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IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, as amended

AND

IN THE MATTER OF MARLON GARY HIBBERT, ASHANTI CORPORATE SERVICES INC., DOMINION INTERNATIONAL RESOURCE MANAGEMENT INC., KABASH RESOURCE MANAGEMENT, POWER TO CREATE WEALTH INC. AND POWER TO CREATE WEALTH INC. (PANAMA)

REASONS AND DECISION

Hearing:	December 5, 7 and 9, 2011 and January 11, 2012	
Decision:	April 4, 2012	
Panel:	James D. Carnwath, Q.C.	- Commissioner and Chair of the Panel
Appearances:	Swapna Chandra Jennifer Lynch	- For Staff of the Commission
		- No one appeared for Marlon Gary Hibbert, Ashanti Corporate Services Inc., Dominion International Resource Management Inc., Kabash Resource Management, Power to Create Wealth Inc. or Power to Create Wealth Inc. (Panama)

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I. INTRODUCTION

[1] Staff of the Ontario Securities Commission (the "**Commission**") or (the "**OSC**") allege that the respondents engaged in conduct contrary to the public interest in the period from January 2005 to December 2010 as follows:

a) The Respondents traded and distributed securities without filing a prospectus in circumstances where no exemption was available, contrary to s. 53 of the *Securities Act*, R.S.O. 1990, c. S.5 (the "***Act***") and contrary to the public interest;

b) The Respondents traded and advised on the trading of the securities, without being registered and in circumstances where no exemption was available, contrary to s. 25 of the *Act* and contrary to the public interest;

c) Hibbert engaged in or participated in acts practices or courses of conduct relating to the securities that he knew or ought to have known perpetrated a fraud on persons contrary to s. 126.1(b) of the *Act* and contrary to the public interest; and

d) Hibbert made statements during his examinations by Staff that were materially misleading or untrue and/or failed to state facts in respect of PCWP that were required to be stated, contrary to s. 122 of the *Act* and contrary to the public interest.

II. THE PRINCIPAL PLAYERS

[2] Marlon Gary Hibbert is a Pastor and founder of Dominion World Outreach Ministries Dominion Worship Center Inc. He is also a founding member of Fight For Justice ("**FFJ**"), an organization devoted to bettering the lives of members of the African-Canadian community. He was never registered in any capacity with the Commission.

[3] Dominion International Resource Management Inc. ("**Dominion**") was incorporated December 19, 2003 in Ontario. Dominion operated under the name Kabash Resource Management ("**Kabash**"), although Kabash was never a registered name. Dominion was never registered with the Commission.

[4] Power To Create Wealth Inc. ("**PCW**") was incorporated January 10, 2007 in Ontario. PCW's name was changed to Ashanti Corporate Services Inc. ("**Ashanti**") on February 19, 2008. Neither PCW nor Ashanti was ever registered with the Commission.

[5] Power To Create Wealth Inc. (Panama) ("**PCWP**") is a Panamanian company whose incorporation was arranged by Hibbert.

III. STAFF WITNESSES

A. H.S.

[6] H.S. is a part-time teacher living in Western Ontario with her family. She had been off for a few years on an extended parental leave and had just returned to work in September 2011. Her evidence is supported in the Hearing Brief identified with her name and filed as Ex. 4. Her evidence may be found in Tr. Vol. 1, pp. 29-92.

[7] H.S. said she invested $60,000 with Marlon Hibbert and recalled advancing the monies in four parts. She heard about the investment through close friends. She learned that the rate of return on the investment was good, there was no risk involved and that there was a guaranteed return of principal. She was also persuaded that the investment was a good idea because Hibbert was a pastor.

[8] She called Hibbert in March 2007 and learned that Hibbert was eager to have H.S. invest with him. Hibbert confirmed that he guaranteed repayment of principal supported by a signed contract. Indeed, Hibbert mailed a contract which H.S. signed before wiring him the first part of the funds.

[9] At no time did Hibbert ask H.S. about her financial circumstances nor did he say that he had taken any training or courses in trading securities.

[10] Contrary to H.S.'s recollection she invested her $60,000 in five instalments as follows:

April 27, 2007	$10,000
May 11, 2007	$10,000
August 9, 2007	$10,000
October 1, 2007	$20,000
May 9, 2008	$10,000
Total:	**$60,000**

[11] The records indicate that $10,000 was invested so that monthly interest returns of 5% would be paid to H.S. The balance of $50,000 was invested in a capital account where sums were allegedly compounded. At Ex. 4, Tab 11, p. 49 is a statement dated December 31, 2008 showing a capital of $50,000 invested, a return on investment of $74,862.24 and a current account balance of $124,862.24.

[12] At the outset, $40,000 was invested in the monthly interest payment arrangement. H.S. believes she received $16,000 by way of monthly interest payments during the course of her dealings with Hibbert. The final arrangement that committed $10,000 for monthly interest and $50,000 for compounded interest appears to have started on January 31, 2008 as shown in Ex. 4, Tab 11, pp. 26 and 38.

[13] In early 2009, H.S. told Hibbert it was important for her to receive the return of capital on the anniversary date in April. H.S. and her husband were changing school boundaries, requiring them to move from their residence. They also wanted to pay down their line of credit. Hibbert sent H.S. a letter dated February 6, 2009 addressed to "Client" saying that "we are still working through the issuing of payments in a manner that will not compromise the integrity of our business account." The letter goes on to say that it was expected that the monthly payment would be back on schedule for the month of May, therefore the monthly payment could be delayed for up to two weeks.

[14] In Ex. 4, Tab 7 is a further letter from Ashanti dated April 23, 2009. The letter refers to difficulties in getting funds into Ashanti's bank account as well as recent volatility in the financial markets. The letter purports to cancel the monthly payment plan because of sustained losses. The letter goes on to recite that Ashanti was unable to make payments over the next 12 weeks. The letter advises that Ashanti would not be able to pay all of the outstanding amounts at once, but that payments would be over a more consistent period. It was at this point that H.S. became worried about her investment.

[15] In Ex. 4, Tab 8, p. 14 is a copy of a letter from H.S. to L.B., who worked at Ashanti, asking to receive a statement of her account so that she could negotiate with her bank for a new mortgage. Also in Tab 8 at p. 13 is a "Client" letter confirming repayments beginning the end of July.

[16] Staff counsel asked H.S. if, at that point, she was comfortable with the state of the investment and the projected payout. H.S. confirmed "we were very much believing what he was saying."

[17] H.S. and her husband completed the purchase of their new home and moved in. To do so, they had to empty their RSPs to pay the bank and eliminate some of the credit line they had used to invest with Hibbert. Towards the end of August, the family went to see Hibbert in his office in Scarborough. He said that he could give them a payout of $1,000 per month starting in September of 2009. No such payment was ever received.

[18] H.S. then described the consequences of having lost the $60,000 invested. She had not intended to return to teaching and her maternity leave expired in January 2010. She started a tutoring business at home and got some students, but the family was falling into debt every month. As of the date of her testimony, she was both tutoring and teaching. When asked how the loss of her investment affected the family, H.S. replied "well, it's pretty devastating." They put their new home up for sale in December 2010 and had to move into an 800 square foot rental with their three children. At this point in her evidence, H.S. became upset and began to weep. The hearing adjourned for five minutes.

[19] On January 29, 2010, H.S.'s husband attended a meeting of investors with Hibbert. Hibbert told the investors that he had 70% of the principal owing to investors but needed 16 more weeks before he could make any repayments. Even at that point, H.S. said that a part of her still wanted to believe Hibbert.

B. T.S.

[20] Staff called T.S., a stay at home mother with two sons. During the course of her testimony, T.S. revealed that her elder son is both blind and autistic and her younger son is blind. She invested $60,000 with Marlon Hibbert, $10,000 on November 21, 2006 and $50,000 on February 9, 2007. Her evidence is supported in the Hearing Brief identified with her name and filed as Ex. 5. Her evidence may be found in Tr. Vol. 1, pp. 92-149.

[21] T.S. identified Ex. 5, Tab 6, p. 23, a copy of an investment contract with Kabash recording her investment of $10,000 on November 21, 2006. The contract is similar to the one signed by H.S., the previous witness. She and her husband had called Hibbert, had been put on a waiting list and finally signed the contract. They did not inquire about whether he was registered with the OSC or another regulator. She described their investment experience as very minimal. She understood that their investment would be used to trade foreign exchange currencies; they were never told that part of their money would be used to pay other investors, used for office expenses or used to compensate Hibbert and his family. As with H.S., $10,000 was receiving interest monthly and the $50,000 was compounding. The source of the funds was from her mother-in-law's estate.

[22] T.S. was referred to Ex. 5, Tab 3, p. 109, a letter dated May 15, 2008. The letter informed investors that PCW had moved to Belize and would henceforth be known as Ashanti. The letter was signed by L.B., Hibbert's secretary. The letter caused some uneasiness for T.S.

[23] In Ex. 5, Tab 6, p. 28 is an email sent by T.S. to L.B. asking that half the total value of her "locked in" investments to January 31, 2009 be paid out and deposited into her bank account. On the same page is a response from L.B. explaining that a large volume of payments for the end of January and February required T.S.'s payout to be made over a 2-week period "to avoid having red flags raised on the account".

[24] Commencing in January 2009 a series of communications emanated from Ashanti much as they did in the case of H.S. They are as follows:

(1) In Ex. 5, Tab 5, p. 18, a letter dated January 14, 2009, advising T.S. payments would be postponed to the first week of April;

(2) In Ex. 5, Tab 5, p. 15, a letter dated March 23, 2009, addressed to "Client" advising that Ashanti is looking for alternative banking to alleviate a problem. The change could not be in place until June 2009;

(3) In Ex. 5, Tab 5, p. 13, a letter dated July 17, 2009, addressed to "Client", laying out any payouts promised for July 31, 2009; and

(4) In Ex. 5, Tab 2, a letter dated May 6, 2010, addressed to "Investor", reporting the closing of Ashanti's forex trading account. The letter blames the actions of certain investors who wanted the account closed so that they could be paid whatever remained in the account. The letter makes it clear that Ashanti had no intention of doing so.

[25] In Ex. 5, Tab 6, p. 27, T.S. wrote L.B. pointing out that her account statement showed that $113,690.44 was paid out to her and that she had not received the money. L.B. replied on February 23, 2009 saying, "The amount is deducted out to be paid. This amount, because it has not yet been paid has been accounted for separately." It will be recalled that on March 23, 2009 Hibbert had promised new banking arrangements by the end of June 2009.

[26] It was at this point in her testimony that T.S. became upset but chose not to take a five minute recess. She described a meeting with Hibbert in August 2009 at which Hibbert's wife, Shelly (also known as "Verna"), was present. She described the meeting as Mr. and Mrs. Hibbert giving excuses why money was not being sent out, but asking that T.S. not complain to the police, stating "[w]e received the same excuses, banking, loss of money, yeah, it's just tied up."

[27] T.S. and her husband attended the same investors meeting in January 2010 in Scarborough that was described by H.S. T.S. learned that Hibbert intended to pay only the principal back and not any compound interest. She confirmed that Hibbert told the investors that he had 70% of the principal left. He refused to give any banking information about Panama. T.S. was then referred to Ex. 5, Tab 6, p. 35, a statement of her account as of January 15, 2009. The amount invested is shown as $218,474.25 and showing $113,690.44 as having been paid as interest in the period. This, of course, never took place as confirmed by T.S. T.S. believed that the total amount they received by way of interest during the course of her investment was $12,500. She was asked what effect the making of her investment had on her and her family and she replied, "This is where I cry." She described the strain of knowing that Hibbert was a pastor, and that he had done this, not just to her and her family, but to hundreds of other people. She described her desire to establish security for her oldest son who would probably never be able to work. T.S. said she wanted to put an end to Hibbert living off other people's money.

C. H.F.

[28] H.F. is employed in insurance sales and has been for 25 years. He is also actively involved in ministry work, teaching biblical principles. His evidence may be found in Tr. Vol. 2, pp. 6-98.

[29] He is an ordained minister and is associated with Pison Financial Ministries ("**Pison**"). He is registered with the Financial Services Commission of Ontario as a licensed insurance agent.

[30] H.F. was introduced to Hibbert sometime in the summer of 2008. H.F. set up a meeting with Hibbert shortly thereafter and ultimately met with him to discuss the currency trading investment promoted by Hibbert. He was told the rate of returns were extremely good and that is why Hibbert was able to guarantee a return of 8.5% interest. H.F. specifically asked him if he was licensed by the Commission and Hibbert replied that "his papers were submitted by an investment lawyer, securities lawyer, that brought his papers in and everything is approved." H.F. was shown a paper with the OSC stamp on it and he said he was satisfied, particularly because he was dealing with a "Man of God".

[31] Staff entered a Hearing Brief marked as Ex. 7, containing the documents relevant to H.F. He was referred to Tab 1, p. 2 of Ex. 7, an agreement between PCWP and Havilah Trading Stream Inc. ("**Havilah**"), H.F.'s company. The agreement followed a discussion between Messrs. H.F. and Hibbert whereby H.F. would obtain investments for the PCWP, pool them through Havilah and transfer them to PCWP so that Hibbert's minimum investment requirement of $10,000 could be met. The agreement provides that revenue obtained from the investments solicited from Havilah would be disbursed as follows:

a) The first 8.5% was to be paid on the loan investments received from Havilah, twice monthly.

b) Forty percent of the remaining profits would belong to Havilah, half of which would be paid as compensation and half was to be retained in the forex trading account to maintain trading margin.

c) PCWP was to retain 60% of the trading revenue as compensation and expense coverage of administration and banking fees. The document was signed by Messrs. H.F. and Hibbert.

[32] H.F. set up Havilah so that smaller sums coming from individuals could be deposited in its account and then be wired according to Hibbert's instructions. Hibbert explained that PCWP was incorporated in Belize because it was easier to process the investing due to the location of one trading account in New York. H.F. said he was not concerned that the head office of PCWP was in Belize.

[33] Following the establishment of Havilah's bank account, H.F. spoke to many members of his congregation and told them "about this brother, this Man of God who was doing this great investment in good return and we can – we can experience positive return on our investment."

[34] H.F. was then referred to Ex. 7, Tab 3, pp. 4-9 containing six transfers from Havilah's RBC account to Ashanti, representing investments made by numerous persons through H.F. and accumulated in Havilah's bank account. The total sum transferred to Ashanti in Tab 3 is $313,000. H.F. added that the total sum transferred from Havilah was $756,000 because there were other transfers and direct cheques.

[35] H.F. also invested personally in Ashanti. An initial investment of $8,000 was followed by another of $25,000.

[36] Following's H.F.'s investments in Ashanti, H.F. invested in a second scheme promoted by Hibbert, allegedly to support Good Works in Africa. The scheme involved a company called So You May Succeed Inc., described as the authorized agent for PCWP. In Ex. 7, Tab 11, p. 43 is a document describing an investment opportunity with a potential annual return of 79.40%. H.F. created a company called Pison Financial Principles Inc. and that company invested $25,000 in PCWP. Unlike the investment in Ashanti, the return was not guaranteed. In Ex. 7, Tab 4, p. 10 is a copy of the agreement executed by H.F. and Hibbert.

[37] Following these investments, information came to the attention of H.F. which caused him to re-think the wisdom of his investments. It became clear to him that Hibbert was not carrying through with his promises, and indeed, he was acting in a manner to suggest that the investments were at risk. In Ex. 7, Tab 12, p. 44 is a letter from H.F. to PCWP saying he wished to redeem all the funds invested by Pison on the anniversary date, October 27, 2010.

[38] Pison's investment was not returned. There then followed the usual excuses offered by Hibbert to other investors previously described in these Reasons. Banking regulations, the advice of lawyers, difficulties with the market and various other excuses were advanced by Hibbert to H.F.

[39] H.F. responded by sending several eloquent emails to Hibbert reminding him of his responsibilities as a Man of God, and of his obligations to the many investors who were persuaded to invest with him because of his seemingly impeccable credentials as a pastor. It may come as no surprise that Hibbert was unmoved by these reminders.

[40] H.F. lost the money he invested. He described the effect this had on him and on those "brothers and sisters" whom he knew personally that had lost money. He said the money he lost had been intended for the education of his two sons who were attending university. At this point, H.F. found it difficult to continue his testimony and a short recess was taken. On his return, H.F. testified:

> I cannot comment about my children. I'll just go on to something else. It's too painful. But I have – I did not put my money or my brothers and sisters' money into a man's hands. I put our money into a Man of God hand. I never would have done that if he was not counted as a Man of God. I've been in the investment business world for a long time and I would not have done that. It's only because of the umbrellas to which cover us, the Body of Christ. So in trusting a person is not just a person, it was a Man of God. And I think that's why it's so painful for all of us.
>
> (Tr. Vol. 2, pp. 96-97)

D. L.B.

[41] L.B. is married with three children and lives in Scarborough. She is currently seeking employment. She is a member and Assistant Pastor at Hibbert's church. Her evidence may be found in Tr. Vol. 2, pp. 100-185.

[42] L.B. told us that she worked for Ashanti part-time in 2006 and full time starting in July 2007. Shortly put, L.B. was responsible for the administration of the office, including communicating with clients, mailing out the monthly statements to the clients, assisting with bank deposits, receiving the monthly bank statements and reconciling them, getting supplies for the office and paying the ordinary and usual office expenses. All this was done under the supervision and direction of Hibbert.

[43] She was a signatory on a CIBC account and a Bank of Montreal account operated in the name of Ashanti. There was also a TD bank account associated with an entity called Dominion, identified earlier in paragraph three of these reasons. Investors in Ashanti either purchased a bank draft which they mailed in or invested by wire transfer which went directly into one of the bank accounts.

[44] Investors' funds were, from time to time, transferred to Forex Capital Markets ("**FXCM**"), the company that was trading in foreign exchange. Transfers to FXCM were done on the instructions of Hibbert. L.B. prepared a list of all investors who asked to be paid their interest on a monthly basis, she would tell Hibbert how much to be paid out each month and he would request funds from FXCM or take it from the bank account. Then L.B. would mail the cheques to those individual investors. Insofar as individual investors were concerned, there was a file for each one containing the signed contract, a photograph of a bank draft if that was the method of payment, a copy of their method of payment and a copy of the monthly statements that they received.

[45] At this point, Staff entered Ex. 8, being a Hearing Brief containing the documents related to L.B. containing 37 tabs. L.B. was referred to Tab 37A, a Venture Capital Investment Agreement made between L.B. and Kabash. The latter was an entity operated by Dominion. L.B. invested USD $3,650 in Kabash with a guaranteed return of 5% monthly payable on the last day of each month. Although her evidence was not clear on this point, it seems that that original investment plus accrued interest totalled slightly over $6,000, which she received in full as did other investors who had connections with Hibbert.

[46] L.B. was referred to Ex. 8, Tab 37D, pp. 159-162, a list of all investors prepared by L.B. It shows total principal invested of $8,530,935.99, total principal repaid of $297,326.13 and a total interest paid of $3,501,158.42.

[47] In Ex. 8, Tab 37C is a list of all investors prepared by L.B. It shows principal owing of $8,290,045.75, total accrued interest owing of $16,503,669.69 and a total of principal and interest paid of $3,738,748.02.

[48] L.B. explained the slight discrepancy revealed in a comparison of Tab C and Tab D by explaining that small errors in the calculation had been revealed in the preparation of Tab D following the preparation of Tab C.

[49] L.B. was taken through a number of exhibits in Ex. 8, at Tabs 14-35 inclusive, being cheques issued by Ashanti. She identified many of the payments to include payments to Hibbert's family, charitable causes promoted by him, a myriad of office expenses for the various companies in which he had an interest and payments for two BMW automobiles driven by Hibbert and his wife.

E. Paul De Souza

[50] Mr. De Souza is a senior forensic accountant with the Enforcement Branch of the OSC. He has been designated as a chartered certified accountant in the U.K. since 1974 and has had a CGA designation in Ontario since 1991. He has been a senior forensic accountant at the OSC

since 2000. He reviews and analyses financial documents, including disclosure documents, corporate records, bank statements and brokerage statements. He also interviews respondents and witnesses. His evidence may be found in Tr. Vol. 3, pp. 7-89.

[51] Mr. De Souza became involved in the investigation of Hibbert some time in August 2010. He conducted four compelled interviews with Hibbert, starting in November 2010. The purpose of his examination was to fully understand Hibbert's business and his involvement in dealing with securities and investors. As a result of Staff's investigation, a cease trade order was issued against Hibbert's companies. Subsequently, Staff initiated contempt proceedings against Hibbert for the non-receipt of documents and failure to comply with requests made during the compelled interviews.

[52] Mr. De Souza was asked if he obtained any evidence that Hibbert was advising investors about securities without being registered at the Commission. Mr. De Souza identified a "video clip", being website information that showed Hibbert was addressing the public in order to promote investments. The video was provided by J.S., the husband of T.S. A transcription of the CD containing the video was filed as Ex. 13. Hearing Brief Vol. 7, Tabs 1-5 was entered as Ex. 14. Tab 5 of Ex. 14 contains the CD from which the transcription was made. The video itself was then played showing Hibbert advising investors about securities.

[53] A document was produced to Mr. De Souza entitled "The Company's Bank Accounts CBNA", and entered as Ex. 15. The document sets out the various bank accounts owned by the companies controlled by Hibbert, as well as Hibbert's personal bank accounts. Also shown are the periods for which Mr. De Souza reviewed those accounts and the status of the accounts as of the date they were closed.

[54] Mr. De Souza then described his analysis of these bank accounts. He started with the account histories as represented by the bank statements. He then analysed all the transactions for all the bank accounts shown on Ex. 15. He used certain thresholds for payments from the bank account and recorded only those items over $5,000. This was because of the enormous number of transactions. On the deposit side, Mr. De Souza wanted a more accurate number on the potential investment monies raised so he used a threshold of $1,000. He was referred to Hearing Brief 6B, which was filed as Ex. 16, Tabs 1-20. In the second Tab 3, pp. 211-361 are the debits and credits revealed by the banking statements after having applied the thresholds described by Mr. De Souza. The analysis indicates the investor funds deposited and by whom and then disbursements from the accounts with the identity of the recipient. The analysis left several questions in Mr. De Souza's mind so he gave the document to Hibbert with questions directed to entries of which he was not certain.

[55] Hibbert's comments were incorporated into Mr. De Souza's final analysis. In Ex. 16, Tab 3, p. 300, investor funds total $8,411,528. Monies disbursed for Hibbert's personal use totalled $458,484. Money disbursed for charitable causes presumably supported by Hibbert totalled $359,338.

[56] Mr. De Souza was asked if p. 300 of Tab 3 recorded all the advances to the use of Hibbert personally. Mr. De Souza replied that it did not because of the threshold he used of $5,000. A document entitled withdrawals and donations (under $5,000) was produced to Mr. De

Souza, identified as having been prepared by him and entered as Ex. 17. Exhibit 17 shows amounts paid to Hibbert to be $94,069, to Mrs. Hibbert $121,071, for donations $124,510 and for other personal expenses $67,017, all flowing from sums under $5,000.

[57] Thus, from the bank accounts analyzed by Mr. De Souza, the Hibberts received approximately $673,000, donations were made of $483,848 and other personal expenses were paid of $67,017.

[58] Mr. De Souza was then asked if he did a trading analysis of Hibbert's activities. A document entitled "Summary of the Profit and Loss on the Currency Trading" was produced to Mr. De Souza. He identified it as having been prepared by him and it was entered as Ex. 18. The document identifies a total trading loss in the period January 2006 to September 2009 of $1,040,382. Exhibit 19 showed a trading summary for FXCM showing deposits of $2,150,804, withdrawals of $1,201,147 and a loss of $948,365 due to trading. The document shows a residual balance of $1,293.

[59] Mr. De Souza was shown a document entitled "Monthly Performance and Trading Account Balance for Ashanti". It was entered as Ex. 20, after having been identified by Mr. De Souza as a document that he prepared. The document shows a different manner of recording the monthly balances in various accounts used by Hibbert in trading. Mr. De Souza confirmed that if the debits and credits were added the result would be a loss of $948,365 as shown on Ex. 19.

[60] Mr. De Souza was then referred to Hearing Brief Vol. 6A previously entered as Ex. 11, Tabs A-23. Attention was directed to Tab 11, p. 619 where Mr. De Souza identified a response to an undertaking by Hibbert to provide Staff with the total obligation owing to investors as of December 31, 2007 and to provide the total of all assets in the names of the companies (Ashanti and/or Kabash) as of December 31, 2007. In a letter found at p. 614 of Tab 11, Hibbert's counsel replied that the total assets were USD $1,599,301.90 and CAD $98,617.66. The total obligations owing to investors as of December 31, 2007 was, according to the letter, $301,028.40.

[61] Mr. De Souza did not agree with these amounts and went through the account statements. He was referred to Tab 13, p. 631 and following where he reviewed Hibbert's numbers and came to an interest obligation outstanding of $2.2 million. This figure was subsequently put to Hibbert, who was forced to agree with it. Hibbert explained he did not understand Commission Staff's request when asked for the obligations.

[62] Finally, Mr. De Souza was referred to a compelled examination of Hibbert, found at Ex. 11, Tab A. At p. 101, Hibbert was asked if there were any immediate family members of his associated with PCWP. Hibbert answered, "no". At p. 110 it was put to Hibbert that he was involved in the Panamanian company known as PCWP. He replied: "I'm not a director. I'm not a founder. I'm not an officer."

[63] Subsequently, Staff obtained information from the National Securities Commission in Panama and from the CFTC in the United States. In Ex. 22, Verna Hibbert, Hibbert's wife, is shown as secretary of PCWP. At Ex. 24 is a document signed by Marlon G. Hibbert as a trading agent for PCWP.

IV. ANALYSIS

(a) Did the Respondents trade in securities without being registered to do so in circumstances where no exemptions were available to them, contrary to s. 25(1)(a) of the *Securities Act* (pre-September 2009) and s. 25(1) of the *Securities Act* (post-September 2009) and contrary to the public interest?

[64] Prior to September 28, 2009, s.25(1)(a) of the *Act* stated that no person or company shall trade in a security unless that person is registered with the Commission as a dealer, or as a salesperson, partner, or officer of a registered dealer. Subsection 25(1)(a) of the *Act* stated:

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

[65] The current s. 25(1) of the *Act* came into force on September 28, 2009. It provides that a person or company shall not engage in or hold himself, herself, or itself out as engaging in the business of trading in securities unless the person or company is registered with the Commission:

> Unless a person or company is exempt under Ontario securities law from the requirement to comply with this subsection, the person or company shall not engage in or hold himself, herself or itself out as engaging in the business of trading unless the person or company,
>
> (a) is registered in accordance with Ontario securities law as a dealer; or
>
> (b) is a representative registered in accordance with Ontario securities law as a dealing representative of a registered dealer and is acting on behalf of the registered dealer.

[66] The requirement for registration is now determined by a "business trigger". In determining whether a person or company is trading in securities for a business purpose, section 1.3 of Companion Policy 31-103 sets out a number of relevant factors that are derived from case

law and regulatory decisions that have interpreted the "business purpose test" for securities matters. The relevant factors are as follows:

> a) engaging in activities similar to a registrant, including promoting securities or stating that an individual or company will buy or sell securities;
>
> b) intermediating trades or acting as a market maker;
>
> c) directly or indirectly carrying on in the activity with repetition, regularity or continuity, especially trading in any way that produces, or is intended to produce profits;
>
> d) being, or expecting to be, remunerated or compensated for trading and it is irrelevant if the individual or company actually received compensation or in what form; and
>
> e) directly or indirectly soliciting, including contacting anyone by any means to solicit securities transactions.

[67] The definition of "trade" or "trading" in s. 1(1) of the *Act* includes:

> (a) any sale or disposition of a security for valuable consideration whether the terms of payment be on margin, instalment or otherwise,
>
> …
>
> (e) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of the foregoing.

[68] The definition of "security" in s. 1(1) of the *Act* includes:

> …
>
> (n) any investment contract;
>
> …
>
> whether any of the foregoing relate to an issuer or a proposed issuer.

[69] I find that the contracts prepared by Hibbert and signed by him and investors he solicited to be a "security" as defined in s. 1(1) of the *Act*. Hibbert promised investors high rates of return at no risk and guaranteed the return of the investors' capital investment.

[70] Hibbert's interaction with H.S., T.S. and H.F. consisted almost entirely of trading or acting in furtherance of trades and conducting the business of trading in securities. Not only did he cause the incorporation of the corporate respondents to assist in the investment scheme, he

also prepared and submitted investment contracts for execution by investors, solicited investments over the telephone and accepted and deposited investors' funds into the bank accounts of the corporate respondents located in Canada. In addition, he paid referral fees to existing investors who referred new investors and signed an agreement with H.F. to gather in yet further potential investors.

[71] Indeed, Hibbert himself acknowledged that neither he nor his companies had ever been registered with the Commission. He further acknowledged there were no exemptions from the registration requirements available to any of the Respondents (Agreed Statement of Facts, Ex. 2, Ex. 2, paras. 3 and 8).

[72] I find that all the Respondents engaged in activities or a course of conduct that constituted "acts in furtherance of a trade" or the "business of trading in securities without being registered contrary to s. 25(1)(a) of the *Act* (pre-September 2009), and contrary to s. 25(1) (after September 2009), in circumstances where no exemption was available to them.

(b) Did the Respondents trade and advise on the trading of securities of the corporate respondents without being registered and in circumstances where no exemption was available, contrary to s. 25(1)(c) of the *Securities Act* (pre-September 2009) and s. 25(3) of the *Securities Act* (post-September 2009) and contrary to the public interest?

[73] Prior to September 28, 2009, s. 25(1)(c) of the *Act* provided:

> No person or company shall,
>
> …
>
> (c) act as an adviser unless the person or company is registered as an adviser, or is registered as a representative or as a partner or as an officer of a registered adviser and is acting on behalf of an adviser,
>
> And the registration has been made in accordance with Ontario securities law and the person or company has received written notice of the registration from the Director and, where the registration is subject to terms and conditions, the person or company complies with such terms and conditions

[74] On September 28, 2009, s. 25 of the *Act* was amended. Subsection 25(3) of the *Act* now provides:

> Unless a person or a company is exempt under Ontario securities law from the requirement to comply with this subsection, the person or company shall not engage in the business of, or hold himself, herself or itself out as engaging in the business of, advising anyone with respect to investing in

> securities or buying or selling securities or derivatives unless the person or company,
>
> (a) is registered in accordance with Ontario securities law as an advisor;
>
> …

[75] In *Re Maguire* (1995), 18 O.S.C.B. 4623 at pp. 3-4, the Commission established a three-part test for a breach of subsection 25(1)(c) of the *Act*:

> 1. Has a recommendation or opinion been given as opposed to simply factual information?
>
> 2. If so, was the recommendation or opinion given in a manner that reflects a business purpose?
>
> 3. Were any exemptions available?

[76] The evidence of H.S., T.S. and H.F. establishes that Hibbert recommended they invest in the respondent companies and that he was doing so for a business purpose. Each of the investors testified that Hibbert promised a high rate of return and that the principal amount invested was guaranteed.

[77] In addition to advising individual investors to invest, Hibbert created and posted the video clip referred to earlier in these Reasons touting advantages of investing in Power to Create Wealth Inc. The transcript of the video clip, Ex. 13, sets out in considerable detail the promised rate of return of up to 79.4% a year.

[78] Based on Mr. De Souza's evidence, I find that Hibbert intended to and did in fact gain financially from the investments.

[79] I find that Hibbert personally and through the corporate respondents engaged in a course of conduct that constituted "advising" within the meaning of s. 25(1)(c) (pre-September 2009) and s. 25(3) (post-September 2009) of the *Act*. I find there were no exemptions from the registration requirement available to any of the Respondents.

> **(c) Did the Respondents distribute securities for which no preliminary prospectus or prospectus had been filed and for which no receipt had been issued by the Director, contrary to s. 53(1) of the *Act*?**

[80] During the period of Hibbert's activities, s. 53(1) of the *Act* stated:

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

[81] As found earlier, Hibbert personally and through the corporate respondents traded in securities. Hibbert admitted that no prospectus or preliminary prospectus was ever filed with the OSC with respect to the investor contracts and no receipts were issued by the Director.

[82] Hibbert acknowledged there were no exemptions available from the prospectus requirements to any of the Respondents (Agreed Statement of Facts, Ex. 2, para. 7).

[83] I find that Hibbert and the corporate respondents distributed securities contrary to s. 53(1) of the *Act.*

(d) Did Hibbert, directly or indirectly, engage in or participate in acts, practices or course of conduct relating to securities that he knew or reasonably ought to have known would perpetrate a fraud on investors, contrary to s. 126.1(b) of the *Act* and contrary to the public interest?

[84] Subsection 126.1(b) of the *Act* 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.

[85] 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), 192 B.C.C.A. 119 (“***Anderson***”*)* at para. 27, 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 consent
>
> 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).

[86] It is important to note that in Ontario, as it is in British Columbia, the legislature has chosen to impose liability under the *Securities 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 (*"**Al-Tar**")*; *Re Lehman Cohort Group Inc.* (2010), 33 O.S.C.B. 7041 ("***Lehman***"); and *Re Global Partners Capital* (2010), 33 O.S.C.B. 7783 ("***Global Partners***").

1. The *Actus Reus* of Fraud

[87] The *actus reus* requires proof of (a) a dishonest act involving "deceit, falsehood or other fraudulent means" which (b) causes 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. ("***Théroux***"), at paras. 16 and 27).

[88] 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).

[89] "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 such a loss, the conduct is wrongful if it constitutes conduct which reasonable decent persons would consider dishonest and unscrupulous.

[90] 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).

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

[92] 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).

[93] "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

[94] 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 be also 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).

[95] 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 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 the offence of fraud is to catch those who actually practise fraud, its *mens rea* cannot be cast so narrowly as this.
>
> (*Théroux*, above, at para. 36)

[96] 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).

[97] Hibbert deceived investors by misappropriating their funds to his own use and the use of his wife and his charities. He caused payments of approximately $673,000 to be transferred to himself and his wife, including payments for leased vehicles. He caused payments of $483,848 to be paid to his ministries and charities and other charities founded and run by family members. He caused payments of $67,017 for other personal expenses, including VISA payments, school fees, hotels and gym memberships. The payments for personal expenses were made after payments to investors had stopped.

[98] Hibbert lied to investors by telling them he was successful in trading in foreign exchange. There is no evidence to suggest that he ever made a profit in doing so. He lied to investors by providing monthly statements as to the success of their investments which did not reflect actual trading results. The statements showed growth of investors' funds when in fact losses were sustained. Investors believed their funds to be safe and earning returns. He lied to investors when he tried to explain why the payments of principal could not be made and provided a litany of excuses, which were untrue, as to why repayments of principal were not possible.

[99] By virtue of Hibbert's deceptions and untruths, many investors lost their entire investment. To date, they are owed more than $8.2 million in principal, to say nothing of the promised returns of more than $13 million (Ex. 11, Tab B, questions 1361-1374).

[100] I find the *actus reus* of fraud has been established on the evidence.

[101] As perpetrator of the fraud and as directing mind of the corporate respondents, Hibbert had subjective awareness that he was acting dishonestly and putting the investors' funds at risk. He controlled the trading of investor funds in foreign exchange. He had to have known of the losses suffered as a result of his trading. He was aware or should have been aware of the state of the Canadian bank accounts in the name of the various corporate respondents.

[102] Hibbert composed the letters which deceived investors as to the true state of affairs of their investment. At the meeting in January 2010, Hibbert told investors that he had 70% of their principal when he knew that was not the case.

[103] I find the *mens rea* of fraud to have been established.

(e) Did Hibbert make statements in evidence submitted to Staff which were misleading, or untrue or did he fail to state facts that were required to be stated, contrary to s. 122(1) of the *Act*?

[104] During the period in which Hibbert's statements in evidence were made, s. 122(1)(a) of the *Act* stated:

> Every person or company that,
>
> (a) makes a statement in any material, evidence or information submitted to the Commission, a Director, any person acting under the authority of the Commission or the Executive Director or any person appointed to make an investigation or examination under this Act that, in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading;
>
> …
>
> is guilty of an offence and on conviction is liable to a fine of not more than $5 million or to imprisonment for a term of not more than five years less a day, or to both.

[105] In this case, Hibbert was examined under oath with a court reporter on four occasions: (1) November 9, 2010; (2) January 20, 2011; (3) September 22, 2011; and (4) November 15, 2011. He swore to tell the truth at his first two examinations and then subsequently affirmed to do so at his third and fourth examinations.

> Transcript of Examination of Gary Hibbert dated November 9, 2010, Exhibit 11, Tab A and Summary, Exhibit 25
> Transcript of Examination of Gary Hibbert dated January 20, 2011, Exhibit 11, Tab B and Summary, Exhibit 26
> Transcript of Examination of Gary Hibbert dated September 22, 2011, Exhibit 16, Tab 4 and Summary, Exhibit 27
> Transcript of Examination of Gary Hibbert dated November 15, 2011, Exhibit 10, Tab A and Summary, Exhibit 28

[106] On the November 9, 2010 examination, Hibbert testified he had incorporated a company called So You May Succeed Inc., which was a publishing company for his book. He stated that it had nothing to do with investing (Ex. 11, Tab A, questions 825-835). This statement was false. In a document with the letterhead Power to Create Wealth Inc., entitled "Investment

Opportunity", So You May Succeed Inc. is listed as the authorized agent for Power to Create Wealth Inc. (Ex. 7, Tab 11).

[107] At his November 9, 2010 examination, Hibbert testified that he moved all of the investor funds to PCWP in late 2007. He testified that none of his immediate family members were involved with PCWP. This statement was false. The forex trading online application for Power to Create Wealth Inc., with a Panamanian address, lists Verna Hibbert as the trading manager/secretary for PCWP (Ex. 22).

V. CONCLUSION

[108] I find:

(a) The Respondents traded in securities without being registered to trade in securities in circumstances where no exemptions were available to them contrary to s. 25(1)(a) (pre-September 2009) and s. 25(1) (post-September 2009) of the *Act* and contrary to the public interest;

(b) The Respondents acted as advisors with respect to investing in, buying or selling securities without registration in respect of which there were no exemptions available contrary to s. 25(1)(c) (pre-September 2009) and s. 25(3) (post-September 2009) of the *Act* and contrary to the public interest;

(c) The activities of the Respondents constituted a distribution in securities for which no preliminary prospectus or prospectus had been filed and for which no receipt has been issued by the Director, contrary to s. 53(1) of the *Act* and contrary to the public interest;

(d) Hibbert has, directly or indirectly, engaged or participated in acts, practices or a course of conduct relating to the securities that he knew or reasonably ought to have known would perpetrate a fraud on persons contrary to s. 126.1(b) of the *Act* and contrary to the public interest; and

(e) Hibbert misled Staff contrary to s.122(1)(a) of the *Act* and contrary to the public interest.

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

Dated at Toronto this 4th day of April, 2012.

"James D. Carnwath

James D. Carnwath, Q.C.