drafts to accounts in the name of Vito Novielli;
- On May 5, 2008, $100,000 and $35,000 were withdrawn from the Pimentel Accounts in the form of a bank draft. On May 12, 2008, the bank draft was deposited into a Canadian Imperial Bank of Commerce ("**CIBC**") account in the name of Vito Novielli (the "**Vito Novielli CIBC Account**");
- On May 5, 2008, $80,000 was withdrawn from one of the Pimentel Accounts in the form of a bank draft, which was then deposited in another CIBC account in the name of Vito Novielli (the "**Vito Novielli CIBC PLC Account**");
- On May 6, 2008, $120,000 was transferred from the Vito Novielli CIBC PLC Account to the Ophe-Ocean Company, Ghana; and
- On May 12, 2008, $100,000 was transferred from the Vito Novielli CIBC Account to the Vito Novielli CIBC PLC Account.

[178] However, we received no credible evidence as to the purpose of these transactions, the extent to which they were connected to Goldpoint's business purposes, or the use of these funds by the Ophe-Ocean Company. We are not persuaded that Novielli used the funds he withdrew from the Goldpoint RBC Account for legitimate business purposes on behalf of Goldpoint.

[179] To summarize, although Goldpoint made various representations about its operations in Ghana, the tracing of funds shows that only a small portion of the investor funds might be attributed to funding projects in Ghana or to paying expenses for Goldpoint's operations. We were presented with no persuasive evidence that Goldpoint actually had any projects in Ghana. A majority of funds were in the control of the Individual Respondents for purposes that were unrelated to Goldpoint's operations. We find that Goldpoint committed dishonest acts by its unauthorized diversion of funds.

***Removal of Evidence from the Goldpoint Office***

[180] During the hearing, Staff led evidence relating to the removal of documents from Goldpoint's office just before Staff executed its search warrant on May 1, 2008. During the search, Staff investigators talked to people who worked on the same floor as Goldpoint's office and received information that suggested that documents had been removed from Goldpoint's office or shredded. Staff suggested that the removal of documents from Goldpoint's premises on the day of the search is consistent with Novielli and Moloney becoming aware of the freeze directions and attempting to remove compromising evidence in advance of a possible Staff inspection or search of the premises. Based on the very limited evidence we heard, we are not prepared to make any findings on this issue.

**(ii) Deprivation**

[181] The second element to be proven in the fraud analysis is deprivation caused by the dishonest acts. As discussed at paragraph 43, the evidence establishes that from October

18, 2007 to May 1, 2008, Goldpoint received $1,696,750 from more than 110 investors as consideration for Goldpoint shares.

[182] In their testimony, Investors stated that their funds invested have not been returned to them. Some examples of how Goldpoint investors were affected follow:

- Investor One and his spouse had taken the money that was lost out of their retirement fund;
- Investor Two had borrowed money to purchase the shares and said that he was still in the process of paying this debt at the time of the hearing. Investor Two stated that "This is the first time I've ever done one of these before. Now I've learned not to trust anybody ever again" (Hearing Transcript, September 28, 2009, p. 95); and
- Investor Five described the impact of his investment experience as follows: "$75,000 is a lot of money for, you know, somebody in my position. So it's definitely been a struggle for the last year and a half or so…" (Hearing Transcript, September 30, 2009, p. 81). He stated that "Personally it's definitely put some stress" on his relationship with his spouse (Hearing Transcript, September 30, 2009, p. 81).

[183] As the Investors' testimony demonstrates, Goldpoint investors have been deprived of the funds they invested in Goldpoint. Goldpoint's act of deprivation is therefore established.

#### (iii) Knowledge

[184] Finally, in order to commit fraud under subsection 126.1(b) of the Act, the necessary mental element must be present. For a corporation, it is sufficient to show that its directing minds knew that the corporation perpetrated a fraud. The analysis below will show that Novielli and Moloney, the directing minds of Goldpoint, were actively involved in perpetrating that fraud. Attributing their knowledge to the corporation, we find that Goldpoint possessed the requisite mental element of fraud under subsection 126.1(b) of the Act.

#### (iv) Findings

[185] We find that Goldpoint knowingly committed fraud by depriving the investors of the funds that they were induced by deceit to invest in Goldpoint, contrary to the public interest.

### (b) Novielli

#### (i) Dishonest Acts

[186] At paragraphs 51 to 58, we found that Novielli solicited investors to purchase Goldpoint shares, participated in the development of Goldpoint's promotional materials, authorized the issuance of Goldpoint shares, and was one of the signatories on the Goldpoint RBC Account. We find that Novielli committed dishonest acts in carrying out the aforementioned activities.

[187] It is clear from our discussions at paragraphs 147 to 160 that the promotional materials contained misrepresentations. We found at paragraphs 54 to 56 that Novielli

participated in setting up the Goldpoint Website. Contributing misleading information to a website for the purpose of inducing investors to invest is a dishonest act.

[188] There is no doubt, based on the evidence, that Novielli committed acts of deceit and falsehood through the representations that he made while soliciting investors to invest in the scheme. We find that in his solicitation of investors, Novielli made representations that Goldpoint was raising funds for its operations in Ghana, when in fact Goldpoint did not own any mine or mining licence in Ghana. Rather, the investor funds purportedly raised for this purpose were instead used to fund the Respondents' personal expenses or for other purposes that were unrelated to gold mining operations.

[189] The evidence establishes that Novielli was personally involved in the unauthorized diversion of investor funds. An examination of the banking records reveals that, of the $1,681,750 of investor funds deposited in the RBC Goldpoint Account, $591,062 was either transferred to the Novielli-Pimentel Joint Account or the Pimentel Accounts. These transactions are those numbered 6 to 8 at paragraph 172 above.

[190] The banking statements provided by TD Canada Trust show that the investor funds that were transferred to the Novielli-Pimentel Joint Account were used as follows:

- From November 14, 2007 to April 18, 2008, $199,000 was transferred to the Pimentel Accounts through a series of 12 bank drafts;
- From November 16, 2007 to April 4, 2008, $30,000 was transferred to two accounts held by Vito Novielli through a series of 5 bank drafts; and
- From October 1, 2007 to April 30, 2008, a significant portion of the funds were spent on various personal expenditures, including mortgage payments, credit card payments, insurance payments, car payments, phone payments, cable payments, utilities payments, and transactions with retailers and service providers.

[191] We further note that, after the freeze directions, significant activity took place in accounts controlled by people related to Novielli that were not subject to the initial freeze directions issued on April 30, 2008. More specifically, as described at paragraph 177, a total of $215,000 was taken out of the Pimentel Accounts in the form of two bank drafts and deposited into the Vito Novielli CIBC Account and the Vito Novielli CIBC PLC Account.

[192] We find that as a signatory on the Goldpoint RBC Account, Novielli authorized the transfer of investor funds for uses that were unrelated to Goldpoint's operations, contrary to Goldpoint's claim to its investors. Further, he engaged in the unauthorized diversion of investor funds when he used the funds for personal purposes. As such, we find that he committed dishonest acts.

**(ii) Deprivation**

[193] As discussed at paragraphs 181 to 183, investors were deprived of their funds. We find that Novielli's actions contributed to the deprivation of investors, and the act of deprivation by this respondent is therefore established.

### (iii) Knowledge

[194] The flow of funds is relevant to a consideration of Novielli's knowledge of the dishonest acts and deprivation of investors. As a signatory on the Goldpoint RBC Account, Novielli was personally responsible for moving investor funds out of the accounts for purposes unrelated to Goldpoint's operations. For example, banking records referred to at paragraph 42 show that Novielli made withdrawals from the Goldpoint RBC Account on several occasions. These withdrawals included a cheque for $15,000 payable to himself and dated November 6, 2007, a cheque for $1,100 payable to himself and dated December 28, 2007 and $10,000 that was withdrawn by a bank draft on February 7, 2008 and deposited in the Novielli-Pimentel Joint Account.

[195] Based on the foregoing, it is clear that Novielli knew that investor money was being used illegitimately and that the economic interests of investors were being harmed. The mental element of fraud under subsection 126.1(b) of the Act is therefore established.

### (iv) Findings

[196] In conclusion, we find that Novielli knowingly committed fraud by depriving the investors of the funds that they were induced by deceit to invest in Goldpoint. We also find that Novielli's conduct was contrary to the public interest.

## (c) Moloney

### (i) Dishonest Acts

[197] At paragraphs 59 to 65, we found that Moloney solicited the purchases of Goldpoint shares as a salesperson using the alias Caldwell, participated in the development of Goldpoint's promotional materials, authorized the issuance of Goldpoint shares and was a signatory on the Goldpoint RBC Account. We find that Moloney's activities constituted dishonest acts.

[198] As discussed at paragraphs 147 to 160, Goldpoint's promotional materials contained false and misleading statements. We found that Moloney contributed to the making of these false and misleading statements, and committed dishonest acts in doing so. Further, a review of what Moloney told investors in his solicitations, as exemplified by Moloney's conversation with Investor Four, shows that Moloney's statements to investors about both Goldpoint's operations and his own identity were false and misleading, again constituting dishonest acts.

[199] The evidence establishes that Moloney was personally involved in the unauthorized diversion of investor funds. An examination of the banking records reveals that of the $1,681,750 of investor funds deposited in the Goldpoint RBC Account, approximately $890,139 was either transferred to accounts controlled by him or converted to cash. These transactions are items 2 to 5 at paragraph 172.

[200] The bank statements provided by TD Canada Trust show that, of the investor funds that were transferred to the Moloney TD Account, 26 cash withdrawals totaling $196,010 were made from October 31, 2007 to April 25, 2008. We observe that 24 of the 26 cash withdrawals were for at least $8,000 each, and that 18 of the transactions were

evidenced by, among other things, receipts bearing what appears to be Moloney's signature.

[201] We also observe that after the freeze directions, significant activity took place in accounts in the name of Moloney that were not subject to the initial freeze directions issued on April 30, 2008. On May 1, 2008, Moloney withdrew $77,000 in the form of a bank draft from the Moloney HSBC Account which was not subject to a freeze direction. He opened the Moloney NBC Account on May 5, 2008, deposited the $77,000 draft into that account and immediately withdrew $23,000 in cash. Subsequent to this, Moloney attempted to purchase a draft in the name of Daniel Moloney for the amount of $50,000 from the Moloney NBC Account, but the National Bank was able to reverse the transaction at the request of Commission investigative staff.

[202] The evidence establishes that as a signatory on the Goldpoint RBC Account, Moloney authorized the transfer of investor funds for uses that were unrelated to Goldpoint's operations, contrary to Goldpoint's claims to investors. Further, he engaged in the unauthorized diversion of investor funds when he used the funds for personal purposes. As such, we find that he committed dishonest acts.

#### (ii) Deprivation

[203] As discussed at paragraphs 181 to 183, investors were deprived of their funds. We find that Moloney's actions contributed to the deprivation of investors. The act of deprivation is therefore established.

#### (iii) Knowledge

[204] The flow of funds is relevant to a consideration of Moloney's knowledge of the dishonest acts and deprivation of investors. As a signatory on the Goldpoint RBC Account, Moloney was personally responsible for moving investor funds out of the accounts for purposes unrelated to Goldpoint's operations. One such example is $311,879 withdrawn in cash through over 50 cheques signed by Moloney on behalf of Goldpoint, discussed at paragraph 172 above.

[205] Based on the foregoing, it is clear that Moloney knew that investors' money was being used illegitimately and that the economic interests of investors were being harmed. The mental element of fraud under subsection 126.1(b) of the Act is therefore established.

#### (iv) Findings

[206] In conclusion, we find that Moloney knowingly committed fraud by depriving the investors of funds that they were induced by deceit to invest in Goldpoint. We also find that Moloney's conduct was contrary to the public interest.

### (d) Pimentel

#### (i) Dishonest Acts

[207] At paragraph 72, we found that Pimentel, in the role of a qualifier, called prospective investors. However, even more importantly, she oversaw the investor qualification process in a supervisory or managerial role.

[208] We find that Pimentel committed dishonest acts in carrying out these activities. She committed acts of deceit and falsehood through representations made in soliciting investors to invest in the scheme, or through the qualifiers who made representations under her supervision. This is evidenced by the Script that was followed by the qualifiers, which, as discussed at paragraphs 161 to 167, contained misleading and false information.

[209] There is evidence that Pimentel engaged in the unauthorized diversion of investor funds. At paragraph 172, we found that $584,562 of investors' money was transferred from the Goldpoint RBC Account to the Novielli-Pimentel Joint Account from November 7, 2007 to May 5, 2008. In addition, $2,000 was transferred to the Pimentel Accounts from February 22, 2008 to April 21, 2008.

[210] We also found that, of the $584,562 of investor funds that were transferred into the Novielli-Pimentel Account, a significant portion was spent on various personal expenditures, as described at paragraph 190. Further, $199,000 of the amount was transferred to the Pimentel Accounts from November 14, 2007 to April 18, 2008.

[211] We further note that the post-freeze transactions described at paragraph 191 are not consistent with legitimate business activity.

[212] We find that Pimentel engaged in dishonest acts by receiving and spending investor funds for purposes that were unrelated to Goldpoint's operations.

**(ii) Deprivation**

[213] As discussed at paragraphs 181 to 183, investors were deprived of their funds. We find that Pimentel's actions contributed to the deprivation of investors. The element of deprivation is therefore established.

**(iii) Knowledge**

[214] The flow of funds is relevant to a consideration of Pimentel's knowledge of the dishonest acts and deprivation of investors. Pimentel made closing submissions to the effect that she did not take part in and had no knowledge of the movement of the funds. She stated that the Novielli-Pimentel Account was entirely controlled by Novielli, and her understanding of the purpose of the Novielli-Pimentel Account was that it was to be used to pay household expenses. These payments, according to Pimentel, were made from the management consulting fees that Goldpoint paid Novielli.

[215] Considering the evidence before us, however, it can be inferred from the circumstances that Pimentel knew of the dishonest acts. At paragraphs 72 and 73, we found that Pimentel engaged in operations of Goldpoint in a supervisory capacity. The evidence at paragraph 209 above establishes that investor funds in the Goldpoint RBC Account found their way to personal accounts under her control. It can be inferred from those findings that Pimentel knew the source of the funds that were deposited in her account. By receiving investor funds and using them for personal expenditures, it can be further inferred that she knew investors' funds were not spent on Goldpoint's operations as described to investors. Based on the foregoing, it is clear that Pimentel knew that investors' money was being used illegitimately and that the economic interests of investors were being harmed. The mental element of fraud under subsection 126.1(b) is therefore established.

### (iv) Findings

[216] In conclusion, we find that Pimentel knowingly committed fraud by depriving the investors of the funds that they were induced by deceit to invest in Goldpoint. We also find that Pimentel's conduct was contrary to the public interest.

## J. Did the Respondents, as directors or officers of Goldpoint, authorize, permit or acquiesce in Goldpoint's non-compliance with Ontario securities law, contrary to section 129.2 of the Act and contrary to the public interest?

### 1. The Law

[217] Staff alleges that each of the Individual Respondents, as a director or officer, is responsible for Goldpoint's alleged violations of Ontario securities law pursuant to subsection 122(3) and section 129.2 of the Act. Staff is free to allege that the Individual Respondents breached both subsection 122(3) and section 129.2 of the Act. However, our view is that in this case, an analysis and application of both sections would be redundant. We will conduct our analysis based on section 129.2 of the Act.

[218] Section 129.2 of the Act states:

> **129.2 Directors and officers** – For the purposes of this Act, if a company or a person other than an individual has not complied with Ontario securities law, a director or officer of the company or person who authorized, permitted or acquiesced in the non-compliance shall be deemed to also have not complied with Ontario securities law, whether or not any proceeding has been commenced against the company or person under Ontario securities law or any order has been made against the company or person under section 127.

[219] Subsection 1(1) of the Act defines "director" and "officer":

> "director" means a director of a company or an individual performing a similar function or occupying a similar position for any person;
>
> …
>
> "officer", with respect to an issuer or registrant, means,
>
> (a) a chair or vice-chair of the board of directors, a chief executive officer, a chief operating officer, a chief financial officer, a president, a vice-president, a secretary, an assistant secretary, a treasurer, an assistant treasurer and a general manager,
>
> (b) every individual who is designated as an officer under a by-law or similar authority of the registrant or issuer, and
>
> (c) every individual who performs functions similar to those normally performed by an individual referred to in clause (a) or (b);

[220] In *Re Momentas Corp.* (2006), 29 O.S.C.B. 7408 ("***Momentas***"), the Commission provided guidance with respect to the factual determination of whether an individual performs functions similar to a director of a particular company. In *Momentas*, *supra*, the Commission stated at paragraph 100:

> A "*de facto*" director has been characterized ... as "one who intermeddles and who assumes office without going through the legal formalities of appointment." (see *Canadian Aero Service Ltd. v. O'Malley* (1969), 61 C.P.R. 1 (Ont. H.C.) cited in *R. v. Boyle*, 2001 CarswellAlta 1143 (Alta. Prov. Ct.) at paragraph 99).

[221] The test for determining if a person is a *de facto* director is "whether, under the particular circumstances, the alleged director is an integral part of the mind and management of the company", taking into consideration the entirety of the alleged director's involvement within the context of the business activities at issue (*Re World Stock Exchange* (2000), 9 A.S.C.S. 658, at 18).

[222] In *World Stock Exchange*, *supra*, at 18, the ASC also identified relevant factors for the determination of whether a representative is a *de facto* director. Such a conclusion may be drawn when someone:

a) appointed nominees as directors;

b) is responsible for the supervision, direction, control and operation of the company;

c) ran the company from their office;

d) had signing authority over the company's bank account;

e) negotiated on behalf of the company;

f) was the company's sole representative on a trip organized to solicit investments;

g) substantially reorganized and managed the company;

h) selected the name of the company;

i) arranged a public offering; and/or

j) made all significant business decisions.

[223] A further factor that can be helpful in determining whether a person acted as a *de facto* director or officer is whether the person acted in a position with similar remuneration and responsibility as an officer within the company (see *Canadian Aero Service Ltd. v. O'Malley*, [1974] S.C.R. 592 at 605).

**2. Analysis**

**(a) Novielli**

[224] The Corporation Profile Report of Goldpoint lists Novielli as the Administrator, Director and Officer (President). Novielli retained these positions and engaged in conduct consistent with these positions throughout the Material Time. We therefore find that Novielli was a director and an officer of Goldpoint, consistent with the definitions of "director" and "officer" in subsection 1(1) of the Act.

[225] Having made that finding, it is necessary to determine whether Novielli authorized, permitted or acquiesced in Goldpoint's non-compliance with the Act. Novielli was a director and officer when Goldpoint breached subsections 25(1)(a), 53(1), 38(3)

and 126.1(b) of the Act. He was involved in virtually all of Goldpoint's activities, including the preparation of promotional materials for the Goldpoint Website and the signing of Goldpoint Share Certificates. We can only arrive at the conclusion that Novielli authorized, permitted or acquiesced in Goldpoint's non-compliance with Ontario securities law and acted contrary to the public interest.

**(b) Moloney**

**(i) Documentary Evidence**

[226] Staff introduced a significant amount of documentary evidence about Moloney's role in Goldpoint.

[227] The Goldpoint Website lists Moloney as "Vice president [*sic*] Finance, Director". The "employer" field of the documentation for an account held by Moloney at National Bank of Canada states "GOLDPOINT RESOURCES" and "CHIEFFINANCIAL [*sic*] OFFICER".

[228] From the evidence introduced, it is also clear that Moloney had signing authority on behalf of Goldpoint.

[229] The "Transfer Agency and Registrarship Agreement", entered into between Goldpoint and Capital Transfer on November 13, 2007, contains a "Certificate of Incumbency" of the same date that lists "Brian Moloney" as holding the position of "Manager". The document appears to be signed by Moloney under the heading "[t]he following is a list of Officers with their signatures who are qualified to sign documents and other instruments for Goldpoint Resources Corporation". Staff introduced further documents obtained from Capital Transfer to show that typically, and in any event on numerous occasions, it was Moloney who authorized Capital Transfer to prepare share certificates for investors on behalf of Goldpoint.

[230] On the "Business Deposit Account – Customer Agreement" that Goldpoint and Royal Bank of Canada entered into, Moloney was named as one of "people authorized to act on/sign behalf of [*sic*]" Goldpoint for the Goldpoint RBC Account. Moreover, we were provided with evidence that Moloney in fact exercised this signing power. Moloney withdrew a total of $311,879 from the Goldpoint RBC Account by cheques written payable to "Cash". These cheques were signed by Moloney on behalf of Goldpoint.

**(ii) Qualifier and Bookkeeper Testimony**

[231] We also heard evidence from the Qualifiers and the Bookkeeper about Moloney's role at Goldpoint. The Qualifiers and the Bookkeeper identified Moloney as "Brian" or "Caldwell", and described his role, variously as a supervisor or office manager. They testified that Moloney supervised the salespersons, answered any questions they had, and distributed the paycheques. Huang described Moloney as a "manager" in her testimony, stating that "I think Brian [*sic*] in charge of everything, like, the CEO of the office, and Lee [Novielli] the same…" (Hearing Transcript, September 25, 2009, p. 58).

**(iii) Findings**

[232] Having regard to the evidence set out above, we find that Moloney was a *de facto* officer of Goldpoint during the Material Time, pursuant to paragraph (c) of the definition of "officer" in subsection 1(1) of the Act. Further, we find that Moloney was also a *de*

*facto* director of Goldpoint during the Material Time, in accordance with the definition of "director" in subsection 1(1) of the Act, on the basis that Moloney held a position and performed a function similar to that of a formally appointed director.

[233] Having made that finding, it is necessary to determine whether Moloney authorized, permitted or acquiesced in Goldpoint's non-compliance with the Act. Moloney was a *de facto* director and officer when Goldpoint breached subsections 25(1)(a), 53(1), 38(3) and 126.1(b) of the Act. As described at paragraphs 226 to 231 above, he was involved in almost all of Goldpoint's activities, notably the issuance of treasury directions. We can only arrive at the conclusion that Moloney authorized, permitted or acquiesced in Goldpoint's non-compliance with Ontario securities law and acted contrary to the public interest.

### (c) Pimentel

[234] As stated at paragraph 72 above, we find that Pimentel attended Goldpoint's office on a regular basis and acted as a supervisor or manager: she provided qualifiers with the Script and call lists, collected the qualifiers' lead sheets at the end of the day and generally acted as office manager. We also find, as stated at paragraph 209 above, that investors' funds were transferred to the Novielli-Pimentel Joint Account and the Pimentel Accounts in amounts that suggest Pimentel played an important role in the Goldpoint scheme. However, despite the evidence of her managerial role, we are not persuaded that Pimentel performed a function similar to that of a "director" or "officer" of Goldpoint.

[235] Although we find that Pimentel, in her personal capacity, contravened subsections 25(1)(a), 53(1) and 126.1(b) of the Act, we are not persuaded that she was a director or officer of Goldpoint, and therefore we need not consider whether she authorized, permitted or acquiesced in Goldpoint's breaches of the Act.

### 3. Conclusion: Section 129.2

[236] For the reasons stated at paragraphs 217 to 233 above, we find that Novielli and Moloney, as directors or officers of Goldpoint, authorized, permitted or acquiesced in Goldpoint's contraventions of subsections 25(1)(a), 53(1), 38(3) and 126.1(b) of the Act, and therefore, they are responsible for Goldpoint's contraventions of the Act, pursuant to section 129.2 of the Act. As stated at paragraphs 234 and 235 above, we are not persuaded that Pimental was a director or officer of Goldpoint, and therefore she is not responsible, under section 129.2 of the Act, for Goldpoint's contraventions of the Act.

## K. Did Pimentel make materially untrue statements to the Commission in a compelled examination, contrary to subsection 122(1)(a) of the Act and contrary to the public interest?

### 1. The Law

[237] Subsection 122(1)(a) states:

> **122. (1) Offences, general** – Every person or company that,
>
> (a) makes a statement in any material, evidence or information submitted to the Commission, a Director, any person acting under the authority of the Commission or the Executive Director or any person appointed to make an investigation or examination under this Act that, in a material

respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading;

…

is guilty of an offence and on conviction is liable to a fine of not more than $5 million or to imprisonment for a term of not more than five years less a day, or to both.

**2. Analysis**

[238] On September 9, 2008, Pimentel was examined under oath in connection with this matter in response to a summons issued by Staff pursuant to subsection 13(1) of the Act. Pimentel was accompanied by counsel during the examination, which was conducted by Vanderlaan and another Staff investigator (the "**Examination**"). Staff alleges that Pimentel made statements during the course of the Examination, which at the time and in the light of the circumstances under which they were made, were both misleading and untrue in a material respect, contrary to subsection 122(1)(a) of the Act.

[239] Staff relies on the transcript of the Examination, introduced into evidence through the testimony of Vanderlaan, as evidence of the statements made by Pimentel during the Examination. The transcript of the Examination is hearsay evidence, however, as stated at paragraph 122 above, hearsay is admissible in Commission proceedings. Pimentel did not dispute the accuracy of the transcript, and we have no reason to question its reliability as evidence of what was said.

[240] During the Examination, Pimentel repeatedly denied that she personally had any material involvement in Goldpoint, even when evidence of such involvement was put to her. Her language was clear, unequivocal and in no way nuanced:

31 Q Okay. And what was your involvement [with Goldpoint]?

A I wasn't involved. I was a supportive wife.

32 Q Okay. Did you -- were you involved in the setting up of Goldpoint Resources?

A No, absolutely not.

…

34 Q Did you work at Goldpoint Resources?

A Absolutely not.

…

40 Q Okay. So you say that you did not work --

A No.

41 Q -- at any point --

A Absolutely not.

42 Q -- for Goldpoint Resources?

A No.

…

64 Q Okay. We talked earlier about what the requirements are for this type of an examination and I'm going just [to] remind you that you are here for a compelled interview. You are required to answer the questions and you are required to tell the truth.

A Yes, that's what I'm doing, absolutely.

…

67 Q You say you never worked for Goldpoint, correct?

A Never, no.

[241] Pimentel was shown a cheque payable from Goldpoint to her, dated February 19, 2008, for $250 which in the memo line states "Contract Work for Feb 9 to 16". Here are relevant excerpts from the exchange that followed:

82 Q Okay. What contract work did you do for Goldpoint Resources in that time frame?

A I didn't. Maybe that was just the way he [Novielli] wrote the cheque, maybe for tax reasons, I don't know. I really don't know. I don't know why he wrote that.

83 Q You did no work for Goldpoint Resources?

A Not at all.

84 Q And yet you received compensation?

A That was just, like I said, spending money. I don't know how he wrote it or why he wrote it that way. I didn't write it.

…

89 Q So you accepted a cheque from Goldpoint Resources?

A From my husband, yes.

90 Q But you didn't do any work for them?

A No. That was coming out of his pay, I'm assuming.

…

[242] Pimentel was then shown another cheque payable to her from Goldpoint, dated February 22, 2008, for $250 which in the memo line states "wages". The examination continued:

100 Q So you, in fact, accepted this cheque?

A Sure.

…

102 Q But you're telling me that you did absolutely no work?

A Nothing, no.

…

122 Q So you say you don't know any of the names of the people who worked there other than Brian and your husband, correct?

A That's right.

123 Q And you didn't work there?

A Absolutely not.

124 Q But you got paid?

A I got -- my husband paid me spending money. That's what I considered it. Play money. Grocery money.

…

136 Q Flip over to the next one. Cheque number 99, 11th of April, 2008. $250. Again it says "wage", April 6th to the 12th. And the last one, the 18th of April, 2008, $250. Again the re line is "wage," April 13th to the 19th. And yet you're going to appear before the Commission and tell me that you didn't work for Goldpoint Resources, correct?

A Absolutely not. Did not work for Goldpoint.

…

250 Q Okay. Now, you understood at the beginning of this testimony that you were required to not mislead the Commission and you were required to tell the truth.

A That's right.

…

253 Q Is everything you told me here today the truth?

A Yes.

254 Q Would you like to change anything that you've told me?

A No.

[emphasis added]

[243] Pimentel did not testify at the Merits Hearing, but in her closing submissions, she continued to deny that she worked for Goldpoint.

[244] As discussed at paragraphs 66 to 73 above, we received ample evidence that Pimentel was involved in the Goldpoint scheme. We heard evidence from the Qualifiers that Pimentel worked at the Goldpoint office as a supervisor or manager of the qualifiers on a regular basis. In their testimony, the Qualifiers were able to describe tasks undertaken by Pimentel on a daily, or near daily, basis, such as the distribution of lists of prospective investors to be called or the collection of lead sheets at the end of the day.

One Qualifier, Khudinyan, described Pimentel as being at the office where the qualifiers were located "almost every day" (Hearing Transcript, September 24, 2009, p. 37).

[245] Although Pimentel made submissions that her involvement in Goldpoint was minimal and administrative in nature, the Qualifiers testified that Pimentel undertook a range of duties at Goldpoint, particularly with respect to qualifying prospective investors. The documentary evidence demonstrates that Pimentel was paid by Goldpoint, and that Goldpoint considered such payments to be compensation for work undertaken by Pimentel at Goldpoint.

[246] Based on the evidence of the Qualifiers and the documentary evidence, we found that Pimentel worked at Goldpoint, initially as a qualifier, and later as a supervisor or manager of the qualifiers, and that she contravened subsections 25(1)(a), 53(1) and 126.1(b) by her actions.

[247] We find that Pimentel made statements to a person appointed to conduct an examination under the Act, which in a material respect and at that time and in the light of the circumstances under which they were made, were misleading or untrue, contrary to subsection 122(1)(a) of the Act and contrary to the public interest.

## XI. CONCLUSION

[248] The Respondents in this matter were involved in a fraudulent scheme to market and issue securities of Goldpoint. The Respondents actively promoted and solicited investments in Goldpoint and traded previously unissued Goldpoint shares without meeting registration and prospectus requirements, contrary to subsections 25(1)(a) and 53(1) of the Act and contrary to the public interest.

[249] When promoting its shares and soliciting investors, Goldpoint made prohibited representations to investors that it would be listed on a stock exchange, contrary to subsection 38(3) of the Act and contrary to the public interest. These prohibited representations were employed in conjunction with other high pressure sales tactics, such as representations to investors relating to the future value or price of Goldpoint securities, which we find to be contrary to the public interest.

[250] The Respondents engaged in these activities knowing that Goldpoint had no underlying legitimate business. They made false and misleading statements on the Goldpoint Website and in promotional materials that Goldpoint had profitable mining operations in Ghana. Further, they engaged in the unauthorized diversion of investor funds and spent a significant portion of investor funds for purposes unrelated to Goldpoint's operations. As a result, more than 110 investors were wrongfully deprived of $1,696,750. We find that the Respondents knowingly committed fraud, contrary to subsection 126.1(b) of the Act and contrary to the public interest.

[251] As directors or officers of Goldpoint, Novielli and Moloney authorized, permitted or acquiesced in the contraventions by Goldpoint of sections 25, 53, 38 and 126.1 of the Act. They are liable for these contraventions by Goldpoint pursuant to section 129.2 of the Act.

[252] Finally, Pimentel made statements during a compelled examination conducted by Staff that were misleading and untrue in a material respect, contrary to subsection 122(1)(a) of the Act and contrary to the public interest.

[253] For the reasons stated above, we find that:

(a) Goldpoint, Novielli, Moloney and Pimentel traded in Goldpoint securities without being registered to trade in securities, contrary to subsection 25(1)(a) of the Act and contrary to the public interest;

(b) Goldpoint, Novielli, Moloney and Pimentel distributed Goldpoint securities without a preliminary prospectus and prospectus having been filed and receipted by the Director, contrary to subsection 53(1) of the Act and contrary to the public interest;

(c) Goldpoint, through its employees, agents or representatives, made prohibited representations that Goldpoint securities would be listed on a stock exchange, contrary to subsection 38(3) of the Act and contrary to the public interest;

(d) Goldpoint, Novielli, Moloney and Pimentel perpetrated a fraud on Goldpoint investors, contrary to subsection 126.1(b) of the Act and contrary to the public interest;

(e) Novielli and Moloney, as directors or officers or *de facto* directors or officers of Goldpoint who authorized, permitted or acquiesced in Goldpoint's contraventions of subsections 25(1)(a), 53(1), 38(3) and 126.1(b) of the Act, are deemed under section 129.2 also to have contravened subsections 25(1)(a), 53(1), 38(3) and 126.1(b) of the Act; and

(f) Pimentel made statements to Staff of the Commission, during her compelled examination, that in a material respect and at the time and in the light of the circumstances under which they were made, were misleading or untrue, contrary to subsection 122(1)(a) of the Act and contrary to the public interest.

[254] The parties are directed to contact the Office of the Secretary within 10 days to set a date for a sanctions and costs hearing, failing which a date will be set by the Office of the Secretary.

Dated at Toronto at this 5th day of May, 2011.

"*Mary G. Condon*" "*David L. Knight*"

_____ _____

Mary G. Condon David L. Knight, FCA