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
SEXTANT CAPITAL MANAGEMENT INC.;
SEXTANT CAPITAL GP INC., OTTO SPORK, KONSTANTINOS EKONOMIDIS, ROBERT LEVACK AND NATALIE SPORK

REASONS FOR DECISION
(Section 127 of the Act)

Hearing:	June 7, June 14-17, June 21, August 4-5, October 4-8, October 13-15, and December 9-10, 2010	
Decision:	May 17, 2011	
Panel:	James D. Carnwath Carol S. Perry	- Chair of the Panel - Commissioner
Appearances:	Tamara Center Brendan Van Niejenhuis Pavel Malysheuski	- For Staff of the Commission
	Suzy Kauffman	- Counsel for PricewaterhouseCoopers in its capacity as Receiver and Manager of Sextant Capital Management Inc. and Sextant Capital GP Inc.
	Joseph Groia Kevin Richard David Sischy Ashley Krol Tatsiana Okun (student-at-law)	- Counsel for Otto Spork, Natalie Spork and Konstantinos Ekonomidis
	Wendy Berman	-Independent Counsel for Otto Spork, Natalie Spork and Konstantinos Ekonomidis in attendance on October 5, 2010

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REASONS FOR DECISION

I. INTRODUCTION

[1] Staff of the Ontario Securities Commission (the "Commission") allege that Otto Spork, Sextant Capital Management Inc. ("SCMI") and Sextant Capital GP Inc. ("Sextant GP") committed non-criminal fraud during the period from July 2007 to December 2008 in three ways:

(a) they sold investment fund units with falsely inflated values;

(b) they took millions of dollars in fees based on falsely inflated values; and

(c) they directly misappropriated money from investment funds.

[2] Staff allege the fraud was perpetrated through three investment funds managed from Toronto – the Sextant Strategic Opportunities Hedge Fund L.P. (the "Canadian Fund") in Ontario, the Sextant Strategic Hybrid^{2}Hedge Resource Fund Offshore Ltd. (the "Hybrid Fund") incorporated in the Cayman Islands and the Sextant Strategic Global Water Fund Offshore Ltd. (the "Water Fund") incorporated in the Cayman Islands (the three funds together, the "Sextant Funds").

[3] Staff make further allegations of conduct contrary to the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "*Act*") and contrary to the public interest against some or all the named Respondents. Staff allege that Otto Spork, Konstantinos (Dino) Ekonomidis, Natalie Spork and Robert Levack, each had a role in managing the Canadian Fund. Staff allege that all of the named Respondents breached their management duties to that fund, to the detriment of investors.

[4] There is a Temporary Cease Trade Order in place against certain Respondents, made on December 8, 2008. The order also suspended SCMI's registration and continues until the conclusion of the hearing on the merits. Various directions freezing a custodial trading account and bank accounts related to the Canadian Fund were also issued by the Commission and continued by the Ontario Superior Court of Justice.

[5] On application of the Commission dated March 5, 2009, the Canadian Fund, SCMI and Sextant GP were placed into receivership by Order of the Ontario Superior Court of Justice dated July 19, 2009.

[6] On May 15, 2009, the Cayman Islands Monetary Authority appointed controllers over the Hybrid Fund and the Water Fund. The powers of the controllers were confirmed by Order of the Grand Court of the Cayman Islands dated June 16, 2009.

II. ISSUES

[7] The Statement of Allegations requires us to answer the following questions:

(a) Did Otto Spork, SCMI and Sextant GP commit a fraud on investors contrary to s. 126.1 *Act*?

(b) Did SCMI, Sextant GP, Otto Spork, Dino Ekonomidis and Natalie Spork breach their duties as investment fund managers contrary to s. 116 of the *Act*?

(c) Did SCMI, Otto Spork, Dino Ekonomidis and Natalie Spork breach their duties pursuant to *OSC Rule 31-505 – Conditions of Registration* ("Rule 31-505")?

(d) Did SCMI and Sextant GP fail to maintain proper books and records contrary to s. 19 of the *Act*?

(e) Did the Respondents act contrary to the public interest?

[8] Robert Levack is no longer a respondent. On June 1, 2010, a Commission Panel approved his settlement agreement.

III. THE MATERIAL FILED

[9] At the opening of the hearing on the merits, twenty volumes of hearing briefs were provisionally filed as Exhibit 4. Counsel agreed that their admission as exhibits would take place in the course of the hearing as documents in those volumes were

identified by witnesses. References to the exhibits in these Reasons will be by exhibit number, tab number and where necessary, page number ("Ex.-, Tab.-, p.-").

[10] In addition there is a complete transcript of the proceedings comprising 14 volumes. Reference to the transcript will be by volume number, page number and line, as required ("Tr., Vol. -.p.-, l.-"). As well, there are transcripts of the closing submissions referred to by date.

IV. THE MAJOR PLAYERS

[11] The following descriptions of the major players are the Panel's findings of fact based on the evidence, the agreement of counsel and information not seriously challenged by the parties.

[12] Otto Spork is a former dentist, with subsequent experience as a trader on the TSX. In 2006 and early 2007, he created the three hedge funds described in these reasons as the Sextant Funds. Otto Spork managed the Sextant Funds through companies which he controlled. He was registered under the *Act* as Officer and Director (Trading and Non-Advising), Designated Compliance Officer and Ultimate Responsible Person in the category of limited market dealer, investment counsel and portfolio manager with SCMI from February 1, 2006 to June 5, 2008.

[13] Helen Spork is Otto Spork's wife.

[14] Dino Ekonomidis is Helen Spork's brother and Otto Spork's brother-in-law. He was vice-president, Corporate Developments, for SCMI and registered under the *Act* as a salesperson with SCMI in the limited market dealer category from August 14, 2006 to September 28, 2009 and as a dealing representative in the exempt market dealer category from September 28, 2009 to January 31, 2010.

[15] Natalie Spork is Otto Spork's daughter. From July 7, 2008 she was registered as Officer and Director (Non-Advising, Non-Trading) and Ultimate Responsible Person in the categories of limited market dealer, investment counsel and portfolio manager and as Officer and Director (Non-Advising) in the category of commodity trading manager with

SCMI. On May 28, 2008, Natalie Spork was given the title of President and Secretary of SCMI.

[16] Gary Allen was a trader under the *Commodity Futures Act*, R.S.O. 1990, c. C.20, as amended. He was hired to act as a supervisor of Otto Spork while the latter attempted to obtain his futures trading license.

[17] Jamie Spork is Otto Spork's daughter from a previous marriage

[18] Robert Levack was a Chartered Financial Analyst and was SCMI's Chief Compliance Officer from February 2006 to July 17, 2009. He was registered under the *Act* as an Officer (Advising, Non-Trading) and Chief Compliance Officer in the categories of limited market dealer and investment counsel and portfolio manager with SCMI from February 1, 2006 until June 5, 2008. As of June 5, 2008 his registration was modified to Officer (Advising and Trading), Chief Compliance Officer and Designated Compliance Officer.

[19] The Canadian Fund is a hedge fund in Ontario organized as a limited partnership. The limited partners consist of the investors in the hedge fund.

[20] The Hybrid Fund is one of two hedge funds operating as a corporation under Cayman Islands law. The Water Fund is a second hedge fund operating as a corporation under the law of the Cayman Islands. We refer to the Hybrid Fund and the Water Fund as the "Offshore Funds".

[21] Sextant GP is the general partner and manager of the Canadian Fund.

[22] SCMI is the Investment Adviser for the Canadian Fund. SCMI was registered under the *Act* as an investment counsel, portfolio manager and limited market dealer as of February 1, 2006, until its suspension on December 8, 2008.

[23] Sextant Capital Management a Islandi ehf ("Sextant Iceland") is an Icelandic company and was the sub-adviser to the Canadian Fund from July 2008. In addition, Sextant Iceland is the investment adviser to the Offshore Funds.

[24] Sextant Capital Management S.a.r.l. ("Sextant Lux") is a Luxembourg company and adviser to the Offshore Funds before June 2008. It was replaced by Sextant Iceland in June of 2008.

[25] Iceland Glacier Products ehf ("IGP" or "IGP Iceland") is an Icelandic company in which the Sextant Funds became major investors.

[26] iGlobal Water (Canada) Inc. ("iGlobal Water") is located in Toronto, and was controlled by Otto Spork.

[27] Riambel Holdings S.A. ("Riambel") and Hermitage Holding A.G., Switzerland ("Hermitage") are two holding companies owned 100% by Otto Spork.

[28] Iceland Global Water ehf ("IGW" or "IGW Iceland") is an Icelandic company in which the Sextant Funds became investors.

[29] Iceland Global Water 2 Partners S.C.A. ("IGW Lux") is a Luxembourg company which owns 100% of IGW.

[30] Iceland Global Water II S.a.r.l ("IGW GP") is a Luxembourg company 100% owned by Otto Spork. IGW GP owns 100% of the "unlimited shares" in IGW Lux, making it akin to a general partner in IGW Lux.

[31] Attached to these Reasons is Schedule "A", which the parties agree sets out the various relationships among the various companies identified above. Based on the schedule, we find that Otto Spork owned 100% of SCMI, Sextant GP and Sextant Iceland.

[32] We find Otto Spork controlled each of the corporate identities shown on Schedule "A" and owned many of them outright as more particularly shown on Schedule "A". We also find that any third-party transfers to, or investments in, any of the entities on Schedule 'A' fell under the total control of Otto Spork.

V. THE NARRATIVE HISTORY

A. Formation and Operation of the Sextant Funds

1. Canadian Fund

[33] Otto Spork created the Canadian Fund in 2006 and marketed it through a Confidential Offering Memorandum (the "OM") dated February 17, 2006. The Canadian Fund operated under a limited partnership agreement (the "LP Agreement") which bound the investors (the limited partners). Sextant GP was the general partner and SCMI was the investment adviser to the Canadian Fund (together the "Fund Manager").

[34] The OM set out the investment objectives and strategies of the Canadian Fund, as well as investment restrictions that applied to its activities. The LP Agreement incorporated the same investment restrictions, which included the following terms:

> The Fund will not engage in any undertaking other than the investment of the Fund's assets in accordance with the Fund's investment objective and subject to the investment restrictions set out below and will engage in such activities as are necessary or ancillary with respect thereto.
>
> …
>
> The Fund may not invest more than 20% of its portfolio, based on the Net Asset Value of the Fund at the most recent Valuation Date, in any single class of securities of an issuer, where for the purposes of this restriction a long position is valued as the cost of the securities purchased and a short position is valued as the gross proceeds of the sale of the securities sold short;
>
> …
>
> The Fund will not purchase securities from, or sell securities to the Investment Advisor or any of its affiliates or any principal of any of them or any firm in which any principal of the Investment Advisor may have a direct or indirect material interest.
>
> (Ex. 4-1, Tab 2)

[35] The OM and LP Agreement also provided for the compensation of the Canadian Fund's General Partner and Investment Adviser. There were two forms of compensation:

1. Advisory Fee. Initially Sextant GP, later SCMI was entitled to an advisory fee (also referred to as a "management fee") of 2% of the NAV ("Net Asset Value") payable monthly in 1/12 instalments. The NAV was established by Sextant GP with the assistance of Investment Administration Solutions Inc. ("IAS"), located in British Columbia. IAS calculated the values of publicly traded securities as established by reported trades. The value of the IGP (and IGW) shares held by the Canadian Fund was established by Otto Spork. We note the value of the IGW shares was set at their cost or book value throughout the applicable period in calculating the NAV of the Canadian Fund.

2. Performance Fee. Sextant GP was entitled to a performance fee, consisting (in broad terms) of 20% of the increase in NAV in the most recent month. This was subject to a provision which provided that, should the Canadian Fund's NAV decrease, Sextant GP would not collect a performance fee until the Canadian Fund NAV exceeded the "high-watermark" achieved in the prior or current fiscal year.

2. Offshore Funds

[36] Both Offshore Funds had substantially identical terms for the compensation of the Fund Manager. In their case, the Fund Manager was Sextant Lux. After June 2008, Sextant Iceland became the Fund Manager. These Fund Managers were owned and controlled by Otto Spork.

[37] The Offshore Funds were each offered to investors under the Confidential Private Placement Memoranda dated January 15, 2007.

3. Canadian Fund's Investment Practices

[38] The OM portrayed a strategy of taking primarily long positions in equity and equity-related securities, hedged by short positions in commodities. In 2006 and 2007, but to a far lesser degree in 2008, the Canadian Fund traded in a variety of securities.

[39] For that purpose, the Canadian Fund maintained a brokerage account with Newedge Canada Inc. ("Newedge"); Newedge served as the fund custodian. Brokerage records from Newedge (which have been reviewed and analyzed by OSC Staff, but not by the Receiver) show the Canadian Fund's trades over the term of its active life. In the case of publicly-traded securities, trading by the Canadian Fund would occur by SCMI instructing Newedge to purchase or sell a particular security.

[40] The Canadian Fund also contracted with IAS to serve as its fund accountant. In that role, IAS also served as its NAV calculation agent. Newedge would regularly report to IAS on transactions, so that IAS could maintain a current record of the Canadian Fund's overall holdings, and calculate the NAV of the Canadian Fund weekly and monthly.

[41] In the case of publicly traded securities, IAS would use their market price on the relevant NAV calculation date in order to determine the value of those holdings as part of the Canadian Fund's portfolio value. In the case of IGP and IGW, IAS would take instruction from Otto Spork as to the value to assign to the Canadian Fund's holdings in those private companies.

[42] The reported NAV of the Canadian Fund is relevant for this case in three ways:

(a) **Investor Reliance.** The NAV of the Canadian Fund was reported to investors, and potential investors, as representing the current market value of the Canadian Fund. This information could influence existing investors in deciding whether to remain in the Canadian Fund or redeem their units and could influence prospective investors in deciding whether to make an investment. The NAV and its historical progression were regularly

reported to investors on the website used to promote the Canadian Fund and through monthly mailings to investors.

(b) **Advisory Fees.** The monthly NAV calculation was used, under the terms of the OM, to calculate the Advisory Fee payable to SCMI and Sextant GP based on 1/12 of 2% of the reported NAV of the Canadian Fund.

(c) **Performance Fees.** The month-over-month increase in the NAV was used under the terms of the OM to calculate the Performance Fee payable to Sextant GP, based on 20% of the increase in the reported NAV over the prior month (subject to the provision protecting unit-holders against a decrease in the NAV, as referred to above).

VI. STAFF WITNESSES

A. Jane Lee

[43] Jane Lee became a Chartered Accountant in 1990. After several years experience in finance administration she became the Senior Vice-President for fund accounting with IAS. Ms. Lee's evidence may be found in Tr., Vol. 11, p. 5 and following.

[44] SCMI became a client of IAS and IAS assumed certain responsibilities for the Canadian Fund and the two Offshore Funds; IAS did fund accounting and record keeping for the Canadian Fund and only fund accounting for the Offshore Funds.

[45] Ms. Lee described the role of IAS, which was to prepare and determine the NAV per unit for a fund. This was done by taking the value of the total assets less the liabilities and then dividing by the number of units outstanding to arrive at a NAV per unit. Ms. Lee's responsibility was that of a senior person who reviewed the file to ensure its accuracy before releasing it to the client for its approval.

[46] Ms. Lee said that Otto Spork was the only person who approved the NAV for the Sextant Funds, which he communicated by e-mails (Ex. 4-6, Tabs 7, 8 and 14). The NAV was established for the Canadian Fund on a weekly and monthly basis and at month-end and for the Offshore Funds. Ms. Lee was referred to Ex. 4-4 which contained

the portfolio valuation statements for the Canadian Fund from June 2007 to January 2009 separated by tabs into months. She was asked to comment on the portfolio valuation ending April 30, 2008. The portfolio valuation showed total portfolio holdings of $15,427,000 (all dollar figures are rounded and approximate throughout these Reasons). Included in the portfolio holdings were 7,109,750 shares of IGP with a book value of $2,483,000 and a market value of $10,055,000. The IGP shares represented approximately 65% of the total portfolio value. The values of the securities in the portfolio valuations were established in two ways. The market value of the publicly-traded securities was established in the usual manner by referencing public market prices. The value of the private company securities came from Otto Spork. Ms. Lee never received instructions from anyone other than Otto Spork for establishing the value of IGP shares.

[47] Ms. Lee's evidence on this point led to the following exchange with the Chair:

> THE CHAIR: You take what Dr. Spork gives you.
>
> THE WITNESS: Because we're – he's in a position to value that particular stock, we're not. It's a private company.
>
> THE CHAIR: Yes. It's not a criticism. I'm trying to understand the methodology.
>
> THE WITNESS: M'hmm.
>
> THE CHAIR: And what I heard you say earlier was he gives you the numbers, you enter them.
>
> THE WITNESS: Yes.
>
> THE CHAIR: No matter what the number is.
>
> THE WITNESS: We review it, but we – again, we're not in a position to say that it's not an incorrect number because again we are not privy to the value of the private company.
>
> THE CHAIR: You accept his instructions.
>
> THE WITNESS: Yes.
>
> THE CHAIR: Thank you.

(Tr. Vol. 11, p. 39 l. 23 – p. 40 l. 17)

[48] As for the non-portfolio items (liabilities) identified by Ms. Lee, one in particular stood out. This was an item referenced as "Advanced Payment" of $4,033,000 approximately found at p. 73 of the April 2008 Tab in Ex. 4-4. She explained this sum as an amount actually owing from the Fund Manager. It should be remembered that the "Fund Manager" for these amounts owing included both Sextant GP and SCMI. The figures represent monies already taken by the Fund Manager as advance payment for management and performance fees. The figure of $4,033,000 was a cumulative balance to April 30, 2008.

[49] Ms. Lee was then referred to the securities ledger that listed the individual transactions for the purchases and sales of IGP shares by the Canadian Fund. (Ex. 4-6, Tab 18).

[50] Ms. Lee identified two acquisitions of IGP shares on July 31, 2007, one for 320,000 shares seemingly acquired by a transfer of securities, and one for 6,575,350 shares acquired at a price of €0.170820 per share for a cost of CDN $1,758,405. Ms. Lee was then referred to the portfolio valuation for the Canadian Fund as of July 31, 2007 (Ex. 4-4, p. 10) where the market value of IGP shares was set at €0.321 per share. The market value of the shares was shown to be CDN $3,200,000, almost twice as much as their cost.

[51] Ms. Lee conducted a similar analysis for the two Offshore Funds. Her attention was drawn to Ex. 4-6, Tab 19, which she identified as the securities ledger for the Hybrid Fund. She was also referred to Ex. 4-5 at the tab for December 31, 2008 at p. 72. She identified that the Hybrid Fund held 14,536,928 shares of IGP as of December 31, 2008 with an average cost of €0.373 per share and a book value of USD $8 million. As of December 31, 2008, the market value was shown at €2.45 per share for a total market value of USD $49,576,000 and represented 92.37% of the Hybrid Fund's portfolio value.

[52] The same analysis was carried out for the Water Fund. It held 16,511,323 shares of IGP as of December 31, 2008 with a book value of USD $8,600,000. The market

value of the shares at that date was set at €2.45 per share for a total market value of USD $56,310,000 and represented 95.04% of the Water Fund's portfolio value.

[53] Ms. Lee's examination-in-chief concluded with a question about how the operating expenses of the funds were paid. Ms. Lee testified that the expenses were accrued on instructions from Otto Spork by referring to Ex. 4-6, Tabs 4, 5 and 15. Ms. Lee said there was no pattern in terms of timing, frequency or amount. She said the amounts were usually in round amounts. IAS was never told what the expenses were for nor did it ever receive supporting documents other than the e-mails with the instructions. She examined the general ledger for the Canadian Fund (Ex. 4-10, Tab 12a, p. 129) as of December 31, 2008. She identified the operating expenses recorded for that year to be $1.8 million. This sum, she said, was fully paid in 2008 over and above the management fees and the performance fees that were paid to the Fund Manager.

[54] Ms. Lee's cross-examination began with a question directed to the book value of the IGW shares, held by the two Offshore Funds. After examining the portfolio valuations for each of the funds found at pp. 72 and 144 in Ex. 4-5, Ms. Lee acknowledged that book value was the same in each of the Offshore Funds. Ms. Lee's attention was then drawn to Exhibit 4-4, Tab April 2008, p. 84, an incentive fees report. She confirmed that SCMI, Helen Spork and Robert Spork invested approximately $4 million in the Canadian Fund in April 2008. Ms. Lee was then shown Ex. 5, Tab 8, in which Otto Spork instructed Newedge to carry out certain transactions involving the redemption of the Canadian Fund units purchased by SCMI, Helen Spork and Robert Spork. Ms. Lee said that based on the e-mail at Tab 8, it appeared that the settlement of the redemption would be carried out by the transfer of shares of IGP, the actual number of shares of IGP to be transferred being 1,591,000 plus 1,117,000. Ms. Lee was then shown Ex. 4-6, Tab 18, where on July 21, 2008 the securities ledger for the Canadian Fund shows the exact number of shares previously identified coming out of the fund. She acknowledged that the redemptions were thus carried out without cash payments to the Spork's but rather a transfer of shares of IGP from the Canadian Fund to the Offshore Funds.

[55] Further questions to Ms. Lee were put by counsel for the Respondents relating to the correlation between entries in the general ledger and the entry for accrued management fees in the portfolio valuation statements. Several examples were put to Ms. Lee of matching entries with which she agreed. It was put to Ms. Lee that there appeared to be a short-fall of $400,000 between the crystallized performance fee, as used in the portfolio valuation, and the entries indicated in the general ledger. Ms. Lee acknowledged the discrepancy but pointed out for the discrepancy to be accurate the general ledger would have to be correct. Her view was that the general ledger was not correct.

[56] Following re-examination, Commissioner Perry asked Ms. Lee to explain what she meant when she said earlier in her testimony that there were areas where Sextant's practices deviated from what Ms. Lee would consider normal. Her response was that as far as she could remember, there were no other clients that advanced or pre-paid their performance or management fees.

B. Supriya Sarin and Andrew Wilczynski

[57] Supriya Sarin is a manager in the corporate advisory services group of PricewaterhouseCoopers Inc.

[58] Andrew Wilczynski is a partner with PricewaterhouseCoopers LLP and a senior vice-president of the restructuring and insolvency arm of PricewaterhouseCoopers ("PWC").

[59] The parties agreed that Ms. Sarin and Mr. Wilczynski could testify as a witness panel, as permitted by s. 15.2 of the *Statutory Powers Procedure Act,* R.S.O. 1990, c. S.22 ("SPPA"). The procedure is designed to avoid calling two or more witnesses separately with the understanding that the person best qualified to answer a specific question will respond to that question for the panel. Their evidence is found in Tr. Vol. 3, p. 5 and following.

[60] PWC was appointed the receiver over SCMI, Sextant GP and the Canadian Fund on July 17, 2009. PWC was not appointed as receiver of the Offshore Funds who were

placed under a controllership ("Controllership") pursuant to the laws of the Cayman Islands. PWC and the Cayman controllers share legal counsel in Iceland. PWC had filed two reports to the Ontario Superior Court of Justice and both reports have been approved by the court. (Ex. 4-16, Tabs 1 and 2)

[61] The witness panel concluded that the Canadian Fund held 17% of the issued shares of IGP. Their belief was that the two Offshore Funds together held 42% of IGP, split between the two funds.

[62] The witness panel described the efforts to serve Otto Spork with a notice of examination pursuant to the receivership. Service was attempted in Canada and PWC has retained a service in Iceland to serve Otto Spork in that location. PWC also attempted to meet with Otto Spork but he has refused to do so. Service was attempted on his counsel in Canada but counsel advised that they had not been retained to accept service on behalf of Otto Spork.

[63] The witness panel then described the efforts to carry out the receivership mandate, including obtaining information and gathering in the assets. They obtained the portfolio valuation statements for the Sextant Funds from IAS. They met with Tony Tartaglia, the audit partner in charge of the Sextant account at BDO Dunwoody ("BDO") and gained access to the Sextant books and records for the audit year 2007. BDO Dunwoody no longer had any information for 2008 and the witness panel were told that those documents had been sent back to Sextant. They obtained from the Royal Bank ("RBC") copies of all the bank statements for the three entities, SCMI, Sextant GP and the Canadian Fund.

[64] The witness panel explained the difficulties in reviewing the activities of the three entities. The records were incomplete and no staff was available to explain the transactions. PWC therefore shifted their focus and decided to "follow the money". They tried to map what monies came in and what monies went out to try and understand the dynamics of the flow of funds in and out of the Sextant group.

[65] During its review of the group's bank statements obtained from RBC for the period January 2007 to December 2008, the receiver noted several transfers by one or

more members of the group to non-arms-length individuals and entities. The transfers are identified in the receiver's second report to the court and appear as follows:

Party	**Amount ($)**
Otto Spork	1,580,681
1035316 Ontario Ltd.	668,300
Dino Ekonomidis	457,544
Helen Spork née Ekonomidis	1,110,147
Natalie Spork	271,506
Jamie Spork	98,617
Sextant Capital Management a Islandi ehf	2,557,267
Riambel Holding S.A.	79,435
Total	**6,823,497**

(Ex. 4-16, Tab 2, p. 154)

[66] We find that the recipients of the $6.8 million are Otto Spork, his relatives or companies which he controls. PWC noted that they were unable to find sufficient supporting information to determine the nature and appropriateness of all these transfers.

[67] In addition to the transfers to the non-arms-length's individuals and entities listed above, a significant portion of the credit card expenses of $1.7 million between January 2007 and December 2008 are in respect of personal credit cards held by Otto Spork, Helen Spork, Natalie Spork and others. The credit card expenses covered hotels, meals, other travel costs as well as personal expenditures. The receiver was not able to determine the extent to which the payments were for appropriate business purposes and which were for personal expenses based on the information, or lack thereof contained in the books and records.

[68] In paragraph 24 of the receiver's second report is found a revised summary of the group's Consolidated Cash Flow. The summary shows receipts from arms-length third-party investors of $26 million, together with the proceeds from a sale of IGP shares to the Water Fund of $1.4 million, accounting for total receipts of approximately $27 million. The summary shows redemptions by arms-length third-party investors of $5 million, leaving $22 million to be accounted for.

[69] In the disbursements, the summary shows monies received from non-arms-length parties of $2.8 million and investments by non-arms-length individuals in the Canadian Fund of $1.6 million. These items were explained by Ms. Sarin as a partial re-classification of receipts. The $2.8 million, in the light of the cancelled cheques, indicated that the money was basically being loaned out by the various companies to those related parties and then reinvested by those related parties as subscriptions for units of the fund. Similarly, the $1.6 million was shown as a negative disbursement because the receiver concluded that the monies were advanced by the companies to the individual related parties and then put back in to the Canadian Fund. The receiver concluded this was not fresh money coming in but rather recycled money. The total of the two entries comes to approximately $4.4 million.

[70] It was Ms. Sarin's view that of the original $6.8 million transferred to non-arms-length parties, $4.4 million came back as investment in the Canadian Fund leaving approximately $2.4 million in monies paid to related parties and not repaid to the fund. She pointed out that this was the simple math of the transactions, although the receiver's view was that the entire $6.8 million was owed by the recipients because there was no evidence of the purpose of the transfers.

[71] In the course of its mandate, the receiver visited Iceland from January 18, 2010 to January 21, 2010. Its investigation led the receiver to make the following conclusions:

(i) IGP Iceland was formed to sell bottled water, including the possibility of expanding to include large bulk water shipments. IGP Iceland was in the course of constructing a 7,300 sq. ft. bottling facility in Rif, in western Iceland.

(ii) IGP Iceland's principal asset was a contract with the town of Rif that provided it with water rights. Under the contract, IGP Iceland had constructed a pipeline from a glacier-fed spring running to Rif. Approximately US $2,000,000 was spent building the pipeline.

(iii) The proposed building was at the foundation stage. The contract required the facility be completed by April 4, 2010. It was not clear whether IGP

Iceland would meet that deadline; indeed, the receiver found that to be unlikely. The receiver estimated that US $8,000,000 to $10,000,000 had been spent on developing and constructing the plant.

(iv) The receiver estimated once the building was erected, it would take six to nine months to make the plant operational, including the installation of a bottling line. The receiver estimated the cost of construction and purchasing and installing two bottling lines to be US $20 million or more. The source of funding was uncertain. Aside from its water contract and capitalized costs, IGP Iceland had no material assets.

(v) The receiver also investigated the then current status of IGW, a vehicle through which medium bulk water was to be sold by shipping in medium-sized bladders of water, loaded on to ships for transport. IGW owned a fully constructed medium bulk water filling facility located on the Westmann Islands off the southern coast of Iceland. The facility consisted of a large hangar with three bay doors from which filled bladders could be loaded on to waiting ships. The facility was approximately 50 yards from a large sea port.

(vi) The water to be shipped was to be obtained from a glacier located in southern Iceland. Water was delivered to the island by pipeline, owned by the municipality.

(vii) The facility was fully constructed but not operational due to the absence of sales contracts. Moreover, certain government approvals were necessary to commence operations. The only remaining material construction was the paving of a roadway from the facility to the seaport.

(Ex. 4-16, Tab 2, pp. 170-172)

IGP/IGW Funding Gap

[72] In pursuit of its mandate, the Receiver attempted to understand and reconcile the funds advanced from the Canadian Fund to the IGP/IGW group. Its findings are found in

Ex. 4-16, Tab 2, pp. 177-180 reproduced below:

111. The Receiver has attempted to understand and reconcile the funds advanced from the Sextant Canadian Fund to the IGP/IGW Group and the distinction between the funds invested into IGP and IGW and the lesser amounts in turn invested by IGP and IGW into IGP Iceland and IGW Iceland (the "IGP/IGW Funding Gap"). To the extent that not all of the funds invested in IGP and IGW made it into IGP Iceland and IGW Iceland, the Receiver is now attempting to uncover where such funds went (i.e. as they are apparently no longer with IGW and clearly not within IGP given the Liquidation).

112. The Receiver remains concerned with the apparent inability to account for the funds invested by the Sextant Canadian Fund in the IGP/IGW Group. Understanding the IGP/IGW Funding Gap is made more complicated by the exchange rate considerations resulting from dealing in four currencies over different periods of time (i.e. Canadian dollars, US dollars, Euros and Icelandic Kroners (which exchange rate fluctuations have been particularly volatile following the financial collapse of Iceland's principal banks)).

113. As set out above, according to the books and records in the Receiver's possession, approximately $26.4 million was raised by the Sextant Canadian Fund from investor subscriptions, of which only approximately $9.37 million was invested in IGP and IGW, consisting of: (i) $7.37 million in equity subscriptions (as confirmed by both RBC bank records and the IAS statement of December 31, 2008); and (ii) a further sum in the approximate amount of $2 million (as confirmed only by RBC bank records and not by the IAS statement of December 31, 2008), for which no shares have been issued to the Sextant Canadian Fund.

114. Information provided to the Receiver by Mr. Mirakian on February 12, 2010, indicated that the following investments were made by Sextant Canadian Fund and the Cayman Funds:

	Sextant Strategic Opportunities Hedge Fund (CDN)	**Sextant Strategic Global Water Fund (USD)**	**Sextant Strategic Hybrid 2 Hedge Resources Fund (USD)**
IGP Luxembourg	6,131,347	8,602,252	8,015,040
IGW Luxembourg	1,235,125	2,476,167	1,238,083
Total	**7,366,472**	**11,078,419**	**9,253,123**

Total Investment in IGP & IGW (USD)[1]	**26,346,952**

1 – Opportunities fund converted from CDN to USD at exchange rate of 1.2246

115. As a result of the comingling of monies obtained from the Sextant Canadian Fund and the Cayman Funds, it is not always possible for the Receiver to separate the uses of the Sextant Canadian Fund's monies by IGP and IGW from the uses of the Cayman Funds' monies by IGP and IGW. However, collectively, the Sextant Canadian Fund and the Cayman Funds transferred approximately US $26.35 million to IGP and IGW.

116. The Receiver was informed via information received from Mr. Mirakian on February 12, 2010, of the following uses of the Sextant Canadian Fund and Cayman Funds' monies:

(i) approximately US $4.7 million was invested in IGW; and (ii) US $21.6 million was invested in IGP, with monies invested in IGP used as follows:

	Sextant Strategic Opportunities Hedge Fund (CDN)	**Sextant Strategic Global Water Fund (USD)**	**Sextant Strategic Hybrid 2 Hedge Resources Fund (USD)**
1 – Purchase of IGP shares	5,535,952	5,386,100	1,371,000
2 – Loan to IGP	404,933	421,263	421,263
3 – Sale & Purchase of shares w/ other subsidiaries	705,351	288,800	4,615,855
4 – Share swap transactions	(834,889)	2,506,290	1,607,022
5 – Adjustments for free shares	320,000	0	0
Total	**6,131,347**	**8,602,253**	**9,253,123**

Sum of Items 1 and 2 (USD)[1]	4,851,286	5,807,363	1,792,363
Sum of Items 3,4,5 – no cashflow to IGP	155,530	2,794,890	6,222,677

	Sextant Strategic Opportunities Hedge Fund (CDN)	Sextant Strategic Global Water Fund (USD)	Sextant Strategic Hybrid 2 Hedge Resources Fund (USD)
Sum of Items 1 and 2 for 3 funds (USD)	12,541,011		
Sum of Items 1 and 2 for 3 funds (USD)	9,173,097		
Sum of Items 1, 2, 3, 4, and 5 (book value)	**21,624,108**		

1 – Opportunities fund converted from CDN to USD at exchange rate of 1.2246

117. According to the audited financial statements for IGP Iceland and IGW Iceland for the year ending December 31, 2008:

(i) in total, approximately US $12.5 million was invested by IGP in IGP Iceland, whether by way of equity or debt. Of this amount, $5.94 million or approximately 47.4% came from the Sextant Canadian Fund and the balance from the two Cayman Funds. All of this money has apparently been spent by IGP Iceland in the course of the construction project as well as interest paid to IGP on its loans and professional costs incurred by IGP Iceland, save for the funds in trust with Mr. Jonsson to fund completion of construction of the second pipeline; and

(ii) In total, approximately US $2 million was invested by IGW in IGW Iceland, whether by way of equity or debt. All of this money has apparently been spent in the course of the construction project as well as interest paid to IGW on its loans and professional costs incurred by IGW Iceland.

118. Accordingly, though US $21.6 million was invested in IGP by the Sextant Canadian Funds and the Cayman Funds, only approximately US $12.5 million was invested by IGP in IGP Iceland. As per the uses of the IGP funds provided by Mr. Mirakian, the balance US $9.1 million has been paid to then existing shareholders in IGP (whose identities are not known to the Receiver) for purchase of their shares in IGP and other share swap transactions in IGP. While no details of the share purchases and share

swap transactions have been provided by Mr. Mirakian, this once again raises concerns with respect to possible self-dealing by Dr. Spork and the absence of appropriate corporate governance protocols in IGP. It seems extraordinary that the existing shares of IGP could have been properly valued at over US $9 million, given that IGP had no assets or business at this time, save for the shares of IGP Iceland, which itself was a shell company at the time.

119. Further, though US $4.7 million was apparently invested in IGW by the Sextant Canadian Funds and the Cayman Funds, approximately US $2 million was invested by IGW in IGW Iceland. The Receiver has not determined what has happened to the balance of the funds (amounting to US $2.7 million).

120. The above discussion only considers the transfer of funds by the Sextant Canadian Fund and the Cayman Funds in IGP and IGW. There are many other shareholders in both IGP and IGW and if these shareholders paid anything close to what the Sextant Canadian Fund and the Cayman Funds paid, there should be many more millions of dollars in missing capital. The numbers suggest that the other shareholders perhaps did not pay for their shares or alternatively, did not pay the same value for the shares as the Sextant Canadian Fund and the Cayman Funds.

[73] In cross-examination, counsel for Otto Spork referred to a number of documents which Mr. Wilczyanski had never seen. He acknowledged that they appeared to explain "the funding gap" referred to in his evidence but he was unable to conclude that without further analysis.

C. Michael Ho

[74] Michael Ho is a Forensic Accountant employed by the Commission. Mr. Ho became a Chartered Accountant in 1988 and obtained his CMA certification in 1999. Mr. Ho's evidence centered on Exhibit 38 (described as Hearing Brief Vol. 20) containing a

series of spreadsheets prepared by him or under his supervision. His evidence may be found in Tr. Vol. 12, pp. 76-137.

[75] Mr. Ho's attention was first drawn to Ex. 38, Tab 5, which Mr. Ho described as an analysis of the cash-flow of the Canadian Fund from January 1, 2007 to December 31, 2008. It is important to remember his evidence concerned only the Canadian Fund. His analysis was based on documents he received from the various banks and brokers that the Canadian Fund had accounts with, including RBC and Newedge. He also looked at the accounting records of the Canadian Fund as prepared by IAS as described in the evidence of Ms. Lee. A copy of Ex. 38, Tab 5 is attached to these reasons as Schedule "B".

[76] Briefly put, a total of $30 million was deposited into the accounts of the Canadian Fund and during that same period $29 million was dispersed from those accounts. Mr. Ho did not take into account any transaction under $10,000. Third-party investors invested $23 million. In addition, Otto Spork and parties related to him invested $4.6 million. SCMI transferred $1 million and the Water Fund transferred $1.5 million to the Canadian Fund.

[77] The application of funds included investments and transfers to IGP of $2.9 million. There were transfers to SCMI and Sextant Capital GP totalling $16.3 million, third-party investor redemptions accounted for $3.9 million and net investments in other securities of $3.7 million.

[78] Included in the $16.3 million paid or transferred to SCMI and Sextant GP there were various transactions totalling $3.5 million that IAS characterized as investments in IGP. Mr. Ho said it was appropriate to add the $3.5 million to the $2.9 million in the first line of his analysis of application of funds to reflect a $6.4 million investment in IGP by the Canadian Fund.

[79] Mr. Ho's attention was drawn to the Receiver's revised summary of the group's consolidated cash-flow found in Ex. 4-16, at p. 151. Mr. Ho explained that the different figures in that revised summary when compared to his summary at Ex. 38, Tab 5 was caused by the Receiver analysing three entities – the Canadian Fund, SCMI and Sextant GP. He added that his analysis looked at source documents that relate to both the bank

account with RBC as well as the brokerage accounts, whereas the Receiver's analysis did not cover cash-flow movements that took place within the brokerage accounts for the Canadian Fund.

[80] Mr. Ho was then asked about the spreadsheets found in Tab 1 of Ex. 38. Three spreadsheets related to the Canadian Fund, the Hybrid Fund and the Water Fund. Each of the spreadsheets shows the market price per IGP share held by the respective funds for the period July 31, 2007 to December 31, 2008. Each further shows the market price per share, the total market value of investment in IGP, the total NAV, a total market value of the investment in IGP as a percentage of NAV. Mr. Ho took the information from the reports provided by IAS and made the percentage calculations shown in the final column on spreadsheets one, two and three in Tab 1, Ex. 38. Shortly put, the total market value of investment in IGP as a percentage of NAV as at December 31, 2008 for the Canadian Fund was 94%, for the Hybrid Fund 107%, and for the Water Fund 98%.

[81] Mr. Ho was referred to Tab 3 of Ex. 38. In this spreadsheet, he extracted all the balances relating the Fund Manager and put them all in one page, coming up with a net balance for all those balances relating to the Fund Manager for each month. The first two columns in the spreadsheet are described as "Due From Fund Manager" and "Advanced Payment to Fund Manager". Taken together, those two columns represent sums the Fund Manager owed to the Canadian Fund for each month in 2008. The next seven columns are the varying sums owed by the Canadian Fund to the Fund Manager. These columns include accrued management fees and GST, operating expenses, crystallized performance fees and GST and accrued performance fees and GST. The spreadsheet shows that as of April 30, 2008 an advance payment of $4 million was paid to the Fund Manager. In Ex. 38, Tab 4, Mr. Ho calculates the total amount paid in 2008 to the Fund Manager was $6.6 million.

D. The Indications of Value

[82] During 2007 and 2008, Otto Spork obtained two calculations of value, received a marketing letter from Canaccord and arranged two share purchases by third parties to justify his valuations of the IGP shares held by the Canadian Fund. These five alleged indications of value are discussed below.

1. Hempstead

[83] Hempstead & Co. ("Hempstead") is a US company carrying on business in New Jersey. In December 2007, Otto Spork retained Hempstead to perform "an appraisal on the fair market value" of the aggregate equity of IGP as of December 31, 2007. The report dated April 2, 2008 may be found at Ex. 4-18, Tab 32.

[84] Hempstead's opinion was that the fair market value of the aggregate equity of IGP at December 31, 2007, on a majority interest basis was $250 million.

[85] Attached to the report as Exhibit 1 is a statement of assumptions and limiting conditions. The first three of the assumptions and limiting conditions are as follows:

- Information, estimates and opinions contained in this appraisal are obtained from sources considered reliable; however, no liability for such sources is assumed by the appraiser.

- It is understood that in preparation of this report, Hempstead & Co. Inc., is acting as a service provider and not in a fiduciary capacity.

- We have relied upon the accuracy and completeness of information supplied by the client company without further verification thereof. We have assumed that all financial statements were prepared in conformity with generally accepted accounting principles unless informed otherwise.

[86] At page 3 of the report, Hempstead confirms that it conferred with IGP's management and received a copy of the company's business plan, which it incorporated by reference. Hempstead makes it clear that it is assumed that all financial statements were prepared in accordance with general accepted accounting principles and that it relied upon the accuracy and completeness of the material furnished to it and did not independently verify the information contained in that material.

[87] Hempstead calculated the value of IGP using an income-based or discounted cash-flow approach. At p. 38 of the report, Hempstead notes that the calculated value of $250 million assumes that the company will remain an ongoing concern and will have the

funds necessary to finance the start up of its facility, as well as the operating costs of the company during its formative stages. We find this report cannot be relied upon as an independent valuation of IGP shares. It appears to have been produced by Hempstead accepting Otto Spork's projections without, as the report acknowledges, verifying the information provided by him. Our conclusion extends to any subsequent analysis which relies upon the Hempstead report.

[88] Hempstead was also retained by Otto Spork to prepare a second report dealing with the value of IGP's lease rights over the Snæfellsjökull glacier. In a report dated April 2, 2008 Hempstead calculated the value as being $510 million. In effect, the second report is a calculation of the incremental value of the water that IGP itself couldn't use according to its business plan. The second report repeats the qualifications of the first report, rendering it equally unreliable.

2. Spardata

[89] Securities Pricing and Research Inc. ("Spardata") is a US company carrying on business in Maryland. It was retained by Otto Spork and issued a report dated January 28, 2008, placing a calculated value on IGP as of December 31, 2007 of US $442,833,500 and a value per share of US $6.50. The report is found in Ex. 4-18, Tab 29. Spardata said the purpose of the report was to perform a calculation of enterprise value of IGP as of December 31, 2007.

[90] The report contained the following qualification at p. 7:

> **Calculation of Value**. The reader of this report should be cautioned to the fact that this analyst relied on Client-prepared projections of future revenues, expenses and accounts in this valuation. The analyst relied on the client-provided information at the direction of the client. SPARDATA has not formally reviewed the Client's calculations or the assumptions used in the information provided by the client and cannot opine regarding the likelihood that the projections will indeed be attained. Furthermore, if the analyst had used SPARDATA-prepared projections, the value conclusion would likely have varied significantly from the value conclusion derived from the Client's projections. Therefore, SPARDATA does not express an *opinion* of value in this report, but provides only a *calculation* of value based on the Client's assumptions. **SPARDATA strongly cautions the reader that the calculation of value contained**

> **herein may be unreliable, and should not be the basis for a debt or equity investment decision.** [emphasis in original]

[91] The report calculates an enterprise value for IGP based on financial projections provided by Otto Spork. We find this report cannot be relied upon as an independent valuation of IGP shares. Our conclusion extends to any subsequent analysis which relies on the report.

3. Steve Winokur (Canaccord)

[92] Steven Winokur holds a Master of Business Administration from the University of Toronto, and is a Managing Director in the Investment Banking group at Canaccord Genuity ("Canaccord"). He advises companies on accessing capital through public and private equity markets. Canaccord would generally be compensated with a success-based fee on the completion of a financing transaction. Mr. Winokur's evidence is found in Tr. Vol. 5, p.6 and following.

[93] Mr. Winokur was introduced to Otto Spork by Vik Kapoor, a retail broker with GMP. He spoke with Otto Spork by telephone and signed a non-disclosure agreement with IGP on behalf of Canaccord in July of 2008. He then commenced the due diligence process to learn about the company and assess the marketability of a potential initial public offering ("IPO") of IGP. He visited Iceland for 24 hours and observed the IGP facilities at Rif. He observed the construction site of survey stakes in the ground and a pile of pipes in another area. He also visited the port area that was proposed to have bulk quantities of water shipped to prospective purchasers. During the course of his examination-in-chief, Mr. Winokur candidly responded to a question as follows:

> Q. Was there a different focus of water sale that you were looking at, other than bottled?
>
> A. I don't recall. We were looking at -- you know, we were basing our analysis off of the forecasts that were provided.
>
> (Tr. Vol. 5, p. 39, ll. 6-11)

[94] After a lengthy exchange of e-mails and conversations, Mr. Winokur wrote Otto Spork on September 29, 2008, in a letter headed, "Re: Value Discussions Letter". The

letter explained some of the thought processes Canaccord used to determine its recommended valuation range. In short, the letter recommended an initial public offering of IGP to be marketed based on a pre-money valuation of approximately $400 million. Canaccord recommended that the size of the IPO be $100 million. Following this letter, communication between Otto Spork and Canaccord dwindled over the succeeding weeks and months. Sometime in the month of December 2008, Otto Spork and Mr. Winokur had their last conversation.

[95] In examination-in-chief, Mr. Winokur was asked the following question:

> Q. and as a proportion of the diligence, the due diligence you would ordinarily do before taking a company to market, are you able to estimate a percentage of the amount of work you completed?
>
> A. You know, probably 5 percent or less or something along those lines.
>
> (Tr. Vol. 5, p. 16, ll. 14-20)

[96] In cross-examination, counsel for the Respondents drew Mr. Winokur's attention to the several occasions on which he told Otto Spork how highly he thought of IGP's prospects. Among the examples,

> "Guy's, this is why we LOVE what you're doing. Going to be HUGE." (Ex. 8, Tab 30, p. 1);
>
> "I continue to like IGP a great deal and look forward to the opportunity to work with you."
> (Ex. 8, Tab 52)

[97] The following exchange took place between Mr. Groia and Mr. Winokur:

> Q. So would it be fair to suggest that even in December of 2008 you remain keen on doing the potential financing?
>
> A. Well, I had no update on the businesses between the two dates, so I think this is a little bit of marketing.
>
> (Tr. No. 6, p. 47, ll. 1-6)

[98] Our review of Mr. Winokur's evidence and the documents to which he was referred persuade us that Mr. Winokur was indeed engaged in "a little bit of marketing".

We find Mr. Winokur was working diligently to acquire Otto Spork as a client with a view to taking IGP public by way of an IPO. Ordinary life experience and common sense tells us that Mr. Winokur would not do anything other than be enthusiastic about the prospects for IGP in attempting to gain Otto Spork as a client for Canaccord. This, in turn, persuades us to give little weight to the $400 million value suggested by him as the basis to raise $100 million by way of an IPO. The Canaccord letter cannot be relied upon as a valuation of IGP.

4. T.J.

[99] T.J. obtained a Bachelor of Arts from McMaster University and passed the Canadian Securities Course. He was employed at BurgeonVest Securities from 1995 through 2009, with a break of one year. He worked at the Hamilton office where he first met Dino Ekonomidis, who was a salesman with the firm. His evidence is found in Tr. Vol. 13, pp. 8-47.

[100] T.J. described their relationship as co-workers and friends. They socialized together, lunched together and shared their ideas. T.J. said that Dino Ekonomidis covered a lot of the smaller venture-listed type stocks, a world with which he, T.J., was not familiar. On the advice of Dino Ekonomidis, T.J invested in two junior companies and experienced a doubling or more of his investments and realised a paper profit of over $100,000.

[101] In February of 2006, Dino Ekonomidis recommended T.J. invest in a hedge fund that his brother-in-law was starting. This, of course, was Otto Spork. He described the holdings of the fund as commodities and commodity-based type investments. When asked if he was relying on this advice to determine whether to invest, T.J. replied:

> Yes, I mean, to make a long story short, I mean, I had such a big profit in his other recommendations I thought it was only the right thing to do to continue supporting him and so I decided to invest $40,000 dollars into the start-up of this hedge fund.
>
> (Tr. Vol. 13, p. 14, ll. 9-13)

[102] Following his investment, T.J. received promotional material from the hedge fund which reported on the success of the fund. Encouraged by the information he received, he invested a further $95,620 on July 6, 2007 and yet another sum of $62,953 on May 2, 2008. He explained the subsequent investments by saying the fund had been doing so well and that Dino had found him and said it was a good time to buy more of the fund and he proceeded to do so. He described his results as a "massive paper gain".

[103] Dino Ekonomidis gave T.J. information on IGP. The information included a business plan and other related documents promoting a private equity investment. He was persuaded to invest in IGP because he trusted Dino Ekonomidis and his track record was phenomenal as far as the paper returns were concerned. He said he and Dino Ekonomidis were friends and that he trusted him. T.J. invested $75,000 in IGP and had no idea of the price per share. He explained that the price of the shares was not an important factor to him and he did not negotiate the price, nor did he do any due diligence with respect to the price per share. He said the number of shares he was to receive were not an important factor to him.

[104] Staff produced to T.J. an e-mail sent from Otto Spork to Jason Kwiatkowski, a senior manager of BDO. Mr. Kwiatkowski had been looking for documentation to support the consideration of €1.85 per share for T.J.'s purchase. The e-mail response from Otto Spork to Mr. Kwiatkowski reads as follows:

> Tommy wired in $75,000 CDN into the Opportunities Funds' bank account on August 11/08. The conversion rate was approx. $1.56 CDN to the Euro and Tommy received about 25,950 shares. This works out to €1.85 per share.
>
> (Ex. 41)

[105] We can only conclude from the evidence of T.J. and the documents referred to in his evidence that the value of €1.85 per share was not established by an arm's length transaction between a willing vendor and a willing purchaser but rather established by Otto Spork himself. We take from T.J.'s evidence that he invested in IGP for two reasons: he trusted Dino Ekonomidis and his paper profits were extraordinary. He was indifferent as to the number of shares he was buying and invested $75,000 at the

suggestion of Dino Ekonomidis. Moreover, as this was a small tranche share transaction, we find it to be an unreliable indication of the value of IGP particularly when considering T.J.'s explanation of how he came to pay $75,000 for his shares. The purchase price paid by T.J. we find to be worthless as support for a valuation of €1.85 per IGP share in August 2008.

5. J.G.

[106] J.G.'s background education included a Bachelor of Business Administration from York University in 1994, an M.B.A. in 1995 and a CFA designation since 2001. After working for the Toronto Dominion Bank, BC Enterprises and one or two small corporations, J.G., since 2006, has been the President and co-founder of F.M.I. His evidence is found in Tr. Vol. 13, pp. 48-90.

[107] He described F.M.I. as an investment bank operating in the exempt market that seeks to finance private companies and help them to go public. His co-founder is A.S., a securities lawyer. J.G. expanded on the activities of F.M.I. and described how it worked with junior mining and oil and gas private companies who want to move towards going public. Typically F.M.I. would do two or three rounds of financing for these companies on a private placement basis through its established connections and networks, primarily high net worth individuals and small institutions.

[108] J.G. then described F.O.I., an entity established by F.M.I. to invest in early stage companies F.M.I hoped to take public.

[109] J.G. became familiar with SCMI and Otto Spork in 2007 while F.M.I. was working with one of its first clients, a resource company. The Canadian Fund and the Hybrid Fund each invested on three occasions in that company and three other companies promoted by F.M.I. for a total of $1,175,000. (Ex. 42)

[110] J.G. and his partners became aware of IGP through their connections with Otto Spork. Otto Spork told them he was interested in taking IGP public at some time and was looking for brokers and for investors. They received a copy of the IGP business plan which may be found in Ex. 4-8-B, Tab 21. J.G. said they were looking at the business

plan for two reasons – as a possible investment but also as an opportunity to work with Sextant and Otto Spork to assist the company in eventually going public. After various proposals were discussed and considered, a draft letter of engagement was put together by F.M.I in July, 2008. J.G. described the document as something that was intended to advance discussion (Ex. 4-8-B, Tab 23). He acknowledged that F.M.I. never entered into an engagement with IGP.

[111] Nevertheless, F.O.I. invested in IGP shares, a decision that was taken about 10 days or so after Otto Spork informed J.G. he was closing a financing and was offering F.O.I. a chance to participate as an investor.

[112] On August 22, 2008, F.O.I. purchased 100,000 shares in IGP for €150,000, a price per share of €1.50. J.G. said that there was no negotiation with respect to the price of the shares. The explanation was that the financing had already been arranged, there was no opportunity to negotiate and the price of €1.50 was simply presented to F.O.I. He confirmed that F.O.I. made no attempt to negotiate a different price nor had it done any due diligence to determine whether or not it was an appropriate price, other than some preliminary review of information they had at the time. He also confirmed that when they made the investment there was still a possibility that F.M.I. would act for IGP in taking it public.

[113] J.G. said the decision to invest in IGP was partially prompted by an attempt to maintain a decent relationship with Otto Spork with the prospect of participating in an IPO for IGP.

[114] In October of 2008, F.M.I. began pursuing Otto Spork for completion of subscription agreements committed to by Otto Spork's companies which remained outstanding and for which payments had not been made. The funds were never delivered.

[115] We find that F.O.I.'s purchase of IGP shares cannot be relied upon as a valuation of IGP. There was no negotiation of price and limited due diligence performed - every indication was that F.M.I/F.O.I. hoped to get something in return from Otto Spork by way of acting as an underwriter in a prospective IPO for IGP. Moreover, while F.O.I.

could be considered a sophisticated investor, this was a small tranche share transaction and thereby an unreliable indication of the value of IGP.

6. Antonio Tartaglia (BDO)

[116] Mr. Tartaglia is a Chartered Accountant since 1982 and joined BDO in 1988. He is a partner in the Hamilton office and first met Otto Spork in 2005. His evidence is found in Tr. Vol. 8, p. 35 and following.

[117] BDO were auditors for the Canadian Fund, for SCMI and produced tax returns and financial statements for Sextant GP He described SCMI as a very small entity with limited resources and unsophisticated from an accounting perspective. Its records were not well maintained, there were errors in their work; BDO always had difficulty in completing its audits.

[118] Mr. Tartaglia described IGP as a company in which the Canadian Fund had invested. He understood IGP to be in the business of obtaining water from a glacier in Iceland and bottling and selling it, as well as selling through bulk means. He was familiar with IGP's business plan found at Ex. 4-18, Tab 26, a document to which reference has been made throughout this hearing.

[119] He believed that Mr. Spork had an ownership in IGP as of December 31, 2007 indirectly through his holding company, Riambel. He thought Riambel owned 20% of IGP. He was aware that the Offshore Funds had an interest in IGP and believed at December 31, 2007 the three funds owned roughly 30% of IGP. He believed Otto Spork was the directing mind of IGP and managed it.

[120] In July of 2008, Mr. Tartaglia and his wife went to Iceland, their expenses paid by SCMI. He was part of a group that went to the town of Rif where he observed a large flat area that looked like it had been recently prepared for construction. He said the site was not ready to produce product at that point.

[121] Mr. Tartaglia visited Westmann Island where it was proposed that IGW capture water from a glacier for the purpose of bulk sales. He was familiar with IGW's business plan found at Ex. 4-19, Tab 1. He assumed that Otto Spork was the directing mind of

IGW. He described the site on Westmann Island as more developed than the IGP site but didn't think it could produce product economically in July 2008.

[122] Mr Tartaglia was asked about the reports prepared by Hempstead and Spardata and the letter written by Canaccord. He described the reports as an estimation of value based on certain assumptions. He confirmed that the reports used management's (i.e. Otto Spork's) projections and calculated values based on those projections. Mr. Tartaglia concluded the Hempstead and Spardata reports were not sufficient for purposes of an audit. He said the Canaccord letter was not a valuation and was not sufficient to support BDO's audit.

[123] Mr. Tartaglia confirmed the retention of Cole & Partners, specifically Scott Davidson, by Otto Spork. Cole & Partners was to carry out a valuation of the IGP shares for the purposes of the December 31, 2007 audit. Mr. Tartaglia described the report prepared by Cole & Partners as unfinished and one that did not come to a conclusion. It was of no assistance to BDO in preparing its opinion for the 2007 audit of the Canadian Fund.

[124] Mr. Tartaglia was asked if BDO considered whether to keep the Sextant group of companies as a client, following the publicity surrounding the Commission's allegations. The identified reasons why the audit was continued included the difficulty of finding an alternative auditor, how that would affect investors and the possibility of being sued by Otto Spork. The delay in the audit might cause the Commission to appoint a receiver for the fund which in turn would result in negative consequences to the investors. In any event the decision was taken to finish the audit engagement, if possible. The internal view of the audit as reported by Mr. Tartaglia was as follows:

> The 2007 engagement will be rated at high risk and therefore will require concurring partner review. In addition, we will reexamine all the audit evidence to ensure that reliance on related party evidence and representations are minimized whenever possible.
>
> (Tr. Vol. 8, p. 76, ll. 4-9)

BDO ultimately decided to do "an assessment of the reasonableness of the value" of the IGP shares. This was done on the instruction of Mr. Tartaglia.

[125] In an internal memo approved by Mr. Tartaglia, the projections prepared by management and relied upon by Hempstead and Spardata were declared, "to be reasonable". Mr. Tartaglia agreed that this was a significant assumption. He further agreed that "…if the assumptions are incorrect then this work is incorrect." (Tr. Vol. 8, p. 83 ll. 12-13)

[126] Mr. Tartaglia spent considerable time attempting to describe "the Riambel transaction". BDO discovered a payment made by the Canadian Fund to Riambel. Initially Otto Spork told BDO that it was an additional investment in IGP made by the three Sextant Funds even though only one fund made the payment initially. However, instead of the money being invested directly, it went to Riambel who, in turn, was being repaid for money it had advanced to IGP. He then amended his view, stating that it was the Water Fund that made the payment, roughly US $1.2 million. An argument ensued about how this action should be recorded from an accounting point of view. Otto Spork insisted that there was no loan to Riambel. Mr. Tartaglia never saw any payments from Riambel to IGP. Ultimately the payments were treated by BDO as a loan receivable from IGP. The end result was that, for accounting purposes, the Sextant Funds assumed a debt owed by IGP to Riambel.

[127] Mr. Tartaglia then described the difficulty BDO had in obtaining from Otto Spork evidence to support the increases in the market values of IGP shares that were used to established the Canadian Fund's NAVs during 2007. Various explanations were provided by Otto Spork which were ultimately accepted by BDO.

[128] BDO completed its review of "the reasonableness of the value of IGP shares" on February 26, 2009. The 2007 audited financial statements for the Canadian Fund were dated February 17, 2009, some nine days earlier. Mr. Tartaglia reported to Otto Spork on May 19, 2009 that the audited financial statements had been "recently filed." (Ex. 4-9, Tab 11)

7. Scott Davidson (Cole & Partners)

[129] Scott Davidson was a partner with Cole & Partners during its interaction with Otto Spork. He is both a Chartered Accountant and a Chartered Business Valuator. His evidence may be found at Tr. Vol. 9, pp. 10-144.

[130] Mr. Davidson described how in May 2008, Mr. Tartaglia called him and explained BDO's requirement for a valuation of the IGP interest held by the Canadian Fund as of December 31, 2007. Mr. Davidson was referred to documents contained in Ex. 4-7 and 7A, which contain documents created by the engagement of Cole & Partners.

[131] Cole & Partners was asked to prepare "an estimate valuation report", which Mr. Davidson described as lying somewhere between a calculation and a comprehensive valuation report. He described the aims of such a report as follows:

> … I think what you're trying to do is you're trying to understand the financial position of the subject business as at or about the valuation date; you are trying to understand the operational, financial outlook for the business as at or about that date; you're trying to understand the market into which the business is selling, its competitors and the like.
>
> (Tr. Vol. 9, p. 19, ll. 12-18)

[132] Cole & Partners and Otto Spork signed an engagement letter dated May 15, 2008, which Mr. Davidson described as contemplating two phases in the preparation of the report. The first phase was to include a review of information, some research, and a preliminary analysis to develop a range of value, to be followed by a meeting to discuss progress to that date. The second phase would have involved a more detailed review and analysis leading to an estimate report. In late May 2008, Mr. Davidson received IGP's business plan and financial projections, the Hempstead and Spardata reports and a copy of an agreement between IGP and the town of Rif in Iceland.

[133] Mr. Davidson noted the projections showed the business growing from a "very small number, if not, zero" revenue to over $500 million after five years. He also noted that the projections used by Hempstead and Spardata were out by a year because of delay in getting the business started. Mr. Davidson felt that there was significant risk around the projections and testified that "the projections were very aggressive".

[134] In late June of 2008 Mr. Davidson e-mailed Otto Spork seeking a meeting with him and asking for IGP's current financial statements. Nothing of note was received from Otto Spork and Mr. Davidson e-mailed Otto Spork again on August 21, 2008.

[135] Mr. Davidson did describe in considerable detail the difficulties he was having with arriving at a valuation for the IGP interest held by the Canadian Fund:

> I had little indication or understanding as to the what the milestones were, what traction had been gained, what was happening, what the distribution plan was, what the marketing plan was, what had been arranged, what was in place, who were the management. I hadn't spoken to anyone. So I was going to at some point wrestle with the issue of did this projection make any sense?
>
> (Tr. Vol. 9, p. 68, ll. 11-18)

[136] Subsequent interactions with Otto Spork included Otto Spork's emphasis on the Hempstead and Spardata reports, the Canaccord letter, and the transactions involving T.J. and F.O.I. described earlier in these Reasons. Mr. Davidson said Otto Spork conveyed to him the idea that he had a business and it was going to progress as projected. Subsequently in late November 2008, Mr. Davidson received the financial statements for IGP for the 2007 year-end.

[137] Finally, Mr. Davidson sent an e-mail to Mr. Tartaglia on December 5, 2008. The third paragraph states:

> Based on the scope of our review to date, it appears that the fair market value of Sextant's interest in IGP at the valuation date is uncertain, if not speculative, and likely lies within a very wide range of potential values.
>
> (Ex. 4-7, Tab 22)

[138] In his testimony, Mr. Davidson developed his explanation for his conclusion in the e-mail to Mr. Tartaglia:

> I think the speculative part really goes into the question of whether this business was going to turn out the way it had been projected. It was a – in my mind, based on what I knew, based on what had not occurred in 2008 up to that point in time, based on a very cursory and limited understanding, virtually no explanation from management, as to what operationally had been done and what milestones had been hit and where

> they were at in terms of going to market, it was speculative as to whether or not they were going to be able to achieve that projection in the time frame in which it was projected.
>
> (Tr. Vol. 8, p. 95, ll. 5-16)

[139] Mr. Davidson prepared a draft report dated December xx, 2008 titled "Comments in Respect of The Possible Value of Sextant's Interest in IGP as at December 31, 2007" that can be found at Ex. 4-7, Tab 22. Mr. Davidson heard nothing further from Otto Spork. In a conversation with Mr. Tartaglia in January of 2009 it became clear that Mr. Davidson was unwilling to accept the projections provided by Otto Spork as the sole basis for determining an estimate of IGP's value.

[140] We find Mr. Davidson's evidence to confirm our own reaction to the business plan and financial projections of IGP. To Mr. Davidson's credit, his firm prepared a detailed analysis of the materials advanced by Otto Spork and was not coerced into providing a valuation opinion that would validate the IGP market values set by Otto Spork.

[141] The Cole & Partners report is of no assistance to us, other than to confirm our analysis of the reports prepared by Hempstead and Spardata and the share purchase transaction by T.J. and F.O.I.

8. Jason Kwiatkowski (BDO)

[142] Mr. Kwiatkowski is employed by BDO. His evidence is found in Tr. Vol. 4, p. 5 and following. Mr. Kwiatkowski has a Chartered Accountant designation, a Chartered Business Valuator designation, an Accredited Senior Appraiser designation and a Certified Exit Planning Adviser designation. He is a Senior Manager with BDO in the valuation and litigation support group.

[143] Early in 2009, he was asked to review the reasonableness of management's valuation of Sextant's investment in IGP as at December 31, 2007. The information was required so that BDO could complete its audit of the Canadian Fund for the year ending December 31, 2007. Mr. Kwiatkowski explained that where management has provided a value or representative value to BDO, BDO would conduct a review of how that value

was determined so that it could conclude whether or not the value represented was reasonable. It is clear that the audit staff of BDO was having difficulty in justifying the values ascribed to the IGP shares held by the Sextant group. For this reason Mr. Kwiatkowski and his colleagues with valuation expertise became involved. Mr. Kwiatkowski described in some detail how he arrived at his determination of the reasonableness of Otto Spork's valuation of the IGP shares held by the Sextant group.

[144] Jason Kwiatkowski and his colleagues in the valuation and litigation support group of BDO prepared a report on the "reasonableness of the value of Sextant's investment in Icelandic Glacier Products as at December 31, 2007" that met the needs of the audit group responsible for the Canadian Fund. The result is found in a memorandum dated February 26, 2009. (Ex. 4-18, Tab 1) Page one of the memorandum states the following conclusion:

> Based on the scope of our review, we are of the view that the value of Sextant's investment in IGP as at December 31, 2007 as represented by management is reasonable. See attached analysis' and memorandums for supporting commentary.

[145] The report states that it is not a valuation report and does not provide any conclusion as to value. The document was not to be circulated outside of BDO as it did not contain all the disclosures required by the Canadian Institute of Chartered Business Valuators, when providing a critique or a review of values provided by others. The memorandum points out a number of assumptions made underlying the various valuation reports referred to in the memorandum that significantly influenced the conclusions reached in those valuations. One such important assumption was the reliance on certain projections provided by management.

[146] On page two the report states the authors have reviewed and relied on the reports prepared by Hempstead and Spardata. Curiously, a footnote on page eight of the report states the authors have not considered the Spardata valuation because the discount rates apply therein may not accurately reflect the risk associated with the projections and because the Spardata valuation does not consider the value of the incremental water capacity.

[147] The authors assumed for the purposes of their analysis that management had made available all information requested and all information that management believed was relevant to the preparation of the memorandum.

[148] On page four of the memorandum, the authors note that Otto Spork valued Sextant's investment in IGP as at December 31, 2007 at €0.80 or US $1.17 per share. This indicated a value of US $23.3 million for the 19,955,000 shares or 30% of IGP held by the Sextant Funds at that time.

[149] In order to test the reasonableness of management's valuation of Sextant's interest in IGP as at December 31, 2007, BDO compared management's valuation (US $23.3 million) to:

> (1) A probability-weighted sensitivity analysis based on the two Hempstead reports and applying discounts to reflect the then shareholder dispute and to reflect the minority interest in IGP and its illiquidity; and
>
> (2) Subsequent transactions in 2008 (F.O.I.., T.J., G.P.) and the Canaccord letter. BDO chose not to include the purchase by the Sextant Funds in May 2008 of a 2/3 interest in IGP at €0.07 per share.

[150] In cross-examination, Mr. Kwiatkowski acknowledged that throughout the course of his engagement he became aware of some actions that had been taken by the Commission. At the time he wrote his report he knew that Tony Tartaglia, the lead person on the audit, had declared the audit of the Canadian Fund to be a "high-risk audit". He had no reason to doubt what Otto Spork, Sergiy Kaznadiy, Shahen Mirakian or Gunnar Jonsson told him. He told Respondents' counsel that he had no reason to question or doubt the conclusions contained in the memo. Mr. Kwiatkowski confirmed that he stood behind BDO's work as of the date he testified.

[151] At the conclusion of Mr. Kwiatkowski's evidence, the following exchange took place:

> Commissioner Perry: Okay, so my final question, then, is on page 8, in terms of your analysis or probability-weighted analysis, I have to tell you, and I would like to hear your response, I was struck by the exactness of

> your analysis being US $23.3 million, exactly equal to what was being carried by management in the books. I just – it just struck me very odd to guess.
>
> The Witness: It is weird, it is odd, it is sort of like, whoa, but it is purely coincidental.
>
> (Tr. Vol. 4, p. 93 l. 17 - p. 94 l. 2)

[152] We agree it is both "weird" and "odd". We don't agree that it was "purely coincidental." We find the figure was arrived at to allow BDO to complete an audit that had gone off the rails.

[153] BDO found management's valuation of the IGP shares held by the Canadian Fund as at December 31, 2007 to be reasonable. We disagree. Given our finding that the Hempstead reports cannot be relied upon for such a valuation, BDO's reliance on those reports cannot justify the BDO conclusion as to the reasonableness of IGP's stated market value as of December 31, 2007. Similarly, its reliance on certain subsequent transactions in 2008, two of which we have found to be unreliable indications of IGP's value, cannot justify BDO's conclusion as to the reasonableness of the value represented by management.

E. Robert Levack

[154] Mr. Levack was named as a respondent in this matter and entered into a settlement agreement with Staff that was approved on June 1, 2010. His evidence is found in Tr. Vol. 9, p. 146, and Tr. Vol. 10, pp. 5-31.

[155] Mr. Levack completed a Bachelor of Arts degree in history, a Masters degree in history and a Bachelor of Education degree. At the time of his testimony, Mr. Levack was a Certified Financial Adviser and formerly had been a Certified Financial Planner. He had taken the Officers, Partners and Directors course and the Canadian Securities Course. From 1986 forward Mr. Levack worked as a portfolio manager, a client service representative and in portfolio management.

[156] He was hired by SCMI in February 2006 and remained there until July 17, 2009. SCMI was registered with the Commission as an investment counsel portfolio manager

and limited market dealer for the province of Ontario. Mr. Levack's role with Sextant was Chief Compliance Officer and portfolio manager. He said his duties were largely on the administrative side in terms of keeping track of purchases and sales of client's subscriptions, and generally looking after the back office. He was responsible to ensure that the trades carried out by SCMI were in compliance with offering memoranda and with securities law. Although Otto Spork was not registered as a portfolio manager, Mr. Levack said that, in essence, Otto Spork carried out that role. Quite often Mr. Levack learned that Otto Spork made decisions on portfolio purchases about which Mr. Levack would find out after the fact. He said Otto Spork made all the investment decisions at Sextant.

[157] Mr. Levack described Otto Spork's role as out of the ordinary in the sense that Otto Spork's obligation was to report to Mr. Levack in the latter's role as Chief Compliance Officer. On occasion, Mr. Levack would receive a call looking for money to settle a particular purchase, a purchase he knew nothing about. He confronted Otto Spork with these situations and reminded him of his obligations; it "kind of went in one ear and out the other". Mr. Levack said that this attitude was consistent with his analysis of Otto Spork's personality as being somewhat grandiose in nature and perhaps a little too overly confident.

[158] Mr. Levack was invited to review his settlement agreement. In it he acknowledged that on more than one occasion there was insufficient working capital in terms of the regulations. When he brought this to the attention of Otto Spork, Otto Spork said: "No, we're not going to report it, and in any case, there's more than enough money here to cover any capital deficiency." (Tr. Vol. 9, p. 171, ll. 22-24) Mr. Levack did not report the deficiencies to the Commission.

[159] Mr. Levack was asked about the second matter covered in the settlement agreement, that of exceeding 20% exposure in any one investment as limited by the terms of the offering memorandum. Mr. Levack acknowledged that he received the portfolio valuation statements which had to be approved by Otto Spork. When he drew the over-concentration to Otto Spork's attention, Otto Spork made some reference to a potential IPO where he was thinking about taking IGP public and also that he was thinking of

directing future cash flow into non-water areas. At the time the Canadian Fund was invested almost 90% in IGP, calculated on its NAV. Mr. Levack did not report this to the Commission.

[160] Mr. Levack was asked if he ever knew that Otto Spork had an ownership interest in IGP or IGW. Mr. Levack said he learned that in the latter part of 2008 that Otto Spork owned virtually all of IGP. This contravened the terms of the offering memorandum which provided that the Canadian Fund would not purchase securities from or sell securities to the Investment Adviser or any of its affiliates or any principal of any of them. Since Otto Spork was affiliated with the Investment Adviser and was selling shares of IGP to the Sextant Funds, his activities contravened the offering memorandum. Mr. Levack did not report this matter to the Commission.

[161] When asked about Otto Spork's attitude regarding compliance issues, Mr. Levack replied: "I almost got the impression, that, you know, the attitude was one of, well, yes, there are rules but somehow those rules don't seem to apply to me". (Tr. Vol. 9, p. 189, ll. 22-25)

[162] Asked about Dino Ekonomidis, Mr. Levack recalled that he joined Sextant in May of 2006 as VP of Corporate Development. He would assist with the marketing and sales of the Sextant Funds and was in charge of a group of, perhaps three or four, who worked to sell the Canadian Fund. He recalled that Dino Ekonomidis was out of the office traveling for periods of time both in London and in western Europe generally.

[163] Mr. Levack was asked about Natalie Spork. She joined the office in 2006 on an intermittent basis and was there full time starting sometime in the middle of 2007. Her job description was that of marketing assistant but Mr. Levack's recollection was that she did little marketing and that he was unsure of what her responsibilities were. He remembers receiving an e-mail from a law clerk at McMillan Binch saying that Natalie Spork had been approved as president and secretary of the company as of early July of 2008. This coincided with Otto and Helen Spork's departure for Europe. He said Natalie Spork's role changed in a sense that she was on the telephone much more of the time, speaking to Otto Spork as far as Mr. Levack could determine. She made no investment

decisions in Mr. Levack's opinion. In Mr. Levack's opinion, Natalie Spork was not qualified for the roles of president and secretary of the company and he had the distinct impression that she didn't really want to be there. Her attendance at the office was sporadic and two or three days might pass and "you wouldn't see her". His impression was that the office was effectively run from afar by Otto Spork. Mr. Levack remembered that it was about this time that the Canadian Fund holdings of Otto and Helen Spork were transferred to their holding companies, one being Arctic Preservation and the other, Eleni Holding. At this point the hearing adjourned to October 5, 2010.

[164] On the resumption of the hearing, Mr. Levack was asked to describe the circumstances surrounding his departure from SCMI. Mr. Levack said that on May 17, 2009 the landlord, accompanied by security, came up to the office and informed them that they had 10 minutes to vacate the premises. He was asked why he stayed at SCMI as long as he did. He replied:

> That's a good question. I guess by the end of '07, I was certainly thinking about leaving. But, frankly, I think I was torn. Part of me, I think, wanted to leave and didn't – was starting to feel quite seriously that, you know, the business did not have long-term viability, but, I think, part of me wanted, you know, to see it succeed. And I felt like I needed to, for some reason, I needed to be there to help it succeed.
>
> (Tr. Vol. 10, p. 6, ll. 5-12)

[165] In cross-examination, Mr. Levack confirmed that he received a copy of the "detailed portfolio valuation reports" that IAS produced. He acknowledged reviewing them on a weekly and monthly basis. He confirmed that at all the time he was at Sextant he never declined to approve a trade. If he objected it was approved over his objection. However, he took no steps to cancel it. He acknowledged receiving and reviewing the Canadian Fund's monthly bank statement accounts. He either authored or approved the written portion of the performance charts that were published or sent to investors. He reviewed and approved the newsletters which were sent to investors on an interim basis.

[166] We accept Mr. Levack's evidence as it relates to the conduct of Otto Spork, and the roles played by Dino Ekonomidis and Natalie Spork in the operation of SCMI. Mr. Levack showed no overt animus towards Otto Spork and indeed, was almost tentative in

his description of some of Otto Spork's activities. His evidence was uncontradicted in cross-examination and is consistent with the documents filed in this hearing. His conduct is but one example of many found in this proceeding where the force of Otto Spork's personality overbore the attempts of third parties to rein him in and regulate his conduct.

F. Gary Allen

[167] Gary Allen was a portfolio manager with many years experience dating back to 1964. Beginning in 1994 and leading up to 2006, Mr. Allen was a portfolio manager with Crystal Wealth where he was a 15% shareholder. Crystal Wealth invested $1.5 million in two of the Sextant Funds, as did Mr. Allen in the amount of $200,000. His evidence is found in Tr. Vol. 7, p. 132 and following.

[168] In August of 2006, Otto Spork was looking for a way to trade futures through his funds. He was unlicenced at the time and needed someone who could act as his supervisor while he obtained his futures trading licence. To obtain a licence, a person must have two years of direct supervision by a registered trader. Mr. Allen was hired by Otto Spork for a salary of $36,000 a year to carry out this function.

[169] When Mr. Allen joined SCMI, he described the office as "quite small" involving Otto Spork, Helen Spork, Dino Ekonomidis, Natalie Spork, Robert Levack and Christine Gan. He described Dino Ekonomidis as the chief salesperson and second-in-command to Otto Spork. There was no question that Otto Spork was the Chief Executive Officer and Chief Operating Officer. Mr. Allen confirmed other witness testimony to the effect that in 2008 Otto Spork spent more and more time in Europe and eventually moved to Iceland in June or July of that year. He confirmed that Natalie Spork became president of SCMI although Dino Ekonomidis continued to be very much in charge of the sales function and Otto Spork was still in control of the operation by telephone from Iceland. He considered Natalie Spork unqualified to act as president of the company.

[170] He was asked about the Hybrid^{2}Hedge strategies and described them as a marketing tool "devised" by Otto Spork. When Mr. Allen first arrived at SCMI, the Canadian Fund might have carried out 4 to 6 trades a week but that tailed off in 2008. He thought the explanation for this was the increased interest in the water companies. Mr.

Allen later learned that Otto Spork was actively involved in the water companies and went from being an investor to taking control and using the Sextant Funds and his personal funds to control them.

[171] When Mr. Allen joined the company and met Robert Levack, he inquired when he would get to see the Canadian Fund's portfolio. It was then he learned that he would never be able to see the portfolio, that only Otto Spork or Dino Ekonomidis had that information. He was asked if this was a problem for him as commodities trading manager. He replied that it would be preferable to have seen the portfolio because he would have known the appropriateness and the size of the positions. We find his ability to act as the supervisor of Otto Spork's trading was compromised.

[172] Mr. Allen then described the efforts of the principals of Crystal Wealth to obtain more information about the operation of the Sextant Funds including obtaining the 2007 financial statements. He related a series of events that can only be described as the principals of Crystal Wealth being given the runaround by Dino Ekonomidis who cancelled scheduled meetings and refused to expose the difficulties that BDO was having in completing the 2007 audit of the Canadian Fund. Mr. Allen did his best to obtain the information for the shareholders of Crystal Wealth and for his efforts was discharged by Dino Ekonomidis on November 27, 2008.

G. Sergiy Kaznadiy

[173] Sergiy Kaznadiy has considerable experience in international sales. After acting as brand manager in Australia for Nestle and TetraPak Canada, Mr. Kaznadiy worked for the Cliffstar Corporation from 2006 to 2008 selling juices under private labels to five or six countries. Mr. Kaznadiy began working for iGlobal Water in February 2008 with the title of Sales Manager. He resigned almost exactly two years later in 2010. His evidence is found in Tr. Vol. 7, p. 14 and following.

[174] About two months after he started work, Natalie Spork told Mr. Kaznadiy that Otto Spork promoted him to Vice-President, Corporate Development. He was given a business card to that effect but none of the responsibilities that would go with such a position. In fact, he remained as Sales Manager with most of his job involving making

sales and marketing iGlobal Water as best he could. Most of his activity centered on promoting IGP and IGW, focusing on bottled water and medium bulk water sales respectively.

[175] Mr. Kaznadiy described the state of readiness for the sale of bottled water and medium bulk water. As late as May 2008, the filling station for medium bulk sales was unfinished and there were no bottles available for the sale of bottled water. In his experience he said it would take a minimum of one year, sometimes a year and a half to bring a new brand to production.

[176] Mr. Kaznadiy described the difficulty in establishing a realistic timetable for obtaining bottles. He felt that most of the months of February and March, 2008 were practically lost for any development of the bottled water business or for any other effort. Otto Spork directed Mr. Kaznadiy to find a company with bottling experience with a view to establishing a business partnership. Mr. Kaznadiy attempted to do so but no agreement was reached with either Corona or Heineken.

[177] Mr. Kaznadiy described the office space provided for iGlobal Water as he found it in early 2008. It was very small and inadequate for a full-fledged operational water company. For seven months, three or four iGlobal Water employees shared part of a long table in the Sextant office.

[178] Also early in 2008, Mr. Kaznadiy was called by Otto Spork from a Starbucks in the Royal Bank Tower. He was summoned to a meeting about which he had no prior knowledge. Present were two men from Empire Valuation Consultants and Otto Spork directed Mr. Kaznadiy to tell them about his sales efforts and his work history. He described to them what he saw as the basic sales strategy for concentrating on bottled water and also possibly medium bulk and big bulk water. After the meeting, he learned that the men were actually valuation consultants.

[179] From April to September 2008, Mr. Kaznadiy concentrated on a design for the bottle that would be sold to consumers. Considerable work was done on the design of the bottle but Otto Spork noted that nothing had been done for bulk water and that there should be a focus on that as well. Mr. Kaznadiy found this strange because with only

three people working for iGlobal Water it would be very tough to develop the big bulk and medium bulk water businesses as well the bottled water business. Otto Spork was anxious to have a price established for a cubic meter of water. Despite Mr. Kaznadiy's view that maritime engineering consultants should be hired to define how to bring bulk water in tankers to the market, Otto Spork refused to take any steps in that direction. Otto Spork opined that defining how much one cubic meter in a tanker would cost was a relatively easy task. During this period Mr. Kaznadiy consulted widely with people in the tanker industry and in the softdrink industry and also attempted to hire people in Europe. He attended trade conferences in effort to develop sales contracts.

[180] Staff produced to Mr. Kaznadiy the Sales Plan which Otto Spork had given to Canaccord (Ex. 7). The figures in the Sales Plan were news to Mr. Kaznadiy, particularly the projected sale of 3.2 billion litres of water in 2009 rising to 32 billion litres in 2014. He described the price of $0.50 per litre rising to $0.90 per litre in 2014 which was "obviously too high". (Tr. Vol. 7, p. 71, l. 6)

[181] Mr. Kaznadiy was asked to estimate the total revenues of all the water sales during his two years of employment as the person responsible for IGP sales. He estimated total sales at €5,000 for bottled water sales only. He said no medium or large bulk water sales took place during his employment at iGlobal Water.

[182] We took from Mr. Kaznadiy's evidence that his usefulness to Otto Spork consisted mainly of telling investors and valuators of Mr. Kaznadiy's qualifications to validate the IGP business plan and financial projections.

H. J.P.L.

[183] J.P.L. is normally resident in Geneva, Switzerland. His evidence is found in Tr. Vol. 12, pp. 6-74. He was examined by way of video teleconference from a hotel in Crete.

[184] In 1960 J.P.L. became a partner in a family bank and remained with it until 1997. The bank was mainly involved in fund and asset management for clients.

[185] From 1997 until 2008 J.P.L. was chair of an asset management company which had $53 billion under management with approximately 75 to 100 different funds.

[186] Also in 1997 J.P.L. started his own company. This latter company started managing assets for customers, for clients and mainly for friends. At its peak it had $100 million under management. He described the companies' clients as friends of a certain age who asked him to take care of them and he basically invested their funds in hedge funds and bonds. He had full authority to make decisions on behalf of the clients.

[187] J.P.L. first heard about the Sextant Funds in 2006. He had been seeking information on funds that were invested in water and resources. He met with Otto Spork three times before he invested in the Offshore Funds in May 2007, November 2007 and April 2008. Meetings took place in the Sextant offices in Toronto and Dino Ekonomidis was also present. Messrs. Spork and Ekonomidis talked about many potential investments they were thinking of making, not restricted to investments in water companies. Reference was made to the two Offshore Funds based in the Cayman Islands.

[188] J.P.L. testified that based upon the representations of Messrs. Spork and Ekonomidis and after reviewing the performance charts provided by Otto Spork, he decided to invest USD $1 million and €4.4 million of his clients' money in the two Offshore Funds.

[189] Subsequent to the investment, J.P.L. attempted to learn from Dino Ekonomidis details of the two Offshore Funds' assets. A series of e-mails were produced to him which outline in detail his repeated attempts to obtain information from Dino Ekonomidis. Finally after several exchanges, Dino Ekonomidis provided information which we find to have completely misrepresented the actual state of affairs of the two Offshore Funds. He misstated the number of holdings by the Water Fund as 15 when they were actually six. He overstated the assets in the Water Fund as being $90-108 million when the actual figure was $40 million in July 2008. He misstated the percentage split of publicly-listed to private companies held by the Water Fund in July 2008 as 70:30 when the actual split was 6:89. With respect to the Hybrid Fund, Dino Ekonomidis misstated the assets under management as somewhere between $90 million to $103

million when the actual figure was approximately $35 million in July 2008. He told J.P.L. that the percentage split of publicly-listed to private companies held by the Hybrid Fund in July 2008 was 70:30 when the actual split was 20:80.

[190] We find these misrepresentations were intentionally made by Dino Ekonomidis to dissuade J.P.L. from pursuing his investigations of the two Offshore Funds. J.P.L.'s attempt to redeem the units purchased on behalf of his clients were frustrated by Dino Ekonomidis finally advising him that the board of directors had not approved the redemptions. It was at that point that J.P.L. sought and obtained a *mareva* injunction against the two Offshore Funds in the Superior Court of Justice (Ontario) in February 2009.

I. W.G.

[191] W.G. is a retail broker with a securities firm. He services approximately 200 client households to whom he gives financial advice. One of his clients was J.G., a witness in the hearing.

[192] W.G. learned of the Canadian Fund while having lunch with Dino Ekonomidis in late 2006 or early 2007. He learned that the fund was going to be positioned largely as a resource-oriented fund with diversification into different kinds of companies. There was no discussion at that point about the water industry. W.G. did not invest in the Canadian Fund at that point.

[193] In August 2008, W.G. became aware that the Canadian Fund had been awarded the "hedge fund of the year" prize. In late August, he spoke with Dino Ekonomidis who told him that about a third of the fund was in some private water companies, a third in public and/or private placements in the mining resource area and another third in commodities which were hedged using Hybrid^{2}Hedge, a proprietary tool. Dino Ekonomidis also told him that a third party valuation of the Canadian Fund's units was done independently by IAS. Further, he was told that "nobody in Sextant would even touch the valuations." As we have learned, that was not the case. Dino Ekonomidis also told him that there were plans to take IGP public. W.G. put family members and clients into the Canadian Fund for a total investment of approximately $2 million. He said he

was horrified to learn that 95% of the fund was invested in one private water company. He then described his efforts to get an explanation for the events which led to the loss of the investment.

VII. THE CONSTITUTIONAL MOTION

A. Overview

[194] Otto Spork submits that s. 126.1 of the *Act* is unconstitutional. Both the Ministry of the Attorney General of Ontario and the Attorney General of Canada were served with Notice of a Constitutional Question, but neither appeared.

[195] In Addition, Otto Spork submits that the tripartite structure of the Commission gives rise to a reasonable apprehension of institutional bias or lack of independence which violates s. 11(d) of the *Charter* or constitutes a denial of natural justice and procedural fairness under the common law.

B. The *Mens Rea* Argument

[196] Otto Spork submits that since *mens rea* is an essential element to make a finding of fraud before the Commission under s. 126.1, the proceeding is penal in nature since fraud is by definition a "criminal offence" or a "true crime." For this proposition, reliance is placed on *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 ("*Wholesale Travel*"), *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 ("*Wigglesworth*") and *R. v. Shubley*, [1990] 1 S.C.R. 3 ("*Shubley*").

[197] We reject this submission. *Wholesale Travel* is authority for the proposition that "there is a rational basis for distinguishing between crimes and regulatory offences". (*Wholesale Travel*, above, para. 128)

[198] *Wigglesworth* and *Shubley* established that proceedings are characterized as criminal or penal when they either: (1) are penal in their very nature or, (2) involve the imposition of true penal consequences. However, it is the nature of the proceeding, not the nature of the conduct (fraud), which governs the applicability of s. 11(d) of the *Charter*:

> Applying the double test set forth in *Wigglesworth*, the first question in whether the proceedings in question are, by their very nature, criminal proceedings.
>
> … The question of whether proceedings are criminal in nature is concerned with, not the nature of the act which gave rise to the proceedings, but the nature of the proceedings themselves. Section 11(h) provides protection against the duplication in proceedings of a criminal nature. It does not preclude two different proceedings, one criminal and the other not criminal, flowing from the same act.
>
> (*Shubley*, above at paras. 33 and 34)

[199] Otto Spork's submission rests on the nature of the conduct (fraud) in order to characterize Commission proceedings as penal or criminal. Our highest court finds this to be an error:

> … it is true that ascertained forfeiture is intended to produce a deterrent effect. This is completely understandable in a self-reporting system. Fraud must be discouraged, and offences punished severely, for the system to be viable. However, actions in civil liability and disciplinary proceedings, which are also aimed at deterring potential offenders, nevertheless do not constitute criminal proceedings.
>
> (*Martineau v. Canada (Minister of National Revenue)*, [2004] 3 S.C.R. 737 at para. 38 ("*Martineau*"))

[200] It is open to the Commission to take proceedings under s. 126.1 both before the Commission and before the Ontario Court of Justice. Section 126.1 can be involved in either a regulatory or a criminal forum with different legal consequences. This was explained in *Martineau* where the Supreme Court cited the Saskatchewan Court of Appeal judgment in *Wigglesworth*:

> … the fact that the false statements could result in criminal prosecution does not in itself mean that a notice of ascertained forfeiture can properly be characterized as a penal proceeding. The fact that a single violation can give rise to both a notice of ascertained forfeiture and a criminal prosecution is irrelevant. The appropriate test is the nature of the proceedings, not the nature of the act.
>
> …
>
> > A single act may have more than one aspect, and it may give rise to more than one legal consequence. It may, if it constitutes a

> breach of the duty a person owes to society, amount to a crime, for which the actor must answer to the public. At the same time, the act may, if it involves injury and a breach of one's duty to another, constitute a private cause of action for damaged for which the actor must answer to the person he injured. And that same act may have still another aspect to it: it may also involve a breach of the duties of one's office or calling, in which event the actor must account to his professional peers.
>
> (*R. v. Wigglesworth* (1984), 31 Sask. R. 153, at para. 11)

(*Martineau*, above at paras. 31 and 32)

[201] Martineau is conclusive – conduct amounting to "fraud" may attract non-criminal proceedings without depriving them of their regulatory and administrative nature. (*Martineau*, above at para. 38)

[202] The regulatory nature and mandate of securities acts in Canada was underscored in *Pezim*:

> It is important to note from the outset that the [British Columbia Securities] Act is regulatory in nature. In fact, it is part of a much larger framework which regulates the securities industry throughout Canada. Its primary goal is the protection of the investor but other goals include capital market efficiency and ensuring public confidence in the system…
>
> (*Pezim v. British Columbia (Superintendant of Brokers)*, [1994] 2 S.C.R. 557 ("*Pezim*"), at para. 59)

[203] The Commission in *Re Rowan*, (2010), 33 O.S.C.B. 91 (aff'd *Re Rowan* (2010), 103 O.R. (3d) 484 (Div. Ct.)) has considered the issue of the characterization of its proceedings and came to the conclusion that Commission proceedings are regulatory in nature. The Commission relied on *Wigglesworth*, which also recognized that Commission proceedings have a regulatory objective and are not subject to s. 11 *Charter* protections generally:

> Proceedings under section 127 of the Act are "intended to regulate conduct within a private sphere of activity". In reviewing examples of such regulatory proceedings, the *Wigglesworth* decision itself cites two cases involving securities commissions, including the Commission. Both of these cases affirmed that securities commission proceedings are regulatory in nature and are therefore not subject to section 11 of the

> Charter (See: *Re Malartic Hygrade Gold Mines (Canada) Ltd. and Ontario Securities Commission* (1986), 54 O.R. (2d) 544, (H.C.J.); and *Barry v. Alberta (Securities Commission)*, (1986), 25 D.L.R. (4th) 730 (Alta. C.A.)).
>
> (*Rowan*, above at para. 37)

[204] We find a hearing held pursuant to s. 127 of the *Act* which includes allegations of fraud under s. 126.1 of the *Act* is fundamentally regulatory and does not meet the "criminal by nature" test.

C. Commission Proceedings – Criminal or Penal Consequences?

[205] In oral argument counsel for Otto Spork submitted that the imposition of an administrative penalty leads to penal consequences, particularly where the funds are paid into the Consolidated Revenue Fund pursuant to s. 3.4(2) of the *Act*.

[206] Otto Spork takes the position that since disgorgement and administrative penalties may be ordered as sanctions and that since, according to Otto Spork, these funds are paid into the Consolidated Revenue Fund pursuant to s. 3.4(2) of the *Act*, this demonstrates that the purpose of these sanctions is to redress harm to society done at large and thus entails a penal or criminal consequence. Mr. Spork relies on *Wigglesworth* at paragraph 33, which states that:

> ... the possibility of a fine may be fully consonant with the maintenance of discipline and order within a limited private sphere of activity and thus may not attract the application of s. 11. It is my view that if a body or an official has an unlimited power to fine, and if it odes not afford the rights enumerated under s. 11, it cannot impose fines designed to redress the harm done to society at large. Instead, it is restricted to the power to impose fines in order to achieve the particular private purpose. One indicium of the purpose of a particular fine is how the body is to dispose of the fines that it collects.

[207] While s. 3.4(2) of the *Act* provides that funds ordered by the Commission be paid to the Consolidated Revenue Fund, there is an exception to this stipulated in s. 3.4(2)(a) and (b) of the *Act*, which provides that any funds ordered may reimburse the Commission for costs or be designated to or for the benefit of third parties. In fact, monetary orders

made by the Commission refer to s. 3.4(2)(b) of the Act. As explained in *Re Rowan et al* (2010), 33 O.S.C.B. 91 at paras. 58 and 59:

> In the case of the Commission's administrative penalty, subsection 3.4(2) of the Act provides that the sums collected as administrative penalties may be designated to or for the benefit of third parties. Only if there is no specific designation would the funds collected go to the Consolidated Revenue Fund.
>
> Administrative penalties that have been imposed by the Commission to date have contained a clause providing that the administrative penalty funds be distributed to or for the benefit of third parties (See for example: *Re Crombie* (2009), 32 O.S.C.B. 1628; *Re Research in Motion Ltd., supra*; *Re Biovail Corp.* (2009), 32 O.S.C.B. 563; *Re McCaffrey* (2009), 32 O.S.C.B. 827; *Re Devendranauth Misir* (2009), 32 O.S.C.B. 1807; *Re Limelight Entertainment Inc., supra*; *Re First Global Ventures, S.A.* (2008), 31 O.S.C.B. 10869; *Re Duic* (2008), 31 O.S.C.B. 8551; *Re Leung* (2008), 31 O.S.C.B. 6759; *Re Lee* (2008), 31 O.S.C.B. 8730; *Re Stern* (2008), 31 O.S.C.B. 4029; *Re Momentas Corp.* (2007), 30 O.S.C.B. 6674; *Re Melnyk* (2007), 30 O.S.C.B. 4695 (Order); *Re Griffiths* (2006), 29 O.S.C.B. 9529; *Re Bennett Environmental Inc.* (2006), 29 O.S.C.B. 9527; *Re Mountain Inn at Ribbon Creek Limited Partnership* (2005), 28 O.S.C.B. 9489; and *Re Wells Fargo Financial Canada Corp.* (2005), 28 O.S.C.B. 1062 (Order)).

[208] Based on the finding in *Re Rowan* (above), which has been upheld by the Divisional Court, we find that the possibility that a monetary sanction may be imposed (such as an administrative penalty or disgorgement) does not create a penal or criminal consequence. Therefore, s. 11(d) of the *Charter* is not invoked.

D. Institutional or Structural Bias

[209] Otto Spork submits that he faces what is, in nature, a criminal proceeding with respect to the fraud charges in the *Act*. He says the very structure of the Commission and the nature of the hearing afforded to him give rise to a reasonable apprehension of bias and therefore offends s. 11(d) of the *Charter*. He further submits that s. 126.1 of the *Act* can only be considered by a tribunal that does not have the tripartite structure of the Commission.

[210] In support of his submissions, Mr. Spork continues to refer to this hearing as a "criminal proceeding" or is "criminal in nature". He repeats his submission that s. 126.1

creates a "penal offence" to which the *Charter* applies. These allegations of "criminal" proceedings and "penal" consequences have already been dealt with earlier in these Reasons. We have found the proceedings to be administrative and regulatory in nature.

[211] This issue has been settled by the Commission in *Re Norshield et al.* (2009), 32 O.S.C.B. 1249 ("*Norshield*") and the Supreme Court of Canada in *Brosseau v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301 ("*Brosseau*"). The Commission's tripartite structure does not give rise to a reasonable apprehension of bias.

[212] Otto Spork also claims that the proceedings have been subject to structural bias as a result of a motion brought by him that required a mid-hearing ruling. Otto Spork's motion was denied by the Panel.

[213] The rightness or wrongness of the mid-hearing ruling has no connection with structural bias. Were this so, every ruling in an administrative proceeding that went against a particular party could be the subject of an allegation of structural bias. If Otto Spork is dissatisfied with the ruling, his course is clear.

[214] We find no merit in the submission that Otto Spork has been denied natural justice and procedural fairness by virtue of the tripartite structure of the Commission.

[215] Given our previous findings, we find in unnecessary for us to address s. 1 *Charter* arguments. We find no need to apply the "*Oakes*" test.

[216] We find our task is to consider and apply s. 126.1 of the *Act* in the context of an administrative proceeding where the Commission must decide on a balance of probabilities, based on clear and cogent evidence, whether the section has been breached.

VIII. THE ALLEGATIONS

[217] The foregoing conduct engaged in by the Respondents constituted breaches of Ontario securities law and/or was contrary to the public interest:

(a) by engaging in the conduct described above, Otto Spork, SCMI and Sextant GP perpetrated a fraud on investors contrary to s. 126.1 of the *Act*;

(b) by engaging in the conduct described above, all of the Respondents breached their duties as investment fund managers contrary to s. 116 of the *Act*;

(c) by engaging in the conduct described above, SCMI, Otto Spork, Dino Ekonomidis and Natalie Spork, breached their duties pursuant to Rule 31-505;

(d) by engaging in the conduct described above, SCMI and Sextant GP failed to maintain proper books and records contrary to s. 19 of the *Act*; and

(e) by engaging in the conduct described above, all of the Respondents acted contrary to the public interest.

A. Fraud (s. 126)

[218] Staff allege that Otto Spork, SCMI and Sextant GP contravened s. 126.1 of the *Act* which provides as follows:

> 126.1 A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities or derivatives of securities that the person or company knows or reasonably ought to know,
>
> …
>
> (b) perpetrates a fraud on any person or company. 2002, c. 22, s. 182.

[219] In several recent cases the Commission has accepted the definition of fraud established by the British Columbia Court of Appeal in *Anderson v. British Columbia (Securities Commission)* (2004) BCCA 7 at para. 27 [*Anderson*], leave to appeal denied [2004] S.C.C.A. No. 81:

> … the *actus reus* of the offence of fraud will be established by proof of:
>
> 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and

2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.

Correspondingly, the *mens rea* of fraud is established by proof of:

1. subjective knowledge of the prohibited act; and

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

[220] It is important to note that in Ontario, as it is in British Columbia, the legislature has chosen to impose liability under the *Act* where a person "ought reasonably to know … that their conduct perpetrates a fraud on any person or company". Commission cases adopting the definition of fraud in *Anderson* include *Re Al-Tar Energy Corp* (2010), 33 O.S.C.B. 5535; *Re Lehman Cohort Global Group Inc.* (2010), 33 O.S.C.B. 7041; and *Re Global Partners Capital* (2010), 33 O.S.C.B. 7783

1. The *Actus Reus* of Fraud

[221] The *actus reus* requires proof of (a) a dishonest act involving "deceit, falsehood or other fraudulent means" which (b) causes a detriment or deprivation to the victim. A "deprivation" includes circumstances where a mere "risk of prejudice" is caused to the victim's economic interests. *(R. v. Théroux*, [1993] 2 S.C.R. 5, at paras. 16 and 27)

[222] To find "deceit" or "falsehood" the trier of fact must determine whether there was an actual representation that a situation was of a certain character, when, in reality, it was not. (*Théroux*, above, para. 18)

[223] "Other fraudulent means" include all other dishonest situations which cannot be characterized as "deceit" or "falsehood". The issue is "determined objectively, by reference to what a reasonable person would consider to be a dishonest act." It describes underhanded conduct which has the effect, or which creates a risk of depriving others of their property. If the wrongful use of someone else's property results in the loss of that property or creates a risk of such a loss, the conduct is wrongful if it constitutes conduct which reasonable decent persons would consider dishonest and unscrupulous.

[224] Courts have found "other fraudulent means" to include the concealment of important facts, the unauthorized diversion of funds and the unauthorized taking of funds or property. (*Théroux*, above, at paras. 17-18)

[225] The unauthorized use of an investor's funds constitutes "other fraudulent means." (*R. v. Currie*, [1984] O.J. No. 147 (Ont. CA) pp. 3-4)

[226] The element of "deprivation" is satisfied on proof of: (i) actual loss to the victim; (ii) prejudice to a victim's economic interest; or merely (iii) the risk of prejudice to the economic interests of a victim. (*Théroux*, above, at paras. 16-17)

[227] "Prejudice" may be established by proof that a victim faced a risk of economic loss even if no loss took place. If through an act of dishonesty, someone makes an investment or borrows money, even if that action did not cause an actual loss, it constitutes prejudice.

2. The *Mens Rea* of Fraud

[228] The *mens rea* of fraud requires a person to be aware of the risk posed to another's interests. The subjective awareness can be inferred from the evidence. It may also be established by evidence showing that the perpetrator was "wilfully blind" or "reckless" as to the conduct and the truth or falsity of any statements made. (*Théroux*, above, at paras. 26 and 28)

[229] A sincere belief or hope that no risk or deprivation would ultimately materialize does not establish an absence of fraud:

> A person who deprives another person of what the latter has should not escape criminal responsibility merely because, according to his moral or her personal code, he or she was doing nothing wrong or because of a sanguine belief that all will come out right in the end. Many frauds are perpetrated by people who think there is nothing wrong in what they are doing or who sincerely believe that their act of placing other people's property at risk will not ultimately result in actual loss to those persons. If any offence of fraud is to catch those who actually practise fraud, its *mens rea* cannot be cast so narrowly as this.
>
> (*Théroux*, above, at paras. 24, 35, 36)

[230] For a corporation, it is sufficient to show that its directing minds know or reasonably ought to have known that the corporation perpetrated a fraud to prove a breach of subsection 126.1(b) of the *Act*. (*Al-Tar*, above, para. 221); (*Lehman*, above, para. 99); (*Global Partners*, above, para. 245)

[231] We find Otto Spork, SCMI and Sextant GP to have committed several acts of fraud for the following reasons.

(i) Inflation of IGP Market Values

[232] We reject any suggestion that Otto Spork was over his head, unsophisticated or disorganized, as suggested by his counsel in cross-examination of witnesses. We do so for three reasons:

- First, Otto Spork was an experienced investor and had been a registrant with the Commission.
- Second, Otto Spork created a web of inter-related companies designed more to conceal than reveal his financial operations. A cursory look at the Sextant organization chart annexed to these Reasons as Exhibit "A" is enough to dispel any suggestion that Otto Spork was a neophyte in the investment business.
- Third, Otto Spork's self-description in the OM and newsletters to investors could leave no doubt in the reader's mind of his talents as a trader and investment manager.

[233] On a consistent and regular basis Otto Spork inflated the value of IGP from €0.321 per share on July 31, 2007 to €2.45 per share on November 30, 2008. Counsel submits on his behalf that was reasonable for him to do so based on the "valuations" he obtained and other factors. While the explanations for his valuations vary from time to time, the pattern of increases remained constant. Starting in 2008 formal board minutes were prepared to record the rationale of the Fund Manager for its continued increases in the market values ascribed to IGP shares from €0.80 per share as at December 31, 2007 to €2.45 per share by November 30, 2008. The explanations included:

- Repeated reliance on the reports prepared by Spardata and Hempstead. They are referred to as a basis for the "market price quotes" of IGP in all of the

2008 minutes dealing with that issue. We have found those not to be independent valuations but rather calculations of values based on financial projections provided by Otto Spork and adopted by Spardata and Hempstead without verification.

- Repeated claims that IGP continued to meet and make progress in its business plan. We find this statement to be unsupported by any evidence to that effect.

- The reliance on the sale of 100,000 shares of IGP to F.O.I at €1.50 per share in August 2008. As found earlier in these Reasons found that sale to be an unreliable indication of the value of IGP.

- In August 2, 2008 reference is made to the sale of 25,950 shares of IGP to TJ at €1.85 per share. We found this sale to be an unreliable indication of the value of IGP.

- In October of 2008, the market price of IGP shares was raised from €1.85 to €2.15 per share, the increase being attributed to the "valuation" of Canaccord. We earlier found that the Canaccord letter was not a valuation.

- Despite representations to the contrary, at no time up to and including December 31, 2008, was IGP in a position to carry on business as contemplated by the business plan and financial projections. There were no "significant water contracts pending". The "attainment of internal milestones" was nothing more than employee hirings. Sergiy Kaznadiy estimated total revenues of perhaps €5,000 during his two-year employment head of sales ending in February of 2010. No medium or large bulk water orders were received during his time at Sextant. The Receiver's evidence confirmed that only one of two planned pipelines from the glacier to the bottling facility site had been prepared. No bottling facility had been constructed. There was no apparent source of funds to complete the necessary construction estimated to cost US $20 million. Beyond its glacier contract with the town of Rif and its capitalized costs, IGP had no material assets.

[234] We find that Otto Spork knew or ought to have known that the increases ascribed to IGP's market value were totally unreasonable and were not based on any formal independent valuations. Otto Spork set those values and directed IAS to use those values to calculate the Canadian Fund's NAV. He thereby committed an act or acts of fraud.

[235] Reports were distributed monthly to investors showing the NAV and historical performance of the Canadian Fund. None of the performance reports disclosed to investors the holdings of the Canadian Fund nor the concentration of IGP shares in the portfolio. The performance report for July 2008 underlines how Otto Spork's inflation of IGP's market value and the Canadian Fund's NAV allowed him to mislead investors and enrich himself. In the July 2008 report the NAV was shown as having increased to $57.95 per unit, 73% higher than the prior month. A return of 479% was reported for those investors who invested $10 per unit at the inception of the Canadian Fund in February 2006. Investors were invited to add "to your existing position" or "initiate an investment now". It was in July 2008 that Otto Spork increased the market price of the IGP shares held by the Canadian Fund by 50% from €1.00 to €1.50 per share. His justification for the €1.50 market price was the 100,000 share purchase transaction arranged with F.O.I. This 50% price increase, combined with the purchase in July 2008 of more than 5 million shares of IGP at €0.07 per share, had the effect of increasing the "market value" of the IGP investment held by the Canadian Fund from $11 million to $25 million. The corresponding month-to-month increase in the NAV was $12 million on which Otto Spork, through the Fund Manager received performance and management fees.

[236] As a result of the wrongful inflation of the "market price" of IGP, Otto Spork, SCMI and Sextant GP received significant economic benefits. Compensation to the Fund Manager in the form of management fees was calculated as 2% of the NAV paid monthly in $1/12^{th}$ instalments. Performance fees were calculated at 20% of the month-to-month increase in the NAV subject to a "high-water mark" provision to protect investors against a decrease in the NAV.

[237] In the period from July 31, 2007 to December 31, 2008, the Canadian Fund paid management fees totalling $602,831 and performance fees totalling $6,331,356, which

Otto Spork benefitted from directly or indirectly. We find Otto Spork knew or ought to have known that the payments were unreasonable. We find that these payments made to Otto Spork through SCMI and Sextant GP constitute acts of fraud.

(ii) Advanced Payments

[238] To make matters worse, SCMI repeatedly took advances against the performance fees it anticipated receiving and did so at Otto Spork's direction. These fee advances were tracked by IAS and recorded variously as "advanced payments" or "due from Fund Manager".

[239] As of March 2008 there was a zero balance owing from the Fund Manager to the Canadian Fund since SCMI had "caught up" on the advances by submitting performance and management fee calculations. However in April 2008 SCMI took advances of $4,033,599 when only $28,411 of management fees had been earned by the Fund Manager. On April 30, 2008 the Fund Manager owed the Canadian Fund $4,027,135. At June 30, 2008 the Fund Manager owed the Canadian Fund $4,880,744. During the balance of 2008, this latter amount was largely offset by performance and management fees and operating expenses allegedly incurred by the Canadian Fund. Ms. Lee testified it was Otto Spork who instructed IAS to offset the advances by crystallized management and performance fees from time to time. (Tr. Vol. 11, p. 77)

[240] There is no evidence to support the actions of the Fund Manager in taking advances from the Canadian Fund. The OM does not authorize advances or loans from the Canadian Fund to the Fund Manager, nor do the terms of the LP Agreement. Ms. Lee had no other clients that advanced or pre-paid their performance or management fees. Otto Spork's own counsel, Shahen Mirakian, was of the view that the advances on the fees was "a prohibited loan." (Ex. 4-18, Tab 52, p. 306)

[241] We agree with Staff's submission that these advances were prohibited loans taken by Otto Spork for his benefit to the detriment of investors in breach of s. 126.1 of the *Act*. We find that he knew or ought to have known there was the risk of prejudice to the economic interests of the investors in the Canadian Fund who lost the use of their money

during the period when it was advanced to SCMI and Sextant GP, that is to say, to Otto Spork. We find by taking these advances Otto Spork committed acts of fraud.

[242] Pursuant to the authority noted above in para. 230 we find SCMI and Sextant GP have committed fraud contrary to s. 126(1)(b) of the *Act* in that Otto Spork, their directing mind, knew or reasonably ought to have known that the two corporations were committing a fraud.

(iii) The Riambel Payment

[243] During its audit of the 2007 financial statements for the Canadian Fund, Katie Girimonte of BDO discovered that on October 24, 2007, the Water Fund had paid €881,576 (US $1,258,000) to Riambel Holdings S.A., Otto Spork's private holding company. Ms. Girimonte determined that in fact this payment had been made on behalf of all three Sextant Funds and subsequently the Canadian Fund and the Hybrid Fund each transferred US $414,975 to the Water Fund for their share. Otto Spork instructed IAS to record the payment as an investment by the three Sextant Funds in IGP although none of the funds received any additional shares in IGP. When BDO requested an explanation for this transaction Otto Spork explained that the payment was a reimbursement of certain expenses incurred by Riambel on behalf of IGP. An argument ensued between Mr. Spork and BDO over the characterization of the payment. Ultimately, BDO determined to treat the payment as a loan owed by IGP to the Sextant Funds although there were no terms, due date or interest rate. The result was that the three Sextant Funds were now owed the sum previously owed to Riambel, a sum which IGP could not pay. Riambel got paid and the Sextant Funds were left with a worthless IOU, as matters turned out.

[244] We find that Otto Spork knew or ought to have known that this action was prejudicial to the economic interest of the unitholders by creating a risk of economic loss. This action was a fraud contrary to s. 126(1)(b) of the *Act*.

(iv) Failure to Testify

[245] Otto Spork did not testify. In non-criminal cases, an unfavorable inference may be drawn when, in the absence of an explanation, a party litigant does not testify, or fails

to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party (Sopinka Letterman and Bryant, *The Law of Evidence in Canada*, 3rd Ed. (Markham: Lexis Nexis Canada 2009), p. 337, para. 6.449).

[246] Otto Spork chose not to testify, provided no affidavit evidence, nor did he call any witnesses. We have found him guilty of fraud earlier in these Reasons. In addition to those stand-alone findings, we draw an adverse inference from his failure to testify, as confirmatory of those findings.

B. Breaches of s. 116 of the *Act* and Rule 31-505

[247] Staff submit that all of the Respondents (including Natalie Spork and Dino Ekonomidis) breached their duties to investors under s. 116 of the *Act* and Rule 31-505. Section 116 of the *Act* establishes duties of investment fund managers as follows:

> 116. Standard of care, investment fund managers – Every investment fund manager,
>
> (a) shall exercise the powers and discharge the duties of their office honestly, in good faith and in the best interests of the investment fund; and
>
> (b) shall exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances.

[248] Section 2.1 of Rule 31-505 provides as follows:

> 2.1 General Duties - (1) A registered dealer or adviser shall deal fairly, honestly and in good faith with its clients.
>
> (2) A registered salesperson, officer or partner of a registered dealer or a registered officer or partner of a registered adviser shall deal fairly, honestly and in good faith with his or her client.

[249] Rule 31-505, s. 1.3 as it was enforced at the applicable times in this matter sets out the duties and responsibilities of the Ultimately Responsible Person of a registered adviser:

> 1.3 Designation of Compliance Officer or Chief Compliance Officer and Ultimately Responsible Person
>
> (2) (a) A registered adviser shall designate an executive officer as the individual who is ultimately responsible for discharging the obligations of the registered adviser under Ontario securities law.
>
> …
>
> (c) The ultimately responsible person designated under paragraph (a) shall ensure that policies and procedures for the discharge of the obligations of the registered adviser under Ontario securities law are developed and implemented.

[250] We find it unnecessary to decide whether s. 116 imposes a fiduciary duty to investors on investment fund managers. The words employed "honestly, in good faith and in the best interests of the investment fund" can be applied to the conduct of the Respondents using their ordinary, every-day meaning. Also, the words describing the duty of care on an investment fund manager "to exercise the care, diligence and skill that a reasonably prudent person would exercise in the circumstances" may be applied in the circumstances of this case using their ordinary, every-day meaning.

[251] Staff and the Respondents take the view that the nature of the duties under Rule 31-505 are essentially similar or substantially overlap with the duties under s. 116 of the *Act*. We agree with this view.

1. 20% Restriction

[252] Staff submit that at all material times various revised versions of the Canadian Fund's OM established the following restriction on the concentration of the Canadian Fund's investments:

> The Fund may not invest more than 20% of its portfolio, based on the Net Asset Value of the Fund at the most recent Valuation Date, in any single class of securities of an issuer, where for the purposes of this restriction a long position is valued as the cost of the securities purchased and a short position is valued as the gross proceeds of the sale of the securities sold short.

The Respondents submit that the book value (purchase price) of the IGP shares paid by the Canadian Fund never exceeded 20% of the NAV. They submit "cost of the securities

purchased" divided by the NAV is the proper manner to interpret the investment concentration restriction.

[253] In July 2007, according to the securities ledger for the Canadian Fund (Ex. 4-6, Tab 18) IAS recorded two transactions relating to the purchase of IGP shares by the Canadian Fund:

(a) first, 320,000 shares at a unit price of ?, a unit cost of CDN $0.00 and a cost of amount of CDN $0.00; and

(b) second, 6,575,350 shares at a unit price of €0.17082, a unit cost of CDN $0.267 and a cost amount of CDN $1,758,405

This CDN $1,758,405 cost amount was shown on the portfolio valuation statements as of July 31, 2007 as the book value for the 6,895,350 shares of IGP acquired in the two transactions. This would indicate the average cost of the IGP shares held by the Canadian Fund was CDN $0.255 per share as at July 31, 2007.

[254] The NAV as at July 31, 2007 was calculated by IAS as CDN $5,521,887.08. Dividing the $1,758,405 cost of the 6,575,350 shares by the NAV as at July 31, 2007 indicates the fund invested approximately 32% of its portfolio in shares of IGP.

[255] Even using the average cost of CDN $0.255 per share as the cost of the 6,575,350 shares purchased would only lower the percentage to approximately 30%.

[256] Counsel for the Respondents argued that the Canadian Fund held as at June 29, 2007, 320,000 shares of Icelandi PLC having a book value of £1.0 per share that, says counsel, equated to a book value of approximately CDN $682,656. It was argued that this amount should be deducted from the CDN $1,758,405 book value and thereby decrease the percentage to 19.48%. We find no merit in this argument.

[257] The portfolio valuation statements prepared by IAS as of June 29, 2007 show that the holding of 320,000 shares of Icelandi PLC had a book value of CDN $320,000 (CDN $1.00 per share). This is consistent with the information Mr. Mirikian provided to PWC (refer to table in para. 116 of the Receiver's report in para. 73 above) which showed a

non-cashflow adjustment of CDN $320,000 to the Canadian Fund's book value for "free shares". It is presumed the 320,000 shares of Icelandi PLC were exchanged 1:1 for IGP shares in July 2007.

[258] The most favourable analysis to Otto Spork would be to deduct CDN $320,000 from the CDN $1,758,405 book value as at July 31, 2007 and treat the resulting amount of CDN $1,438,405 as the cost of the 6,575,350 shares purchased. Even this calculation only lowers the percentage to 26%.

[259] No explanations were provided as to the inconsistencies in the entries relating to the Icelandi PLC/IGP shares shown in the securities ledger and the portfolio statements. We are also not satisfied that the NAV as at July 31, 2007 was the "most recent Valuation Date" for purposes of calculating the investment concentration percentage at the time of investment. This NAV includes a market value for the IGP shares of CDN $3,232,638, almost double their purchase cost and representing 59% of the NAV. By using this month-end NAV which was calculated after the share purchase transaction, the resulting investment concentration percentage is skewed significantly downwards.

[260] We find Otto Spork contravened the restriction on investment concentration in the Canadian Fund. In doing so, he failed to act in the best interests of the investment fund and failed to exercise the degree of care that a reasonably prudent person would exercise in the circumstances. We find he contravened s. 116 of the *Act* and s. 2.1 of Rule 31-505.

2. Otto Spork's Self-Dealing

[261] The OM of the Canadian Fund established the following restrictions on self-dealing in the Canadian Fund's investments:

> The Fund will not purchase securities from, or sell securities to the Investment Advisor or any of its affiliates or any principal of any of them or any firm in which any principal of the Investment Advisor may have a direct or indirect material interest.

Contrary to this restriction the Canadian Fund held shares of IGP and IGW in which Otto Spork and Spork-related parties had an ownership interest. (see Schedule "A")

[262] Counsel for Otto Spork submits that the term "material interest" is not defined in the OM nor is it defined in Ontario securities law. Since Riambel was an 18% shareholder of IGP on July 31, 2007 (below the deemed control position under Ontario securities law) and Otto Spork was only one of four directors, the 18% interest was not material.

[263] We note IGP's business plan given to T.J. identified Otto Spork as President and CEO of IGP, and as a holder of stock options in IGP. Following the Sextant Funds' purchase of Eurofran's 2/3 interest in IGP in May 2008, Otto Spork directly controlled 37% of IGP through Riambel and Hermitage.

[264] We agree with Staff's submission that in a small, closely-held company, an 18% shareholding interest, a seat on the four-person Board of Directors and holding an executive position fixes Otto Spork with a material interest in IGP. The purpose of self-dealing restrictions is to prevent the fund manager from making decisions in its own interests rather than those of the investors. Otto Spork did just that – he made decisions in his own interest rather than those to his investors, to the ultimate detriment of those investors. In doing so he failed to exercise the powers of his office in the best interests of the investment fund and failed to exercise the degree of care that a reasonably prudent person would exercise in the circumstances. We find he contravened s. 116 of the *Act* and s. 2.1 of Rule 31-505.

3. Dino Ekonomidis

[265] Staff alleges that Dino Ekonomidis breached his duties as an investment fund manager as set out in s. 116 of the *Act* and his duties as set out in s. 2.1 of Rule 31-505.

[266] Counsel for Dino Ekonomidis submits that he was not an investment fund manager within the meaning of the *Act*, that is to say, "a person who directs the business operations or affairs of an investment fund."

[267] We reject this submission. Dino Ekonomidis was the vice-president of SCMI responsible for Corporate Development and was registered under the *Act* as a salesperson for SCMI. A corporate investment fund manager acts through human beings who occupy

the offices of directors, officers and employees. Dino Ekonomidis had the responsibility of selling units in the Canadian Fund and was a qualified registrant in order to do so. In the absence of Otto Spork he assisted in the operation of the affairs of SCMI. Gary Allen described Dino Ekonomidis as the chief salesperson and second-in-command to Otto Spork. He further testified that although Natalie Spork became president of the Canadian Fund, Dino Ekonomidis continued to be very much in charge of the sales function and Otto Spork was still in control of the operation by telephone from Iceland. We find Dino Ekonomidis to have been an investment fund manager within the meaning of s. 116 of the *Act* and breached his duties as described in that section.

[268] Staff alleges that Dino Ekonomidis also contravened s. 2.1(2) of Rule 31-505 which requires a registered salesperson, officer or partner of a registered dealer or adviser shall deal fairly, honestly and in good faith with his or her clients. Counsel for Dino Ekonomidis submits that the unitholders of the Canadian Fund cannot be found to be clients of Dino Ekonomidis by virtue of his positions with SCMI. He further submits that it is important to distinguish between references to "the funds" and the "Canadian Fund". Only the latter, it is submitted, is the subject of the allegations made by Staff. Nevertheless, the Canadian Fund was a client of SCMI and Dino Ekonomidis contravened s. 2.1(2) of Rule 31-505 by failing to deal fairly, honestly and in good faith with the Canadian Fund.

[269] Staff allege that Dino Ekonomidis misrepresented the state of affairs of the Canadian Fund to W.G. when he told the latter that about 1/3 of the Canadian Fund was in private water companies, 1/3 in public and/or private mining companies, and the other 1/3 invested in commodities and futures which were hedged pursuant to a proprietary investment tool. Counsel for Dino Ekonomidis submits that these statements are consistent with the book value of the portfolio. We reject this submission. W.G. was invited to purchase units of the Canadian Fund, based on its market value, not knowing the high concentration of IGP shares in the portfolio. Dino Ekonomidis concealed the high concentration of IGP in the portfolio from W.G. contrary to s. 2.1 of Rule 31-505.

[270] Staff further allege that Dino Ekonomidis misstated the composition of the Offshore Funds to J.P.L. Counsel for Dino Ekonomidis submits that he owed no duty of

care to J.P.L. as the latter had no connection with the Canadian Fund. Assuming without deciding this analysis is correct, nevertheless we find, in effect, that Dino Ekonomidis lied to J.P.L. as to the composition of the Offshore Funds. We find in doing so he acted contrary to the public interest. Officers and registrants of companies subject to Ontario securities law must be held to account when guilty of egregious acts contrary to the public interest.

[271] We find Dino Ekonomidis acted contrary to the public interest in misstating the state of affairs in the Canadian Fund to W.G. and the state of affairs in the Offshore Funds to J.P.L. We adopt the following statement from paragraphs 382 and 383 of *Re Biovail Corp.*, (2010), 33 O.S.C.B. 8914:

> In our view, where market conduct engages the animating principles of the Act, the Commission does not have to conclude that an abuse has occurred in order to exercise its public interest jurisdiction. That is no doubt one of the reasons why the Commission concluded in (*Re Standard Trustco Ltd.*, re (1992), 15 O.S.C.B. 4322 (Ont. Securities Comm.) that the issue of a misleading news release is itself injurious to capital markets. We should not interpret or constrain our public interest jurisdiction in a manner that condones inaccurate, misleading or untrue public disclosure regardless of whether that disclosure contravenes Ontario securities law. The issues raised by this matter directly engage the fundamental principle recognized in the Act for timely, accurate and efficient disclosure.
>
> There should be no doubt in the minds of market participants that the Commission is entitled to exercise its public interest jurisdiction where any inaccurate, misleading or untrue public statement is made, whether or not that statement contravenes Ontario securities law. It is, of course, a separate question whether the Commission should exercise its public interest jurisdiction under section 127 of the Act in any particular circumstances.

[272] We have disregarded Dino Ekonomidis' compelled testimony and not taken it into account.

4. Natalie Spork

[273] Staff allege that Natalie Spork failed in her duties to act in good faith towards investors in the Canadian Fund, thereby breaching s. 116 of the *Act* and Rule 31-505.

[274] Counsel for Natalie Spork submits that she was not an investment fund manager because she did not fall within the definition of fund manager under s. 1 of the *Act* as "a person or company that directs the business operations or affairs of an investment fund." We would agree with a submission that Natalie Spork did not actually direct the business, operations or affairs of the Canadian Fund. Nevertheless, on May 28, 2008, Ms. Spork was given the title of President and Director of SCMI. The OSC approved her as an Officer and Director (non-advising, non-trading) and as the Ultimate Responsible Person in the categories of commodity trading manager, limited market dealer, investment counsel and portfolio manager with SCMI on July 7, 2008. Dino Ekonomidis, Mr. Allen and Mr. Levack all confirm that Natalie Spork was singularly unfit to carry out the responsibilities assigned to her by her father.

[275] We reject the submission that Natalie Spork was not an investment fund manager. We specifically reject the submission that in order to be an investment fund manager, one must actually exercise the power and authority that goes with the position in order to attract the duties that also go with the position. The submission is apparently based on the notion that someone could be found to be a *de facto* officer of a company if they act as though they are an officer and that therefore, the converse must be true that you can't be an officer unless you actually carry out the functions of that officer. We agree with Staff's submission that a person assuming the title of President and the responsibilities of an Ultimately Responsible Person, holds themselves to the world as being an investment fund manager and should be bound by the obligations that go with the office.

[276] Natalie Spork did nothing to either learn about her obligations or to discharge them. She was the person responsible for ensuring that there were policies and that they were implemented and followed. She failed to do so. To permit the use of phantom or nominal officers and directors would work considerable mischief in the securities industry. Persons sanctioned by the Commission might seek to use others who were prepared to take on roles of responsibility only in name. To permit such a tactic would be contrary to the public interest.

[277] We find Natalie Spork to have been an investment fund manager and that she failed in her duties to act in good faith towards investors in the Canadian Fund contrary to

s. 116 of the *Act*. We further find that she contravened s. 1.3 of Rule 31-505 as it was in force at the applicable time in that she did not take any steps to discharge her obligations as the Ultimately Responsible Person.

[278] We have disregarded Natalie Spork's compelled testimony and not taken it into account.

5. SCMI and Sextant GP

[279] SCMI and Sextant GP were investment fund managers for the Canadian Fund and had duties pursuant to s. 116 of the *Act*. In addition, as a registered adviser and dealer, SCMI had a duty pursuant to s. 2.1(1) of Rule 31-505 to deal fairly, honestly and in good faith with the Canadian Fund. We find they both contravened s. 116 and SCMI also contravened s. 2.1(1) of Rule 31-505.

C. The Breach of s. 19 (Books and Records)

[280] Registrants are obliged to keep and maintain proper books and records as required by s. 19(1) of the *Act*:

> **(1) Record-keeping** – Every market participant shall keep such books, records and other documents as are necessary for the proper recording of its business transactions and financial affairs and the transactions that it executes on behalf of others and shall keep other books, records and documents as may otherwise be required under Ontario securities law.

[281] Sextant GP was obligated pursuant to s. 19 of the *Act* to keep or cause to be kept appropriate books and records with respect to the Canadian Fund and to issue audited financial statements for the Canadian Fund no later than March 31 of the following year. SCMI was contractually obligated to maintain accounting records for the Canadian Fund and to arrange for the preparation of the annual audited financial statements.

[282] Both Sextant GP and SCMI were obligated to keep such books and records as were necessary for the proper recording of their business transactions and financial affairs.

[283] A representative for PWC testified that the Receiver could not rely on the books and records of SCMI, Sextant GP and the Canadian Fund in preparing its report. Having

examined the books and records the Receiver found that the information for the fiscal year ending 2008 was "minimal, draft, or incomplete". There was virtually no financial information available for the 2009 fiscal year. In Tr. Vol. 3 at pp. 54-66, PWC's representative set out in detail the shortcomings of the books and records.

[284] We find SCMI and Sextant GP contravened s. 19 of the *Act*.

IX. CONCLUSION

[285] We find:

(a) by engaging in the conduct described above, Otto Spork, SCMI and Sextant GP perpetrated a fraud on investors contrary to s. 126.1 of the *Act*;

(b) by engaging in the conduct described above, all of the Respondents breached their duties as investment fund managers contrary to s. 116 of the *Act*;

(c) by engaging in the conduct described above, SCMI, Otto Spork, Dino Ekonomidis and Natalie Spork, breached their duties pursuant to s. 2.1 of Rule 31-505;

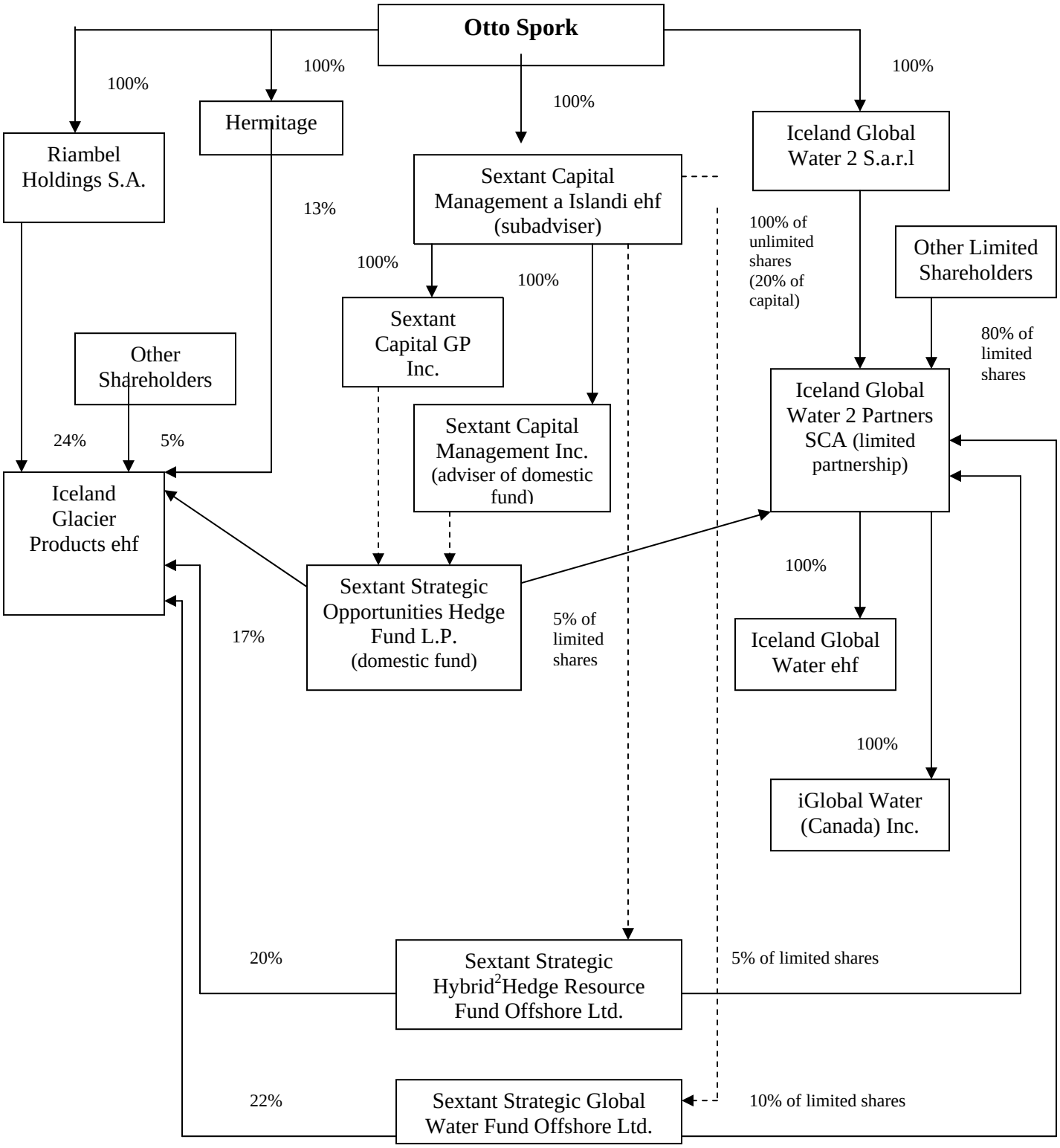
(d) by engaging in the conduct described above, SCMI and Sextant GP failed to maintain proper books and records contrary to s. 19 of the *Act*; and

(e) by engaging in the conduct described above, all of the Respondents acted contrary to the public interest.

Dated this 17th day of May, 2011

"*James D. Carnwath*"	"*Carol S. Perry*"
James D. Carnwath	Carol S. Perry

Schedule "A"


Otto Spork
100%
100%
100%
100%
Riambel Holdings S.A.
Hermitage
Sextant Capital Management a Islandi ehf (subadviser)
Iceland Global Water 2 S.a.r.l
13%
100% of unlimited shares (20% of capital)
Other Limited Shareholders
100%
100%
Sextant Capital GP Inc.
80% of limited shares
Other Shareholders
Iceland Global Water 2 Partners SCA (limited partnership)
24%
5%
Sextant Capital Management Inc. (adviser of domestic fund)
Iceland Glacier Products ehf
100%
Sextant Strategic Opportunities Hedge Fund L.P. (domestic fund)
17%
5% of limited shares
Iceland Global Water ehf
100%
iGlobal Water (Canada) Inc.
20%
Sextant Strategic Hybrid2Hedge Resource Fund Offshore Ltd.
5% of limited shares
22%
Sextant Strategic Global Water Fund Offshore Ltd.
10% of limited shares

Schedule "B"

Sextant Strategic Opportunities Hedge Fund L.P. (the "Sextant Canadian Fund")
Source and Application of Funds
January 1, 2007 to December 31, 2008

Scope: All transactions over $9,999. (Coverage: 99% of total cash flow.)

Source of Funds (Note 1)		
Subscriptions by investors (Note 2)	$	22,998
Subscriptions by parties outlined in Note 2		4,681
Sextant Capital Management Inc. (**"SCMI"**)		979
Sextant Strategic Global Water Fund Offshore Ltd. (the **"Sextant Water Fund"**) (Note 3)		1,510
Other		75
Total	**$**	**30,243**

Application of Funds (Note 1)			
Investment and transfers Iceland Glacier Products (**"IGP"**)		$	2,907
SCMI	10,715		
Sextant Capital GP Inc. (Note 4)	5,648		16,363
Otto Spork (Note 5) and Otto J.			350
Sextant Strategic Hybrid Hedge Resource Fund Offshore Ltd.			1,399
Sextant Water Fund			416
Investor redemptions (Note 6)			3,912
Investments in other securities	7,934		
Less: Proceeds from sale of other securities	(4,154)		3,780
Other			228
Total		**$**	**29,355**

Schedule "B"

Sextant Strategic Opportunities Hedge Fund L.P. (the "Sextant Canadian Fund")
Source and Application of Funds
January 1, 2007 to December 31, 2008

Notes:

1 Includes transactions in the following accounts:
RBC 140-611-5
NBCN 26BB11E,V
NBCN 26BB11U
Newedge 198K3327

2 "Subscriptions by investors" excludes subscriptions received from the following:

Otto and/or Johanna Spork	700,000.00
1035316 Ontario Ltd	131,000.00
Dino Ekonomidis	70,000.00
Helen Ekonomidis	1,060,000.00
SCMI	2,600,000.00
J'Aime Spork	45,000.00
Natalie Spork	75,000.00
	4,681,000.00

3 Includes proceeds from the sale of Iceland Glacier Products shares to the Water Fund, on or about August 22, 2008, in the amount of $1,409,534.80.

4 Includes the following payments in the total amount of approximately $3.5 million which were reflected as an investment in IGP in the fund's accounting records:

	CAD	USD
25-Jul-2008	1,200,000.00	
25-Jul-2008		613,600.00
08-Aug-2008	12,675.00	
15-Sep-2008		357,550.00
16-Sep-2008	750,000.00	
25-Nov-2008		470,000.00
	1,962,675.00	1,441,150.00
Converted to CAD		1,572,325.02
Total in CAD	3,535,000.02	

5 Includes a $300,000 redemption payment to Otto Spork on October 7, 2008.

6 Excludes a $300,000 redemption payment to Otto Spork on October 7, 2008.