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Commission des valeurs mobilières de l'Ontario
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IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

- AND -

INTHE MATTER OF
SHAUN GERARD MCERLEAN AND
SECURUS CAPITAL INC.

REASONS AND DECISION
(Section 127 of the *Act*)

Hearing:	November 14, 15, 16,17, 21, 23 and 24, 2011, January 12, 2012, March 26, 28 and 30, 2012, April 2, 3, 5, 11 and 12, 2012 and June 18, 2012	
Decision:	July 19, 2012	
Panel:	Vern Krishna, Q.C.	- Commissioner and Chair of the Panel
	James D. Carnwath, Q.C.	- Commissioner
Appearances:	Matthew Britton	- For Staff of the Commission
	Self-Represented	- Shaun Gerard McErlean
	No one appeared on behalf of Securus Capital Inc.	

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I. INTRODUCTION

[1] On December 8, 2010, Enforcement Staff ("**Staff**") of the Ontario Securities Commission (the "**Commission**") filed a Statement of Allegations as follows:

> Staff allege that Shaun Gerard McErlean ("**Mr. McErlean**" or "**Shaun McErlean**") and Securus Capital Inc. ("**Securus**") (collectively the "**Respondents**"):
>
> (a) between January 22, 2009 and August 12, 2010, the Respondents engaged in or participated in an act, practice or course of conduct relating to securities that the Respondents knew, or reasonably ought to have known, perpetrated a fraud on any person or company, contrary to s. 126.1(b) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "***Act***");
>
> (b) between January 22, 2009 and September 28, 2009, McErlean traded securities without being registered to trade securities and without an exemption from the dealer registration requirement, contrary to s. 25(1)(a) of the *Act*;
>
> (c) between September 29, 2009 and August 12, 2010, without an exemption from the dealer registration requirement, the Respondents engaged in or held themselves out to be engaged in the business of trading securities without being registered in accordance with Ontario securities law, contrary to s. 25(1) of the *Act*;
>
> (d) between January 22, 2009 and September 28, 2009, McErlean acted as an adviser without registration and without an exemption from the adviser registration requirement, contrary to s. 25(1)(c) of the *Act*;
>
> (e) between September 29, 2009 and August 12, 2010, the Respondents, without an exemption from the adviser registration requirement, engaged in the business of, or held themselves out as engaging in the business of, advising with respect to investing in, buying or selling securities without being registered in accordance with Ontario securities law, contrary to s. 25(3) of the *Act*;
>
> (f) between January 22, 2009 and August 12, 2010, the Respondents traded securities which was a distribution of securities without having filed a preliminary prospectus or a prospectus with the Director or having an exemption from the prospectus requirement, contrary to s. 53(1) of the *Act*; and
>
> (g) that Mr. McErlean, as a director of Securus, authorized, permitted or acquiesced in the conduct of Securus contrary to s. 129.2 of the *Act*.

[2] We find that each of the allegations made by Staff against Mr. McErlean and Securus have been proven on a balance of probabilities.

II. STAFF WITNESSES

[3] Witnesses' testimony will be identified by Transcript Volume number and page number as "Tr. Vol. -, pp. xx – xx". Exhibits entered will be referred to by exhibit number as "Ex. – ". Hearing briefs will be referred to by Volume number, Tab and Page number as "Vol - , Tab(s) -, pp. xx – xx".

A. Indi Dhillon

[4] Mr. Dhillon is a forensic accountant in the Enforcement Branch of the Commission and his task is to assess and investigate potential breaches of Ontario securities law. He has been with the Commission for 15 years.

[5] Mr. Dhillon was assigned to the investigation of Mr. McErlean and Securus in March of 2010. During the course of his investigation, he collected documents and records that were filed, subject to identification, as Hearing Briefs, Volumes 1-16 inclusive.

[6] Mr. Dhillon's search of the National Registration Database revealed that Mr. McErlean was registered in October 2004 as an investment representative, sponsored by CIBC World Markets ("**CIBC**"). His registration terminated on January 22, 2009.

[7] During his investigation, Mr. Dhillon learned of Aquiesce Investments ("**Aquiesce**"). A Business Names Report shows Aquiesce to be a sole proprietorship with an address of 102 Bear Trail, Newmarket, Ontario. Aquiesce is shown as engaged in investment consulting. Mr. McErlean applied for registration of Aquiesce and his residence address is also 102 Bear Trail, in Newmarket, which is Mr. McErlean's residence (Ex. 1, Vol. 16, Tab 1, pp. 1-3).

[8] A subsequent search by Mr. Dhillon revealed that Aquiesce was not registered with the Commission, neither was it a reporting issuer in Ontario.

[9] Staff referred Mr. Dhillon to Vol. 1, Tabs 2–32, introduced as Ex. 2. The tabs contain all the bank statements and supporting documentation for TD Canada Trust Acc. No. 522 1560 in the name of Aquiesce INV. The account opened on December 10, 2008; transactions are shown until January 2, 2009. The last entry at Tab 32 shows a balance of $101,337.28. Mr. Dhillon was then referred to Vol. 16, Tab 2, pp. 4-30, entered as Ex. 3. Documents at Tab 2 include a complaint received at the Contact Center of the Commission from one TB, acting for a Colorado company, GP Co. and its CEO, Mr. JG. The complaint referred to an "Aquiesce Investments Trade Agreement" with PD Co., one of JG's companies. The agreement was never signed by Aquiesce and was described in an internal Staff memo as not contrary to Ontario's securities law. Considerable questions were posed to Mr. Dhillon concerning this unsigned agreement, which apparently did not contravene Ontario's securities law. Further pages from Tab 2, pp. 31 - 33 were entered as Ex. 4. Mr. Dhillon's evidence on this area and these two exhibits are of little or no assistance to the Panel.

[10] Mr. Dhillon was then asked about a meeting he had with James Dickson, a senior manager in the Corporate Investigations Department of the Royal Bank of Canada ("**RBC**"). When Mr. Dhillon and Mr. Dickson met, RBC account statements in the name of Securus were shown to Mr. Dhillon, together with supporting documents. Mr. Dickson showed Mr. Dhillon a Statement of Claim filed by ALLC, a Colorado company, against Mr. McErlean, Aquiesce, TD Waterhouse Canada Inc. ("**TD Waterhouse**"), the Toronto-Dominion Bank ("**TD Bank**"), and RBC (Ex. 5, Vol. 12, Tab 3, p. 10-22).

[11] In paragraph 17 of the Statement of Claim, the plaintiff pleads that on June 11, 2009, USD $2 million was wired from the plaintiff's account to be deposited to the Aquiesce Acc. No. 522 1560 for credit to ALLC.

[12] Staff referred Mr. Dhillon to Vol. 1, Tab 33, entered as Ex. 6, which he identified as a discount brokerage account application made by Shaun McErlean to TD Waterhouse. In the application, Mr. McErlean identifies his primary financial institution as TD Canada Trust, Newmarket with the Acc. No. 522 1560, as earlier identified in these Reasons. The TD Waterhouse brokerage account was numbered 72YJ94.

[13] Staff referred Mr. Dhillon to Vol. 1, Tabs 34, 35 and 36, entered at Ex. 7. Mr. Dhillon said these tabs contained transactions in the Aquiesce brokerage account with TD Waterhouse No. 72YJ94 from July 1, 2009 to August 31, 2009.

[14] Staff then drew Mr. Dhillon's attention to Ex. 2 containing the records for Acc. No. 522 1560 in the name of Aquiesce. Mr. Dhillon demonstrated that in the period from December 12, 2008 to June 4, 2009 there were deposits in the account of $400,000 approximately. This sum appeared to be made up of deposits by three or four persons based in Ontario. By June 4, 2009 there was a nominal amount in the account of $17.34. However, on June 11, 2009 a wire transfer from ALLC went into the account in the amount of USD $2 million or CAD $2,229,988.85. The wire transfer is found in Ex. 2, Vol. 1, Tab 19, p. 214. The "Payment Details" indicate the amount of the transfer is for further credit to ALLC in Acc. No. 77C436B-A.

[15] Mr. Dhillon was asked to explain how the CAD $2,229,988.85 was used. He replied:

(i) two entries of $74,040 and $86,380 were transferred to close a particular account;

(ii) a Canadian draft of $570,113.06 was distributed as follows:

(a)	to Bernadette McErlean,	$8,056.58;
(b)	RM, a relative of Shaun McErlean	$24,390.11;
(c)	to BM, a relative of Shaun McErlean	$22,500;
(d)	to SB,	$25,000;
(e)	to SP,	$100,000;

(f)	to RK,	$333,333.33;
(g)	to Shaun McErlean,	$17,500; and
(h)	to CIBC VISA,	$39,333.04
	Total:	$570,113.06

[16] Mr. Dhillon noted that RK had previously deposited $300,000 into the Aquiesce Acc. No. 522 1560.

[17] Mr. Dhillon identified a transfer from Acc. No. 522 1560 of $1,400,000 to TD Waterhouse. He said it appeared the monies were invested in publicly traded companies, as shown at Ex. 7, Vol. 1, Tab 34, p. 385.

[18] Mr. Dhillon then took us to Ex. 2, Vol. 1, Tab 21, p. 248 and identified a wire transfer to TD Acc. No. 522 1560 of $1,145,442.73 from Cash Flow Financial LLC, being approximately USD $1 million. On the same date there was a transfer to the TD Waterhouse brokerage Acc. No. 72YJ94 of $800,000, shown in Ex. 2, Vol. 1, Tab 34, p. 385.

[19] Mr. Dhillon then described a transfer from the trading Acc. No. 72YJ94 of $8,000 to Aquiesce Acc. No. 522 1560 on the June 19, 2009, found at Ex. 2, Vol. 1, Tab 34, p. 385. The deposit to the Aquiesce account is found at Ex. 2, Vol. 1, Tab 21, p. 248.

[20] Mr. Dhillon turned to his investigation of Securus, and an account opened at RBC for that company by Mr. McErlean, Acc. No. 101-842-3. He was referred to Vol. 3, Tab 1 which contain the opening documents for the account and Tab 2, which contained the account statements from December 2009 to August 2010. Tabs 3 to 10 provide the back up bank documents supporting the transactions that occurred in that account over that period. These documents were entered as Ex. 8, Vol. 3, Tabs 1-10.

[21] The documents show that Mr. McErlean was the president of Securus and the signing officer. His principal occupation is shown as being a "business consultant" which is typewritten. The words "investment advisor" have been added in handwriting. Much heat but not much light was expended on how the words "investment advisor" came to appear on the banking documents. The Panel's conclusion is that this evidence is of no assistance in finding whether Mr. McErlean purported to act as a investment advisor.

[22] Entered as Ex. 9, Vol. 4, Tabs 1-14 inclusive were documents pertaining to Securus delivered by RBC to the Commission. They were described as not as complete as the banking documents filed at Ex. 8.

[23] Staff then referred Mr. Dhillon to Vol. 13, Tab 1, entered as Ex. 10, a document prepared by Mr. Dhillon described as Source and Application of Funds for RBC Business Bank Acc. No. 101-842-3 for the period from December 22, 2009 to August 9, 2010. An edited version (to remove personal information of investors) here follows:

Securus Capital Inc.

Source and Application of Funds for RBC Business Bank Account No. 03342-101-842-3 for the period from December 22, 2009 to August 9, 2010

Source of Funds:	**$**	
Wire Transfers:		
TK AG, (apparently a German corporation)	2,129,140	
RW (apparently a German resident)	1,410,560	
MT REG (apparently a German trust)	1,390,700	
MVWP (apparently a German resident)	1,369,400	
Ms. LK (a Dubai resident)	1,543,568	
EAEB (apparently a Dubai corporation)	1,310,963	
Other Deposit (source unknown)	258,467	
Other deposits/credits re items under $5,000	8,611	
Total:		**9,421.409**
Application of Funds:		
To Shaun McErlean		
Cash or Visa payments	316,860	
To Shaun relatives:	362,327	
To Shaun related entities or persons:		
R3 Auto and Finance	717,007	
Warrior One MMA Ltd.	359,096	
RT Wood Natural Energy Corp.	389,000	
M&AD	75,000	
RS	20,000	
Sub-total: To Shaun, relatives or related entities or persons		**2,239,290**
To former clients/investors of Shaun:		
LLF Lawyers LLP in Trust – Payment for ½ ALLC	1,049,700	
RK – former CIBC client	375,575	
To current investors:	1,352,414	
Unknown debit memos and cheques, bank charges and other cheques under $5,000	2,451,523	
Total:		**7,468,502**
Balance in RBC Account as of August 9, 2010		**1,952,907**
Adjustment for Pending deposit from investor not credited to a/c: Pending Deposits – July 25, 2010 wire transfer of USD $1,049,968 from Ms. LK – bank account statements reflect only a deposit of USD $248,968 - CDN equivalent - $258,466.91. Using the same exchange conversion rate - USD $800,000 is equivalent to $830,522	832,522	
Adjusted balance in the RBC account as of August 9, 2010		**2,785,429**

(There are two small errors made in entering the Canadian equivalent amounts from the USD $1,049,968 transfer from Ms. LK.)

[24] Mr. Dhillon took us to the cross-entries for Acc. No. 101-842-3 found in Ex. 8, Vol. 3. He explained the reference to a "pending deposit from an investor not credited to the a/c." Ms. LK wired USD $1,049,968 for deposit on July 25, 2010. The bank account statements reflect only a deposit of USD $248,968, or CAD $258,466.91. Mr. Dhillon explained that Mr. McErlean requested a draft of USD $800,000 immediately from the transfer to the effect that that sum did not go in and go out of the account. The Canadian equivalent of $258,466.91 of the balance of that transfer is shown as "other deposit – source unknown" on Ex. 10.

[25] Mr. Dhillon demonstrated by reference to the bank records that the item "current investors" relates to the investors who wired funds. We are satisfied that $1,352,414 was returned to them.

[26] Mr. Dhillon also demonstrated to our satisfaction that from the $2,451,523 described as "unknown debit memos, etc.," an amount of $584,674.27 was transferred to AS in Trust in respect of an Emco purchase. Mr. Dhillon's understanding was that this was a building in Barrie, Ontario.

[27] Overall, we are satisfied that the source and application of funds prepared by Mr. Dhillon accurately shows the sums of money deposited in the Securus bank Account No. 101-842-3 for the period described, subject to the minor errors in the calculation of the exchange rate from U.S. dollars to Canadian dollars. We accept the accuracy of the application of those funds, making allowance for the USD $800,000 applied to ALLC which were never deposited in the account.

[28] Mr. Dhillon then confirmed that Staff received a number of documents from RBC indicating that offshore individuals were calling RBC inquiring whether their entities, corporate or otherwise, had accounts at RBC.

[29] In Ex. 11, Vol. 12, Tabs 4-8 inclusive, are found email communications between RBC and TJ, a German investor, forwarded to Mr. Dhillon. Included are copies of an account summary TJ received from Dr. Uri Moelkner. An account summary on RBC letterhead shows a credit of €1,445,600. At Tab 6 is a communication from Securus Fund, L.P. ("**Securus Fund**"), 108 West 13th Street, Wilmington, Delaware, 19801, U.S.A.

[30] TJ confirmed to RBC that he had never heard of Shaun McErlean.

[31] In Vol. 12, Tabs 1-20, entered as Ex. 12, are email communications between RBC and one DH, representing a corporate entity JCNGNBH. TJ was inquiring about an RBC Acc. No. 102-8223 with a further account reference of 7205414. In Tab 14 at p. 63, is a letter on Securus Fund letterhead with an address of 29 Boo Lane, Pawley Islands, Georgetown, Delaware, U.S.A. to JCNGNBH over the purported signature of Shaun McErlean. Also included is a confidential private placement memorandum of Securus (Tab 17) and a limited partnership agreement of Securus Fund. The general partner is shown to be Oristi Holdings S.A. and a signature purported

to be that of Shaun McErlean is affixed. In Vol. 12, Tab 21, entered as Ex. 13, are a number of inconsequential emails.

[32] In Ex. 14, Vol. 12, Tabs 23-25 inclusive, are documents concerning Tobias Haessner, a witness in this proceeding, including emails, banking documents and account statements with reference to MT REG. Mr. Haessner sought confirmation that MT REG had an RBC Acc. No. 720 6920A, containing €1 million.

[33] At Tab 23, there is an email from Mr. Haessner setting out account numbers for each of TK, MT REG, RW, MVWP and EAEB. The evidence of Mr. Dickson of RBC will establish that these accounts were non-existent. At Tab 25, there is an email from Shaun McErlean to KM, a U.S. citizen living in Durham, North Carolina, and Mr. Haessner, in which Mr. McErlean complains about his loss, the misguided shady business people he got involved with and instructs them to inform all clients "that our business relation has come to an end. I will transfer all funds to the account details that I have on file. I'm done."

[34] The following Exhibits were also entered through Mr. Dhillon:

(1) Exs. 15, 15A and 16 containing email correspondence between Staff and Shaun McErlean;

(2) Ex. 17, Vol. 9, Tabs 1-10 inclusive being the transcript of Shaun McErlean's voluntary interview dated August 13, 2010;

(3) Ex. 18, Vol. 9, Tabs 11-14 being a transcript of Shaun McErlean's compelled interview dated August 20, 2010;

(4) Ex. 19, Vol. 2 in its entirety containing documents pertaining to Right Step Solutions Inc., Radical Rods, Rides & Restoration Inc. ("**Radical Rods**") and R3 Auto and Finance Inc. regarding customer profiles and various account statements and banking documents;

(5) Ex. 20, Vol. 10, Tabs 1-9 inclusive containing incorporation documents and bank documents referring to the companies set out in (4), above;

(6) Ex. 21, Vol. 5, Tabs 1-3, contains RT Wood Natural Energy Corp. documents;

(7) Ex. 22, Vol. 16, Tab 5 is a sales history report identifying the Securus real estate purchase from Emco Limited, a property in Barrie occupied by Securus interests; and

(8) Ex. 23, Vol. 13, Tabs 2-7 contains orders and directions of the Commission and the Supreme Court of Justice (Ontario).

[35] In cross-examination by Mr. McErlean, Mr. Dhillon acknowledged that he told Mr. McErlean at the end of his voluntary interview "We appreciate that you've come down, and you've been cooperative with us, and you answered our questions. We appreciate that."

[36] Mr. McErlean's cross-examination of Mr. Dhillon provides little assistance to the Panel. Understandably, Mr. McErlean was unfamiliar with the techniques of cross-examination and on many occasions attempted to put in evidence circumstances of which Mr. Dhillon was unaware.

His questions involved jumping from exhibits to exhibits without providing any clarity to the point Mr. McErlean was making.

[37] Considerable time was spent on asking Mr. Dhillon why he swore an affidavit that the false bank statements were prepared by Securus. Mr. Dhillon tried to explain that at that point in the investigation the name Securus was at the top of the documents. It was nothing more nor less than that.

[38] Ex. 24, Vol. 13, Tabs 8-10, contains certificates regarding Aquiesce, Securus and Shaun McErlean.

[39] Mr. McErlean also spent considerable time on the words "investment advisor" hand-written in the banking documents for Securus referred to earlier in these Reasons. We have concluded that the appearance of those words in the banking documents is not evidence that Mr. McErlean was advising investors.

[40] However, Mr. McErlean noted that Mr. Dhillon had sworn an affidavit that he, Mr. McErlean, acknowledged "that the investors who advanced these funds into the RBC account have generally promised a guaranteed rate of 5%." Mr. Dhillon was pressed on the point and finally acknowledged that nowhere in the voluntary interview did Mr. McErlean say there was a guaranteed return.

[41] During the cross-examination of Mr. Dhillon, Mr. McErlean entered Exs. 25-29. We find them of no value and they play no part in our decision.

[42] In re-examination, Staff entered Ex. 30, including investigative notes of Mr. Dhillon dated August 17, 2010. Entered as Ex. 31, was a transcript which was of no assistance to the Panel.

B. Richard Radu

[43] Mr. Radu is a Senior Investigator in the Enforcement Branch of the Commission. His evidence may be found in Tr. Vol. 3, pp. 67-122 and Tr. Vol. 4, pp. 16-95. From 1988 to 1999 he was a member of the Royal Canadian Mounted Police (the "**RCMP**"). For eight of those years he was in Commercial Crimes, specifically assigned to the Market and Securities Unit. Before he joined the RCMP, he was an assistant manager with the Bank of Nova Scotia in Saskatchewan.

[44] After familiarizing himself with the file on Shaun McErlean, he conducted a telephone interview with KM. He made notes of the interview and incorporated them in his will-say statement. KM is a U.S. citizen living in Durham, North Carolina. He met Mr. McErlean before January 2009 when Mr. McErlean worked at TD Bank. Sometime after their first meeting, Mr. McErlean called KM to advise that he wanted to leave TD Bank and start his own company. He asked KM to invest up to a $1,000,000 towards the $4,000,000 in total he felt he needed.

[45] KM told Mr. Radu he owned a dormant company, Securus Fund. He spoke with a friend of his, DF, about setting up an operation with Mr. McErlean to bring in clients. Finally a partnership was organized, including KM's friend, DF, Dr. Uli Moelkner and Mr. McErlean.

[46] Funds were to be deposited with Securus Fund and Mr. McErlean would be the trader, with zero risk to the clients. Mr. McErlean was to open an account in the name of Securus Fund and then open an account for each client and to provide appropriate documentation. KM told Mr. Radu that Mr. McErlean was to do all of the trading, that he never doubted Mr. McErlean; he knew Mr. McErlean's aunt, known as MI, very well.

[47] Following TK's investment, KM noticed the account was in the name of "Securus Capital Inc." and not "Securus Fund, L.P." Mr. McErlean told KM that they couldn't use the word "Fund" so he used "Capital Inc.". Mr. McErlean assured KM that Securus was in the name of the four partners but never did provide KM with confirming documentation. It was only later that KM discovered that Mr. McErlean had sole control of the Securus account.

[48] Following the creation of the partnership, KM discovered that Dr. Moelkner was involved in a law suit in Germany and so KM removed Dr. Moelkner from Securus Fund.

[49] Five clients provided approximately €1,000,000 for a total of €5,500,000. According to KM in his conversation with Mr. Radu, the sum should still be there. KM said that he received RBC records from Mr. McErlean regarding separate accounts for each client. However, when he contacted someone at RBC, he was told the Commission had frozen the Securus account on August 12, 2010.

[50] Mr. McErlean's aunt, MI, told KM that Mr. McErlean used Securus for other purposes of which KM was not aware. KM received no money from Securus on a monthly basis. An entity by the name of Cascade received three payments of $25,000 each. KM ended the interview by agreeing to provide Staff with documents. Mr. Radu subsequently received a wealth of documents from KM. The first set involved Investor MVWP, one of the investors shown on Mr. Dhillon's Source and Application of Funds. In Vol. 8, Tab 6 were three documents. A document entitled, Asset Management Agreement and Power of Attorney between MVWP and Securus Fund was entered as Ex. 32, Vol. 8, Tab 6, pp. 46-53. A second Asset Management Agreement and Power of Attorney was entered as Ex. 33, Vol. 8, Tab 6, pp. 54-61. This document was signed by MVWP and on behalf of "Secur Capital L.P." and "Secur Capital Inc." by S. McErlean and KM. A third document, a letter from MVWP to Mr. McErlean, was entered as Ex. 34, Vol. 8, Tab 6, p. 62 in which he purports to cancel his contract with Securus Fund.

[51] KM sent a further tranche of three documents. The first document is an account application to RBC Direct Investing Inc., signed by MVWP, entered as Ex. 35, Vol. 8, Tab 7, pp. 65-69. The second involves the communication to the Dresdner Bank, involving Investor MVWP transferring €1,000,000 to RBC Acc. No. 526 942A. No such account existed with RBC. This became Ex. 36, Vol. 8, Tab 7, pp. 70-71. The final document is described as a business account statement on the letterhead of RBC confirming over $1,000,000 in Securus Acc. No. 101-842-3, entered as Ex. 37, Vol. 8, Tab 7, p. 72.

[52] Documents involving Investor MT REG and Securus Fund were entered as Exs. 38-43 inclusive. Significant among the documents is Ex. 40, Vol. 8, Tab 4, p. 34, a letter on Securus Fund letterhead, to MT REG confirming the establishment of an account at RBC in Newmarket. The letter is signed by Shaun McErlean.

[53] Exhibit 44, Vol. 8, Tab 3 is a copy of an email from Shaun McErlean to KM enclosing a blank application form to open an account at RBC.

[54] Exhibits 45-56 are all found in Vol. 6, Tabs 3-5 and consist of emails and attachments referencing TK. The emails confirm that TK invested a total of €1,420,000 by transferring sums to Securus. The emails also confirm Mr. McErlean forwarded a fake RBC statement referencing TK's investment.

[55] Mr. Radu testified about a telephone interview he conducted with NK, a resident of Sedona, Arizona, in the U.S. NK said he invested USD $1,000,000 with Mr. McErlean and Securus to be invested in medium-term notes that are normally sold between banks. He was put in touch with Mr. McErlean by BS and MI. In June 2010, NK travelled to Toronto and set up an account at RBC over which he had control. He said he still has his USD $1,000,000. NK subsequently learned later in 2010 that the Commission had frozen the account.

[56] Subsequently, NK forwarded an email with eight attachments entered as Ex. 57, Vol. 8, Tab 10. In Ex. 58, Vol. 12, Tab 28 are documents confirming NK's interaction with the Commission's Contact Center.

[57] In Ex. 59, Vol. 12, Tab 27, are documents flowing from a complaint by VT regarding his account with RBC over which he retained control. He told the Contact Center that the account was opened with the help of BS and MI who, in conjunction with Mr. McErlean, offered a minimum investment return of 50% per month from a private placement program. BS and MI were identified as sharing 15% in the program. VT was looking for $2,500,000 from Mr. McErlean based on the promised return.

[58] Finally, Mr. Radu was referred to Vol. 12, Tab 26, entered as Ex. 60. Tab 26 contained documents with respect to the investment of ALLC. Mr. Radu spoke with Mr. A, a representative of AALC, and learned that there was no interest in pursuing ALLC's loss with the Commission. Mr. A declined to be interviewed.

[59] Mr. Radu identified a transcript of Mr. McErlean's compelled interview as conducted by Mr. Radu and entered as Ex. 61.

[60] Staff then entered Ex. 62, Vol. 11, all having to do with Mr. Bateman, a witness to be subsequently called.

[61] Mr. Radu was then asked about an interview he conducted with Ms. LK, a resident of Dubai. The interview was conducted on December 8, 2010 and Ms. LK was represented by counsel. Her voluntary interview was entered as Ex. 63, Vol. 6, Tabs 6 – 50. In addition, all

documents provided to Staff by Ms. LK during her interview at Commission offices may be found in Ex. 64, Vol. 7, Tab 1-9.

[62] In anticipation of LK attending to testify, additional documents were entered through Mr. Radu. Exhibit 65, Vol. 8, Tab 2 is a Securus Capital Private Investment Agreement between Securus and Ms. LK. Exhibit 66, Vol. 8, Tab 1 is a private treaty agreement between her and Cartol Limited.

[63] Exhibit 67, Vol. 8, Tabs 11-53 are the telephone records for Mr. McErlean's residence from January 2009 to September 2010.

[64] Exhibit 68, Vol. 9, Tab 16 is a CD-ROM containing PIN to PIN messages sent from Mr. McErlean's BlackBerry provided to Staff by Research In Motion.

[65] Mr. McErlean's cross-examination of Mr. Radu began by asking him to look at Ex. 25, Vol. 6, Tab 1, an Asset Management Agreement and Power of Attorney. Mr. Radu agreed that the font in the first seven pages of the document was quite different from the font on the signature page. Mr. McErlean then referred Mr. Radu to Ex. 25, Vol. 6, Tab 2, p. 28, which appears to be a stand-alone document in the form of a signature page, much like the one at p. 9 of Tab 1. Mr. Radu said he never questioned KM about the difference in the font size of the signature pages.

[66] Mr. McErlean asked Mr. Radu to examine p. 44 in Vol. 8, Tab 6. The document is an email with three attachments dealing with investor MVWP. At p. 46 is an Asset Management Agreement and Power of Attorney that appears to be signed on p. 53 by MVWP and Dr. Uli Moelkner on behalf of Securus Fund. At p. 54 in the same tab is a Asset Management Agreement and Power of Attorney. Once again, Mr. Radu was asked to compare the font size on the first seven pages of the document with the signature page found at p. 61. Once again, Mr. Radu agreed the font size was different. At p. 62 in the same tab is a letter addressed to Securus Fund at 108 West Thirteenth Street, Wilmington, Delaware, 19801, U.S.A. and beginning with "Dear Mr. McErlean". Mr. Radu was asked if he knew how Mr. McErlean received this letter or if he received it. Mr. Radu acknowledged that he did not.

[67] Mr. McErlean then produced 14 pages of hand-written notes made by Mr. Radu during the course of the investigation. The notes were entered as Ex. 69. The gist of his cross-examination on this point was to stress to Mr. Radu that KM was willing to attend for an interview but was never interviewed. After considerable questions and discussion, Mr. Radu acknowledged that KM was repeatedly asked to come and testify. KM continued to say he was willing to do so but never appeared. Also filed on the cross-examination was Ex. 70, a Document Case Assessment sent to Mr. Radu.

[68] The Panel took from Mr. McErlean's cross-examination of Mr. Radu that we will hear his explanations for the matters raised with Mr. Radu during the cross-examination. A number of inconsistencies were acknowledged by Mr. Radu but he, of course, could offer no explanation

for the changes in the font size of some agreements nor why KM apparently was unwilling to appear.

C. James Dickson

[69] Mr. Dickson is a Chartered Accountant and a specialist in investigative and forensic accounting. He is the senior manager for forensic accounting at RBC in the Corporate Investigation Services group. He performed the same function for KPMG in the preceding years before joining RBC.

[70] Mr. Dickson was asked if RBC received a number of requests from companies and individuals residing in Germany. Mr. Dickson stated that requests came in to confirm account balances or account statements for accounts they either held in their own name or as sub-accounts of Securus. The various documents that were provided to Mr. Dickson sometimes referred to Securus Fund and sometimes to Securus. All of the enquiries came from persons who believed they had advanced funds into accounts with RBC. Mr. Dickson's understanding was that the persons in Germany were making some sort of investment with Securus.

[71] Part of the documentation received included falsified RBC Account Statements. Mr. Dickson's review confirmed that they did not in fact represent true accounts held with RBC. He identified that the funds in fact were, for the most part, paid into accounts maintained by Securus at RBC. RBC decided to restrain the accounts and conducted a general overview of what had taken place and determined that just under $2,000,000 was remaining in the account at that point. The bank attempted to get in touch with Mr. McErlean, but was not successful and the matter was reported to the Commission.

[72] The investigation revealed that persons in Germany were not clients of RBC nor was Securus Fund. The evidence did establish that the persons in Germany had deposited funds in the account in the name of Securus.

[73] Mr. Dickson was referred to Ex. 9, Vol. 4, Tabs 1-14 inclusive containing the Securus documents provided to the Commission by RBC. Mr. Dickson confirmed that the documents were the type of documents completed by any company opening an account in the ordinary course.

[74] Mr. Dickson was referred to Ex. 5, Vol. 12, Tab 13, the Statement of Claim filed by ALLC, in which ALLC sued Mr. McErlean and, among others, RBC.

[75] Mr. Dickson confirmed that Aquiesce held an account with RBC. It was his understanding that ALLC had advanced funds to Mr. McErlean and/or Aquiesce for investment purposes in the approximate amount of $2,000,000.

[76] Mr. Dickson was then asked to examine a number of documents purporting to be RBC statements or referencing RBC account numbers. At the end of this exercise, he was asked to look at Ex. 14, Vol. 12, Tab 23, p. 191, which listed TK, MT REG, RW, MVWP and EAEB who appear in the Source and Application of Funds document set out earlier in these Reasons. For

each customer, an account number is shown and it was Mr. Dickson's evidence, which we accept, that the account numbers are false and do not exist at RBC. Mr. Dickson said that the customers listed are not customers of RBC. No accounts at RBC have an 'A' at the end of the account number.

[77] Mr. Dickson was taken to Ex. 14, Vol. 12, Tab 25, pp. 211-213 and 214, purporting to be "screenshots" of account statements presumably brought up on a computer screen. Mr. Dickson testified that none of the screenshots were genuine representations of an RBC account at the applicable dates. His investigation showed that all the screenshots were fakes.

[78] We took from Mr. Dickson's evidence that the only Securus account with RBC was Acc. No. 101-842-3 and any other representation with a different account number held by Securus was bogus.

[79] Mr. Dickson was then asked to review wire transfers from investors that were deposited into the Securus account, entered as Ex. 9, Vol. 4, Tabs 1-14. He confirmed that over $9,000,000 was credited to the account from individuals and entities offshore. In Vol., 4, Tab 4, he identified a wire transfer of CAD $1,480,000 into the account from TK. In Tab 5, he identified a wire transfer of CAD $595,980 going into the account from TK. In Tab 6, he identified a wire transfer of €999,972 going into the account from RW, representing CAD $1,410,560.50. In Tab 7, he identified the transfer of €1,000,000 going into the account from MT REG. In Tab 8, he identified a wire transfer for €1,000,000 going into the account from MVWP. In Tab 9, he identified a wire transfer for CAD $53,160 going into the account from TK. In Tab 10, he identified a wire transfer for USD $557,634 going into the account from Ms. LK. In Tab 11, he identified a wire transfer for USD $896,054.42 going into the account from Ms. LK, of which the Canadian equivalent was CAD $922,488.03. In Tab 12, he identified a wire transfer for USD $46,302 going into the account from Ms. LK, of which the Canadian equivalent was CAD $46,996.53. In Tab 13, he identified a wire transfer of €999,972 going into the account from EAEB, resulting in a conversion to CAD $1,310,963.29. In Tab 14, he identified a wire transfer of USD $1,049,968 going into the account from Ms. LK. Of that amount, USD $800,000 was purchased as a draft for payment to LLF Lawyers, who acted for ALLC. The draft for the $800,000 was created with the funds never going into the account. The balance of the funds after conversion to CAD $258,467 did go into the account.

[80] Mr. Dickson confirmed that as of August 9, 2010 the balance in the Securus account was $1,952,905.39. The account remains under restraint. Mr. Dickson said that RBC made one, possibly two attempts to meet with Mr. McErlean and he was either unavailable or unwilling to meet with an investigator.

[81] Mr. McErlean's cross-examination of Mr. Dickson was somewhat helter-skelter, directed towards establishing that Mr. McErlean was not trying to avoid a meeting with RBC. This was of little help to the Panel.

[82] However, Mr. McErlean directed Mr. Dickson to Vol. 12, Tab 6, p. 29, where TJ writes to Mr. Barbour of RBC to this effect: "here are the copies of the account summary we got from

Dr. Moelkner. There were 11 summaries from Chadstone, this was the first one." Mr. Dickson was then referred to p. 31 in Tab 6 where appears a purported business account statement on the letterhead of RBC. The statement shows an Acc. No. 101-842-2, the account in the name of TJ and HJ. The balance in the account is shown as €1,445,600. Mr. Dickson confirmed that the statement was bogus and that the sum of €1,445,600 went into the Securus account, not into an account purportedly controlled by TJ and HJ.

[83] Mr. Dickson was then referred to Vol. 12, Tab 9, p. 45, a letter from TJ addressed to the head office of RBC. TJ writes "Allegedly our trustee, Dr. Moelkner (Securusfund) established a bank account with the Acc No. 03342-101-842-2 for me, TJ and my wife, HJ with the Royal Bank of Canada." TJ goes on to ask for an acknowledgement of the account and the amount of the money which is deposited into the account. Mr. Dickson confirmed that this was not a RBC account.

[84] Staff counsel then returned Mr. Dickson to Ex. 9, Vol. 4, Tabs 4-14. Once again, Mr. Dickson identified these as copies of the wire transfers from investors that were deposited into the Securus account. He confirmed that Euro dollar amounts were converted to Canadian funds and U.S. dollar amounts were also converted in the same manner. The dollar amounts reflected the amounts credited to the various investors in the Source and Application of Funds document reproduced earlier in these Reasons.

[85] Mr. Dickson also confirmed that the wire transfer by Ms. LK of $1,049,968 was the subject of two drafts, one for USD $800,000 paid to LLF Lawyers and the balance deposited into the Securus account. Mr. Dickson also confirmed that as of August 20, 2010 the balance in the Securus account was $1,952,905.39.

[86] Mr. McErlean's cross-examination of Mr. Dickson did not assist the Panel.

D. Tobias Haessner

[87] Mr. Haessner is a resident of Crailsheim, Germany and is self employed. He has a degree in political science and subsequently obtained a degree in marketing from the Free University of Berlin.

[88] In 2009, Mr. Haessner met DF, a man with a background and contacts in Africa, specifically African governments. It had always been his goal to develop projects and help finance projects in Africa. Mr. Haessner started to work for DF in 2010. He was to research and investigate different kinds of projects, including renewable energy, solar thermics and geothermics. He ordered feasibility studies, visited scientific congresses and studied the appropriate literature. The plan was to open an office in Botswana in 2010. DF told Mr. Haessner he had some experience in trading, particularly in certain kinds of project financing involving medium-term notes and senior unsubordinated bank debentures. When he started with DF no money had yet been raised for the intended projects.

[89] DF had contacted Uli Moelkner, an alleged friend who claimed to have access to some "really rich clients". Also, in January 2010, another contact was made with Shaun McErlean

who thought he could access RBC and get involved in trading. Shortly put, Uli Moelkner was a fraudster and involved in criminal behaviour. He had no access to financing. Following his arrest in July 2010, he was sentenced to seven and a half years in prison.

[90] In the fall of 2009, DF had been introduced to Mr. McErlean by KM, a resident of the United States. The introduction was via email and telephone; KM never met Mr. McErlean in person. The same was true of Mr. Haessner who got to know Mr. McErlean through email.

[91] A company was established by Uri Moelkner, KM, DF and Shaun McErlean. The company, named Securus Fund, was formed to trade in medium-term notes with funds to be invested by clients, not by Uri Moelkner. During the first month in 2010, it became clear that Mr. McErlean established a second company, Securus, in Canada. Mr. Haessner said it should have been a subsidiary of Securus Fund but that never happened.

[92] The investment plan communicated to clients in Germany was such that their money would be collected and bundled at several sub-accounts at RBC in order to achieve trading power at the main account of Securus. Mr. McErlean told DF and KM that he was able to earn profits, approximately 20% per month. The intention was that a client would receive 5% of the 20% monthly sum, earned or accumulate the 5% monthly, with the balance to be divided among the shareholders and then to be used for project financing. There was no breakdown of how the profits would be distributed amongst the various parties. During the first months, KM, DF, Shaun McErlean and Uri Moelkner received €25,000; another €40,000 went into project financing. There was no written agreement about what would happen with the money.

[93] Five investors put approximately €5,500,000 in the scheme. They were told that they would get their own accounts or sub-accounts at RBC. After completing the account application information at RBC, Mr. McErlean provided DF and Mr. Haessner with an account number. Mr. McErlean wired instructions saying that the money goes to the main account at Securus but for credit to or for the benefit of the named client and in a sub-account number for that client. Shaun McErlean sent RBC account opening forms to Germany and the client filled them out; the forms were returned to Mr. McErlean who provided an account number for that client. The sub-account number was in turn forwarded to the client who then carried out the actual transfer of the funds to the Securus account by wire transfer. All account statements for the client were received from Mr. McErlean, never from RBC. It was originally planned that all clients would get their own internet banking and access at RBC as represented by Mr. McErlean. Later on, he said that RBC had technical problems; for that reason Mr. McErlean provided screenshots of internet banking accounts and account statements.

[94] Account statements were only in the name of Securus and not in the name of the client. Delays developed in timely payments of the monthly sums promised and Uri Moelkner became belligerent in seeking payments for the clients he introduced. Mr. Haessner wrote Mr. McErlean, KM and DF stating that he was unwilling to continue to work in the environment created by arguments over timeliness. In turn, Mr. McErlean wrote that the corporation was coming to an end and he would send all the money back to the clients. Ultimately, the matter was brought to the attention of the Commission.

[95] Mr. Haessner was taken to Vol. 15, Tabs 1-12 inclusive which contained a series of email communications from Mr. McErlean to Messrs. Haessner and DF and corresponding emails in reply. Included in the material furnished by Shaun McErlean regarding the clients' accounts with RBC are fake screenshots and fake account statements as identified earlier by Mr. Dickson. The emails reveal a picture of clients in Germany wondering where there money was, why they were not receiving confirmation of their sub-account, and why they were not receiving monthly payouts. It is obvious to us that Mr. McErlean was doing everything in his power to put off the inevitable discovery of his deception by using fake RBC bank statements and fake RBC screen shots of the account.

[96] Mr. McErlean's cross-examination of Mr. Haessner did not assist the Panel.

E. Ms. LK

[97] Ms. LK has been a resident of Dubai, United Arab Emirates, for the past 15 years. She owns two companies in Dubai, one which buys and sells commodities, the other active in real estate. Her evidence may be found in Tr. Vol. 8, pp. 4-81.

[98] LK confirmed that Mr. Richard Radu of the Commission emailed her in the fall of 2010. Arrangements were made for LK to come to Toronto in December 2010 to be interviewed at the offices of the Commission. She brought with her a book of documents containing all the relevant documents and emails with people she dealt with involving her investment with Securus.

[99] She was asked to examine Ex. 64, Vol. 7, Tabs 1-9, and she confirmed that it contained the documents involving Securus.

[100] LK described how she met two persons, named Steve Carleson and Benny Tolentino, while in the United Arab Emirates. Mr. Carleson was from the United States and Mr. Tolentino from the Philippines. She described Mr. Carleson as a retired banker who was trading in financial instruments. Messrs. Carleson and Tolentino told her "a lot of stories" about how well they were doing in investing in financial instruments. Ultimately, LK signed an agreement with Cartol Limited, a company owned by Messrs. Carleson and Tolentino (Ex. 64, Vol. 7, Tab 1, pp. 2-7). The agreement called for LK to invest USD $1,500,000 "as collateral in a matched funds program and private placement transaction". She was required to complete a set of "compliance" documents, apparently to satisfy international banking regulations. She was also required to complete an application for an account with RBC. It was explained to her that her investment would be held by the bank in a separate account controlled by her as collateral for the investment program. Once all the documents were completed to the satisfaction of Messrs. Carleson and Tolentino, LK was passed on to one Brian Smith, located in the United States, and described as the owner of the trading platform. Her communication with Brian Smith was entirely by emails.

[101] Brian Smith explained to Ms. LK that her initial attempt to open an account with RBC was unsuccessful because it should have been sent to Securus. She was assured that she would have access to the account and that she would receive the profit from her investment weekly.

[102] Having sent $1,500,000 to Securus, LK repeatedly asked who her manager was at RBC and who the trader was. She kept getting put off by Brian Smith. Ultimately, she asked to receive a "screenshot" of her account. It was at this point she learned that the trader was Shaun McErlean and that her funds were deposited in the Securus account with RBC. In Ex. 64, Tab 1, pp. 50-52, are three transfer of funds documents evidencing LK's investments in Securus totalling USD $1,500,000 and referring to her RBC Acc. No. 5147894A. As we learned earlier from Mr. Dickson, this account did not exist. At Tab 1, p. 49, there is evidence of a further approximately USD $1 million transferred to Securus, again referencing the same bank account with RBC 5147894A.

[103] LK testified that after she transferred USD $1,500,000, in June of 2010 she was never able to get access to "her account". She received countless excuses from Brian Smith and subsequently from Shaun McErlean. In Ex. 64, Tab 2, are a series of emails from Brian Smith to LK. They confirm LK's evidence that she received nothing but excuses from Mr. Smith as to why it was not possible to have her account with RBC and not have the money under the control of Securus.

[104] In Ex. 64, Tab 9 are 80 emails from LK to Shaun McErlean, running from July 15, 2010 to December 1, 2010. The overall tenor of the emails is LK's demand that she receive confirmation that her funds were secure and under her control. Not until November 6, 2010 did she finally lose patience and threaten legal action.

[105] In Ex. 64, Tab 8 are copies of 76 emails sent by Shaun McErlean to LK. Each email is either designed to reassure LK that her money was in a separate account with RBC, or to explain why the separate account did not materialize.

[106] From July 8, 2010 to September 2, 2010, Shaun McErlean sent 23 emails either promising LK she would receive confirmation of her separate account with RBC, or putting off her inquiries. The Commission's temporary cease-trade order against Securus was issued August 12, 2010. No mention of this was disclosed to LK until September 3, 2010, over three weeks later.

[107] On September 3, 2010 Shaun McErlean emailed LK confirming the existence of the temporary cease-trade order. Since this "had made conducting business extremely difficult", he told LK "I'm looking to move in a different direction". He explained he was looking for a single partner in his business venture, and then offered the opportunity to LK.

[108] From September 3, 2010 to December 1, 2010, Shaun McErlean sent a further 53 emails to LK, promising a resolution of her matter, while still describing the business plan in which he invited her to participate.

[109] We find the emails to be total fabrications on the part of Mr. McErlean designed to explain why the banking problem could not be solved. The various excuses all bear the classic hallmark of a consummate fraudster attempting to put off the inevitable discovery of his scheme.

[110] Ms. LK has not recovered any part of the USD $2,500,000 she transferred to Securus.

F. Jack Bateman

[111] Mr. Bateman lives in Newmarket and is a certified electrician. In the Fall of 2008, he incorporated a company called Warrior One MMA Ltd. ("**Warrior One**"), of which he was the sole shareholder and director. The company put on live events for mixed martial arts exhibitions. He staged three such events in 2009 in the province of Québec. He estimated it took $200,000 to $250,000 to put on one such event. He financed the events through himself and through his family.

[112] Mr. Bateman met Mr. McErlean in the fall of 2009. He learned that Mr. McErlean had a business that developed underfunded and understaffed companies such as his. In the early spring of 2010, Mr. Bateman called on Mr. McErlean because he was looking for a partner to help put on the events. This, he said, involved a tremendous amount of work. The work included booking the venues, hiring the fighters, organising television contracts and sponsorships. For the three events in 2009, Warrior One paid the expenses, including those sums paid in advance by way of deposit. Revenue came from ticket sales and merchandise.

[113] Mr. Bateman said that originally a small amount of money came in to Warrior One's account to pay for expenses but the revenue never came into the company. After 2009, Mr. McErlean was funding expenses outside Warrior One and paid them directly to whomever money was owed. The bulk of the revenues did not come to Warrior One, to the effect that everything was being done outside the company.

[114] The first show in 2010 was put on in Montréal. It was not a financial success because, Mr. Bateman said, the promotion of the show was not done correctly. He said Mr. McErlean and his company, Dreams to Reality, had taken over that portion of the responsibilities. There was also a problem with lack of alcohol at the event – alcohol was neither ordered nor delivered.

[115] Mr. Bateman then embarked on a story that has all the earmarks of bad crime-fiction. Following the second show in Halifax, Mr. Bateman picked up a cheque from Halifax Regional Municipality for $27,000 in favour of Warrior One. After he picked up the cheque, a gentleman he believed to be with the Italian mafia drove to his house in Newmarket. Having learned from his father of the man's arrival, Mr. Bateman called some police friends in Newmarket who sent an undercover officer to sit across the street from Mr. Bateman's house. The man from Montréal told Mr. Bateman that he was owed $5,000 and that if he didn't have the money by 12 noon on Friday that he and his colleagues would kill Mr. Bateman.

[116] Mr. Bateman called Mr. McErlean and told him of the threat he received. Mr. McErlean called back the same night and said, "it was dealt with". Mr. Bateman then had a call from the man from Montréal saying that it had not been dealt with. Eventually Mr. McErlean told Mr. Bateman to come and pick up a cheque. The cheque may be found in Vol. 11, Tab 3, pp. 67-68. The cheque is made by Halifax Regional Municipality payable to "Warrior I" for $27,297.01. On the back is Shaun McErlean's signature and an endorsement which reads, "signed over to Right Steps Solutions Inc. by Shaun McErlean, owner of W-1. Loan Repayment". Mr. McErlean told him to take the cheque and cash it and pay the man from Montréal and pay the

remainder of the expenses left over from the Halifax show. Mr. Bateman completed his story by saying he set up a sting with the Organized Crime Unit of the York Regional Police so that when the man from Montréal met him at the bank, Mr. Bateman handed over the cash while the crime unit filmed the meeting.

[117] In cross-examination, Mr. McErlean recalled to Mr. Bateman that Mr. Bateman received $100,000 by way of loan from Aquiesce. Mr. McErlean drew his attention to Vol. 1, Tab 29, p. 336, the bank statements for Aquiesce, showing a transfer from Aquiesce for $100,000 on September 1, 2009. He then referred Mr. Bateman Vol. 1, Tab 29, p. 342 showing $100,000 deposited into the TD Canada Trust account of Warrior One. Mr. Bateman said that his original evidence was mistaken and apologized.

III. RESPONDENT WITNESSES

A. Shaun McErlean

[118] Shaun McErlean lives in Newmarket, Ontario with his wife, Sarah McErlean. At the beginning of his testimony he told the Panel he was going to include a lot of information which might not seem relevant. He also assured the Panel that at some point it would become relevant. He certainly carried through with his first assurance; he was less successful with his second.

[119] Mr. McErlean described his attendance at the University of Western Ontario where he obtained a degree in administrative and commercial studies. Following university, he took a position with CIBC as a customer service representative in October, 2002. He moved to CIBC Private Banking and became licensed with the Mutual Fund Dealers Association. In October of 2004, he moved to CIBC Wood Gundy and had his Commission certification upgraded to a Registered Representative. Over the next four years, Mr. McErlean "won every investing award that CIBC Wood Gundy had to offer."

[120] In 2008, Mr. McErlean said that the economic downturn caused him to consider his occupation. He couldn't handle watching people in his portfolio lose money based on the recommendations he made. His attendance at work became sporadic; he missed trades and trader reports. Whatever errors he made, he covered from his own money; he did not disclose the majority of those errors that occurred in November and December of 2008.

[121] In January, 2009, CIBC Wood Gundy suspended Mr. McErlean for not disclosing an outside business activity and for what they deemed to be irregular banking activities. In April of 2009, Mr. McErlean learned that Investment Industry Regulatory Organization of Canada ("**IIROC")** wanted to conduct a voluntary interview with him. Mr. McErlean told IIROC that CIBC had all of the answers that they were looking for and more.

[122] Mr. McErlean then described a business plan he chose to pursue, a plan developed by him and his wife. He described in considerable detail the plight of the small business person who had "no clue how to operate the day-to-day aspects of a business." These small business owners found financing difficult and Mr. McErlean, as a business consultant, would help these business owners.

[123] In December, 2008, Mr. McErlean set up a sole proprietorship under the Ontario *Business Names Act* called Aquiesce, mentioned earlier in these Reasons in paragraph 7. Aquiesce would provide financial consulting services and financial resources necessary to allow small-sized companies to become successful. In lieu of a fee, Mr. McErlean was looking for a percentage of those companies. He found that raising money for Aquiesce was difficult. In the end he relied on assistance from his parents, loans from aunts, uncles, family friends and a few former clients from Wood Gundy. He began what he called the "buy in process" of the first of his companies, Radical Rods. That company was owned by his father-in-law and was engaged in renovation and repair of classical cars.

[124] Mr. McErlean described his efforts to obtain capital from a number of investors ending up with CK, who had a network of six to eight individuals with cash-flow. CK introduced them to him in May, 2009. There were three in particular: ALLC, who advanced USD $2 million; Mr. AW who advanced USD $1 million; and a gentleman named JG, who never advanced anything. Mr. McErlean stated he was "astounded" when CK arranged to have USD $ 2 million transferred to the Aquiesce business account at TD Bank. He said he was only looking for $750,000 to $1 million. He used $570,000 to consolidate all of the small loans that he had taken from family and friends and $1.4 million was placed in an account at TD Waterhouse in the name of Aquiesce.

[125] CK arranged for AW to forward USD $1 million into the Aquiesce account. AW chose to have his money sent back to him within a few months. Mr. McErlean said AW was re-paid the USD $1 million plus something for interest earned during the time he controlled those funds. A considerable amount of time was spent in identifying the transfer of funds to AW over a period of several months. Considerable time was spent identifying when the repayments were made. Mr. McErlean later produced a document (Ex. 73) showing AW was re-paid USD $1 million in five payments ending September 14, 2009. The same exhibit shows repayments to ALLC of USD $ 2 million on July 20 and July 28, 2010.

[126] Mr. McErlean completed his evidence on Aquiesce by testifying that everything was informal, there were no written agreements and there was no description of what any bonus or incentives would have been. He acknowledged that his arrangement with these investors wasn't professional and that mistakes were made.

[127] In August, 2009, Mr. and Mrs. McErlean turned their attention from Aquiesce and took their original concept of assisting small business owners "to the next level". Mr. McErlean incorporated Right Step Solutions Inc. ("**Right Step**") and secured a website. There were to be three parts to the website: companies that the McErlean's partnered with whose dreams they were helping to become a reality; people who had done something to achieve their dream and a charitable section where they would help someone else achieve some type of dream. The Panel heard considerable evidence about their efforts carrying out charitable works, evidence which does not assist us. Towards the end of 2009, Mrs. McErlean left her employment to work with Right Step full time.

[128] Mr. McErlean then told us of his first meeting with Dr. Uli Moelkner and DF. They were introduced by KM, someone Mr. McErlean had met earlier. He described Dr. Moelkner and DF as successful businessmen engaged in African projects of a humanitarian nature. Mr. McErlean said it made sense for him to move forward in a working relationship with Dr. Moelkner and DF. To this end, KM signed over 75% of his hedge fund, named Securus Fund, to Dr. Moelkner retaining 25% for himself, DF and Mr. McErlean. Mr. McErlean was asked to incorporate a company in Canada which he did, Securus, wholly-owned by Mr. McErlean. The intention was that Dr. Moelkner would arrange for investors that he knew to transfer funds to Securus. Mr. McErlean described the plan as one where he would do his business in Canada, Dr. Moelkner, KM and DF would run the African projects and any non-Canadian business, with DF to be responsible for ensuring that the investing clients were happy.

[129] We heard considerable evidence about attempts to carry out projects, humanitarian and otherwise, in Africa. That evidence is of no assistance to us.

[130] On February 1, 2010, the first transfer from the German clients of Dr. Moelkner arrive from someone known as TK. He sent €1 million to Securus. The total received by Securus from four German investors are shown on Ex. 10 (Vol. 13, Tab 1, p. 1) as follows:

TK (three transfers)	$2,129,140
RW (€999,972)	$1,410,560
MT REG (€1 million)	$1,390,700
MVWP (€1 million)	$1,369,400

[131] In March of 2010, Mr. McErlean received a telephone call from one Brian Doherty who warned him about Dr. Moelkner whom he described as having a very bad reputation for walking away with people's funds. He decided to look into Dr. Moelkner's reputation in Europe and drew his concerns to the attention of DF. DF responded with a glowing defence of Dr. Moelkner. To make a long story short, Mr. McErlean, KM and DF finally learned that Dr. Moelkner was indeed dishonest, and had been tried and convicted of fraud.

[132] Mr. McErlean spent day two testifying about the application of funds shown on Ex. 10, (Vol. 13, Tab 1, p. 1), entitled Source and Application of Funds for the Securus bank account number 03342-101-842-3 for the period December 22, 2009 to August 9, 2010. It will be recalled that this document was prepared by Mr. Dhillon.

[133] Mr. McErlean first drew the Panel's attention to evidence supporting the payments to ALLC against the funds advanced by ALLC of USD $2 million. In addition to the $1,049,700 shown on Ex. 10 as paid to the lawyers in trust for ALLC, Mr. McErlean produced evidence, which we accept, showing that all the sums payable to ALLC by way of settlement included an annual interest rate of 10%. Similarly, Mr. McErlean filled in a hole in his earlier testimony that satisfied the Panel that entire sums owing to AW were returned to him. Mr. McErlean then testified as to sums invested in R3 Auto and Finance Inc. and what he expected to recover by way of the monthly payments were the sums loaned to the high-credit risk borrowers. He did not dispute that Securus advanced $717,007 to R3 Auto and Finance as shown on Ex. 10. We find

ALLC and AW were repaid with money advanced by subsequent investors in Securus, such as Ms. LK.

[134] Mr. McErlean described his participation in RT Wood Natural Energy Corp ("**RT Wood**"). Mr McErlean disputed the amount of $389,000 advanced to RT Wood as shown on Ex. 10. His evidence satisfied us that Securus advanced $934,000 to RT Wood.

[135] Mr. McErlean then turned to the payments shown on Ex. 10 to MD and AD in the amount of $75,000, together with a single payment of $20,000 to RS. These sums, Mr. McErlean explained, were spent to acquire Barrie Core Wellness. Mr. McErlean confirmed that the total paid to MD and AD and RS for the interest in Barrie Core Wellness was $135,000, which purchased a 50% interest in the business for Right Step.

[136] Mr. McErlean then dealt with the purchase of a building in Barrie to be used by his father-in-law's company, Radical Rods, as well as R3 Auto & Finance and a few other companies. We took from Mr. McErlean's evidence and from Ex. 78, filed, that the total amount expended by Securus to acquire the Barrie property for Radical Rods and others was $1,181,000 approximately.

[137] Mr. McErlean introduced Ex. 80 purporting to be a list of expenses incurred by Securus in promoting the Warrior One exhibitions. The expenses total $1,107,000 approximately and Mr. McErlean testified that the income from the exhibitions was $692,000 approximately after making allowances for repayment of HST. Mr. McErlean estimates the loss on the promotion to be in the neighbourhood of $300,000.

[138] It should be borne in mind that these conclusions by the Panel do not begin to adequately describe the fractured, complex and sometimes incomprehensible testimony of Mr. McErlean. This, we find, to be partly explained by the lack of documents setting out the relationships, the obligations and the agreements for loan repayments, etc. that one would expect to find. It may be further explained by Mr. McErlean's unfamiliarity with presenting evidence in a manner of this kind. Nevertheless, we are satisfied on the balance of probabilities given by Mr. McErlean that the figures referred to earlier in the testimony given on day two to be close to accurate.

[139] On March 30, 2012, Mr. McErlean appeared and asked for an adjournment as his father had fallen ill. The matter was adjourned until Monday, April 2, 2012 at 11:00 a.m.

[140] Mr. McErlean appeared with a number of lending agreements and other documents relating to the various companies in which Securus had invested money. They were entered as Exs. 84 – 92. The Panel identified them all as non-arms-length lending agreements and the documents speak for themselves. Nothing further produced or spoken by Mr. McErlean was of any assistance to the Panel. Cross-examination by Mr. Britton started after the lunch recess.

[141] In cross-examination, Mr. Britton, Staff counsel, began by confirming Mr. McErlean's employment with CIBC Wood Gundy. He obtained confirmation that of the $2 million advanced to Aquiesce, $570,000 approximately was used to pay off relatives and former clients who had advanced money to him. He further obtained confirmation that Mr. McErlean

transferred about $1.4 million from the sums advanced into a trading account at TD Waterhouse, which he used to trade equity. A further USD $1 million from AW was also transferred into the trading account. Mr. McErlean confirmed that it was clear that AW and ALLC were advancing money to him to invest in enterprises that Mr. McErlean thought would be profitable and that they would be repaid out of the profits earned by his investing.

[142] Mr. Britton took Mr. McErlean through the events leading up to his engagements with Dr. Moelkner, DF and KM. Mr. Britton then embarked upon a long series of questions centered on emails purportedly sent by Mr. McErlean to KM, DF and Dr. Moelkner. The series of questions are found at Tr. Vol. 12, pp. 60-133.

[143] A pattern of the examination was established early on when Mr. McErlean was asked about a certain email, purportedly from him to AM dated October 26, 2009. Mr. McErlean declared it to be a forgery. He explained that the emails originated on DF's computer. It was put to Mr. McErlean that his evidence was to the effect that DF, or someone, composed fraudulent emails and forgeries. Mr. McErlean replied that this was so.

[144] The cross-examination continued with specific references to individual emails. The pattern of response was that emails apparently damaging to Mr. McErlean's defence were declared to be forgeries and those emails either neutral or in his favour were identified as being genuine.

[145] Mr. Britton then turned his questions to the relationship between Mr. McErlean and LK. Mr. McErlean confirmed that his aunt, MI played a part in introducing LK to him, along with BS and KM. Mr. McErlean was asked to look at the agreement between Securus and LK found in Vol. 7, Tab 1, p. 43. The agreement had been provided to Staff by LK. Mr. McErlean's attention was drawn to a clause in the agreement which recited that the funds loaned by LK would remain under the investor's sole control during the period of the agreement. Mr. McErlean testified that the clause was not in the agreement that he prepared and sent to BS. He said either BS or KM changed the agreement he forwarded to them. Mr. McErlean also said the initials at the bottom of each page of the agreement were his, that certain clauses were added, which were not in the original document he forwarded to BS. He concluded by confirming that the document was a forgery. There then followed a series of questions involving LK's attempt to open a bank account with RBC in order to retain control of her funds. Various emails and documents indicating that Mr. McErlean was attempting to get the funds transferred to the Securus account were shown to Mr. McErlean. The same pattern of questions and answers continued; if there was an email or document, which apparently contradicted Mr. McErlean's position in this matter, he declared it a forgery. If a document was neutral or supported his position he acknowledged its authenticity.

[146] Mr. Britton's continued cross-examination of Mr. McErlean centered on the relationship between Ms. LK and Mr. McErlean. Mr. McErlean was referred to numerous emails and telephone records that seemed to indicate that Mr. McErlean was deceiving LK about where her funds were. Mr. McErlean's responses continued to follow the same pattern as the previous

days' cross-examination. If her emails alleged misrepresentations by Mr. McErlean that were harmful to his defence, he declared them to be forgeries.

[147] One exchange from this portion of the cross-examination gave the Panel an inkling of how Mr. McErlean approached his relationships with investors:

> Q: You told her I'm wiring you your funds; they'll be there whenever, when you didn't have the money?
>
> A: Officially, no.
>
> Q. Officially? What is officially? You didn't have the money, right?
>
> A. I went to various people looking to raise enough funds, and in October of 2009, there was an investment group in Washington DC which was exceptionally interested in our natural energy company. They were looking to invest funds with us which not only would [LK] have been repaid, everybody would have been repaid. Nothing ever came of that.
>
> I was told two to three times: Funds are en route; funds are en route. I even provided a copy of the contract for [Mr. F]'s partner to look at the contract to make sure that it was going to be legit, as opposed to doing things like I used to do them, and more official, and the funds never arose despite how many times I was told that they were sent.
>
> And unfortunately, throughout this entire process, if somebody tells me they're going to do this, I believe them, and unfortunately, in many instances, I will turn around and convey that message to somebody else.

[148] This answer is typical of many of Mr. McErlean's responses. His explanation for his seemingly deceitful actions were either his signature was forged, someone changed documents without his knowledge, or his inability to pay was someone else's fault.

[149] Mr. Britton concluded his cross-examination by obtaining confirmation of payments made by Mr. McErlean to a number of relatives and friends from whom he borrowed money, and, in addition, to former clients from CIBC Wood Gundy who loaned him money.

[150] Finally, it was put to Mr. McErlean that IIROC commenced a proceeding against him alleging he personally compensated two of his clients for losses in their accounts without knowledge or approval of his member firm, CIBC Wood Gundy. IIROC further alleged he made discretionary trades in the account of a client without first having the client's written authorization or having the account approved as discretionary by CIBC Wood Gundy. The IIROC Panel found the allegations were established.

[151] In response, Mr. McErlean gave a long explanation why he was unable to mount a proper defence because CIBC Wood Gundy had lost a hard drive. He is currently intending to appeal IIROC's decision.

[152] The matter was adjourned to Thursday, April 5, 2012 for Mr. McErlean's re-examination.

[153] Mr. McErlean began his re-examination of himself by offering an explanation of why it appeared he was misleading LK as to transfer of her funds in Securus to her. He said his intentions were sincere but the timing of the extension of the cease-trade orders that froze the Securus bank account made it seem as if he was misleading LK. He offered an explanation for signing a Securus Fund document indicating he was an officer. He explained that he was excited. He acknowledged he should not have signed it based on some of the wording in the document.

[154] He then referred to Vol. 1, Tab 1, p. 67, a bank account of Aquiesce. The document shows a series of transfers into the account via email. These transfers, Mr. McErlean said, were examples of funds that were deposited by individuals who were providing him some of the capital he needed up front, which he would later be repaying. These investors were mainly family and friends. The information was produced to show that the funds from the sale of a house property by the McErleans were used to pay business expenses. The proceeds of the house sale were ultimately intended to build a swimming pool.

[155] There then followed a series of payments identified by Mr. McErlean in Vol. 3, Tab 3, p. 49 and following, which he described as repayments of loans made to him or investments in the various businesses, most of which were operated by family members. He acknowledged that his business accounts and personal accounts were "co-mingled". This concluded Mr. McErlean's evidence.

B. John Ford

[156] In 2000, Mr. Ford graduated from the International Academy of Design and worked in Toronto building websites.

[157] Following a meeting with Mr. McErlean, Mr. Ford's company, 33rd Design, was formed with Right Step having a partial interest. The new company does all the design for the companies that Right Step has an interest in. While the company was getting off the ground, the McErleans proposed that Mr. Ford live with them in lieu of salary. In addition, he was provided with the necessary equipment to produce print design, video and marketing. Mr. Ford described the work he did for Radical Rods, RT Wood and Warrior One, among others. It was Mr. Ford's opinion that all of the companies that Right Step was involved in were doing well.

[158] In cross-examination, Mr. Britton drew his attention to numerous payments going into his bank account from Securus in varying amounts. Mr. Ford was extremely vague as to the reason for these payments, but he assumed they represented salary and sometimes dividends from Right Step. Mr. Ford's evidence only confirmed what we already knew – that funds from Securus were supporting Mr. McErlean's investment enterprises.

C. Shande Alexi Mizzi

[159] Ms. Mizzi started working with Right Step in February of 2011. Her current responsibilities include the day-to-day operations for R3 Auto and Finance. She also does any day-to-day activities that need to be done as far as administration for Right Step. She estimates she puts in 37 hours a week.

[160] Ms. Mizzi was shown a document that set out all the R3 Auto and Finance clients, their monthly payments, the registration numbers for their liens and the total loans each client maintains. There were approximately 70 loans outstanding.

[161] Ms. Mizzi was asked about Right Step Renovations, which as it turned out, was operated by her boyfriend with whom she has been together for seven years. Evidently, the boyfriend, Allan Rewega, originally worked on the renovations for Radical Rods.

[162] In cross-examination, Mr. Britton asked one question – was Allan Rewega related to Mr. McErlean. She replied that Sarah McErlean, Mr. McErlean's wife, is Allan Rewega's sister. That concluded the cross-examination.

D. Joni Rewega

[163] Ms. Rewega is Mr. McErlean's sister-in-law. She has recently taken on some bookkeeping duties for Right Step. She works with the Barrie Core Wellness Center and has been there for approximately five years. She confirmed previous testimony about Right Step's purchase from MD and AD and Right Step's acquisition of a partial ownership in the wellness centre.

[164] Ms. Rewega also did volunteer work for Warrior One and its attempts to get off the ground.

[165] In cross-examination, Mr. Britton asked if she knew the net revenue of Barrie Core Wellness Center – she replied she did not.

E. Gary Nicholls

[166] Mr. Nicholls is Mr. McErlean's father-in-law and is in charge of Radical Rods. He described in considerable detail the acquisition of the property in Barrie and the renovations and additions undertaken to enlarge the building to 17,000 square feet. An email sent by Mr. McErlean to Mr. Britton with attached photographs dated August 26, 2010 was introduced as Exhibit 98. Mr. Nicholls described the work that was carried out as indicated in the photographs.

[167] Mr. Nicholls attention was drawn to a number of payments to various entities which he described as directly connected with the renovations and equipment required for the operation of Radical Rods.

[168] Mr. Nicholls concluded his evidence by acknowledging that the operation of Radical Rods was "breaking even".

F. Sarah McErlean

[169] Ms. McErlean graduated from Humber College in the fitness and health promotion program and worked in that area until October 2009. She has worked for Right Step and in the latter five months has also been working with Lululemon Athletica. She confirmed Mr. McErlean's evidence that Right Step was intended to help people follow their dreams and to inspire others to do great things with their lives. She said that Right Step was not taking on new clients for the present. Right Step is focusing on the people and its companies in which it currently has an interest.

[170] Ms. McErlean confirmed that Right Step operates out of the McErlean home in Newmarket and that, currently, John Ford and Shande Alexi Mizzi work out of that location. Mr. McErlean also confirmed the agreement whereby Mr. Ford lived in the house for a while and recently moved. Ms. McErlean described her role with Right Step as recruiting staff, managing the day-to-day operations, marketing, event planning and preparing administrative documents. In addition, she prepares the content, writing and copy writing for the websites. She works with Mr. Ford to make sure the marketing strategies are prepared for each of the businesses.

[171] Ms. McErlean described the efforts of Right Step to make a success of Warrior One and testified that when the Commission froze the Securus bank account, the business relationship with Jack Bateman dissolved.

[172] The bulk of Ms. McErlean's evidence confirmed the relationships that Right Step had with the various companies in which it had an interest or tried to promote. Her evidence on this topic was of little or no assistance to the Panel since it merely confirmed what previous witnesses had said. In cross-examination, Mr. Britton questioned her about the personal bank accounts operated by Ms. McErlean and her husband and the source of the funds for those bank accounts. This evidence was not particularly helpful for the Panel, inasmuch as Mr. McErlean already conceded that the source of the funds for the support of the various businesses, the payments to Mr. Nicholls and Mr. Ford and the payment of the McErlean's personal expenses all came from the Securus bank account.

[173] Staff counsel chose not to call any evidence in reply and that concluded the hearing on the merits.

IV. THE APPLICABLE LAW

A. Standard of Proof

[174] The standard of proof in this proceeding is the civil standard of proof of the balance of probabilities. The Panel must scrutinize the evidence with care and be satisfied whether it is more likely than not that the allegations occurred (*F.H. v. McDougall*, [2008] 3 S.C.R. 4, at para. 40).

B. The Use of Hearsay Evidence

[175] Some of the evidence introduced during the merits hearing was hearsay evidence. Subsection 15(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "**SPPA**") allows for the admission of hearsay evidence in Commission proceedings. Subsection 15(1) of the SPPA provides:

> *What is admissible in evidence at a hearing*
>
> 15.(1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,
>
> (a) any oral testimony; and
>
> (b) any document or other thing,
>
> relevant to the subject matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

[176] In *The Law of Evidence,* it is stated that:

> In proceeding before most administrative tribunals and labour arbitration boards, hearsay evidence is freely admissible and its weight is a matter for the tribunal or board to decide, unless the receipt would amount to a clear denial of natural justice. So long as hearsay evidence is relevant it can serve as the basis for the decision, whether or not it is supported by other evidence which would be admissible in a court of law.
>
> (John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence Canada*, 2d ed. (Markham, Ont: LexisNexis Butterworths, 1999) at p. 308)

[177] In *Rex Diamond*, the Divisional Court dismissed an appeal of a Commission decision based on the ground that the panel's decision relied upon unreliable hearsay. In dismissing the appeal, Nordheimer J. observed that:

> (i) the Commission is expressly entitled by statute to consider hearsay evidence;
>
> (ii) hearsay evidence is not, in law, necessarily less reliable than direct evidence...
>
> (*Rex Diamond Mining v. (Ontario Securities Commission)*, [2010] O.J. No. 3422 ("***Rex Diamond***") at para. 4)

[178] Although hearsay is admissible pursuant to subsection 15(1) of the SPPA, the Panel must determine the appropriate weight to be given to the evidence. The Panel must take a careful approach and avoid undue reliance upon uncorroborated evidence that lacks sufficient indicia of reliability (*Re Maple Leaf Investment Corp.* (2011), 34 O.S.C.B 11551 at para. 46).

C. Securities Act Fraud

[179] Subsection 126.1(b) of the *Act* prohibits conduct relating to securities that a person or company knows or reasonably ought to know would perpetrate a fraud. Subsection 126.1(b) of the *Act* states:

> **126.1 Fraud and Market Manipulation** - A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities […] that the person or company knows or reasonably ought to know […]
>
> (b) perpetrates a fraud on any person or company.

[180] In previous decisions, this Commission has adopted the interpretation of the fraud provision in provincial securities legislation as set out by the British Columbia Court of Appeal in the *Anderson* decision. In *Anderson*, the British Columbia Court of Appeal held that the fraud provision in the British Columbia *Securities Act*, which is similar to the Ontario provision, requires proof of the same elements of fraud as in a prosecution under the *Criminal Code*. The fraud provision in the *Act* merely broadens the ambit of liability to those who knew or reasonably ought to have known that a person or company engaged in conduct that perpetrated a fraud. The words "knows or reasonably ought to know" do not diminish the requirement of Staff to prove subjective knowledge of the facts concerning the dishonest act by someone accused of fraud. As McKenzie J. stated at para. 26:

> …I find that it is clear that s. 57(b) [the fraud provision in the British Columbia Securities Act] does not dispense with proof of fraud, including proof a guilty mind. Derry v. Peak (1889), 14 A.C. 337 (H.L.) confirmed that a dishonest intent is required for fraud. Section 57(b) simply widens the prohibition against those who know or ought to know that a fraud is being perpetrated by others, as well as those who participate in perpetrating the fraud. It does not eliminate proof of fraud, including proof of subjective knowledge of the facts concerning the dishonest act by someone involved in the transaction.
>
> *(Anderson v. British Columbia (Securities Commission)* (2004), 192 B.C.C.A. 7 at para. 26; leave to appeal to the Supreme Court of Canada denied [2004], S.C.C.A. No. 81 (S.C.C.))

[181] In previous decisions, this Commission has also referred to the legal test for fraud set out in the leading case of *Théroux*. In this decision, McLachlin J. (as she then was) summarized he elements of fraud:

> …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 putting 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 of knowledge that the victim's pecuniary interest are put at risk).
>
> *(R v. Théroux*, [1993] 2 S.C.R. 5 (S.C.C.) ("***Théroux***") at para. 27)

[182] The act of fraud is established by two elements: a dishonest act and deprivation. The dishonest act is established by proof of deceit, falsehood or other fraudulent means. Deprivation is established by proof of detriment, prejudice or risk of prejudice to the economic interests of the victims caused by the dishonest act.

[183] A dishonest act may be established by proof of "other fraudulent means." Other fraudulent means encompasses all other means other than deceit or falsehood which can properly be characterized as dishonest. The courts have included within the meaning of "other fraudulent means" the unauthorized diversion of funds and the unauthorized arrogation of funds or property. The use of investors' funds in an unauthorized manner has been determined to be "other fraudulent means" (*R. v. Currie*, [1984] O.J. No. 147 (Ont. CA) pp. 3-4).

[184] The second element of the *actus reus* of fraud is deprivation. Actual economic loss suffered by the victim may establish deprivation but it is not required. Prejudice or risk of prejudice to an economic interest is sufficient.

[185] The mental element of fraud is established by proof of subjective knowledge of the prohibited act and subjective knowledge that the prohibited act would have the deprivation of another as a consequence. The subjective knowledge can be inferred from the totality of the evidence (*Théroux*, above, at para. 27).

D. Trading Without Registration

[186] Between January 22, 2009 and September 28, 2009, subsection 25(1)(a) of the *Act* prohibited trading in securities without being registered with the Commission. Subsection 25(1)(a) of the *Act* provided:

> No person or company shall,

> (a) trade in a security […] unless the person or company is registered as a dealer, or is registered as a salesperson or as a partner or as an officer of a registered dealer and is acting on behalf of the dealer,
>
> […]
>
> and the registration has been made in accordance with Ontario securities law […]

[187] On September 28, 2009, subsection 25(1)(a) of the *Act* was repealed and was replaced by subsection 25(1) which provides that:

> 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 in securities 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.

(a) Trade in Security

[188] With respect to the phrase "trade in a security" used in s. 25(1)(a) and s. 53(1) of the *Act* or "trading in securities" used in s. 25(1) of the *Act*, the definition of "trade" or "trading" under subsection 1(1) of the *Act* provides for a broad definition that includes any sale or disposition of a security for valuable consideration, including any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of such a sale or disposition.

(b) Acts in Furtherance of Trade

[189] The jurisprudence in this area reflects a contextual approach to determine whether non-registered individuals or companies have engaged in acts in furtherance of a trade. A contextual approach examines the totality of the conduct and the setting in which the acts have occurred, as well as the proximity of the acts to an actual or potential trade in securities. The primary consideration of the contextual approach is the effect the acts had on those to whom they were directed (*Re Momentas Corp*. (2006), 29 O.S.C.B. 7408 at para. 77).

[190] The Ontario Court of Justice stressed the broadly-framed definition of "trade" stating that "the legislature has chosen to define the term and they have chosen to define it broadly in order to encompass almost every conceivable transaction in securities" (*R. v. Sussman*, [1993] O.J. No. 4359, at paras. 46-48).

[191] In addition, taking steps to facilitate the mechanical, or logistical, aspects of trading has also been found by the Commission to be an act in furtherance of a trade. In *Re Lett*, investors

transferred, deposited or caused to be deposited funds into the accounts of the corporate respondents, which had been opened by an individual respondent. The Commission found that the investors' funds were deposited into the accounts and accepted by the respondents for the purpose of selling securities. By accepting investors' funds which were to be invested, the Commission held that all of the respondents had carried out acts in furtherance of trades (*Re Lett* (2004), 27 O.S.C.B. 3215 at para. 60).

(c) Not Necessary to Complete Trade

[192] The respondent does not have to have direct contact or make a direct solicitation of an investor for an act to constitute an act in furtherance of a trade. An act in furtherance of a trade does not require that an investment contract be completed or that an actual trade otherwise occur. Any claim that an actual trade must occur for there to be an act in furtherance of a trade would necessarily limit the effectiveness and negate the purpose of the *Act*, which is to regulate those who trade, or who purport to trade, in securities (*Re First Federal Capital (Canada) Corp*. (2004), 27 O.S.C.B. 1603 at paras. 46-47 and 51).

(d) Definition of Security

[193] The definition of a security provided for in subsection 1(1)(n) of the *Act* includes any investment contract. "Investment contract" is not a term defined in the *Act* but its interpretation has been the subject of a long line of established jurisprudence.

[194] In the leading case, *Pacific Coast Coin*, the Supreme Court of Canada considered and reviewed the test established by the United States Supreme Court in *Howey*: "Does the scheme involve an investment of money in a common enterprise, with profits to come solely from the efforts of others?" (*Pacific Coast Coin Exchange of Canada v. Ontario (Securities Commission)*, [1978] 2 S.C.R. 112 ("***Pacific Coast Coin***") at pp. 10-11; (*Securities and Exchange Commission v. W.J. Howey Co*., 328 U.S. 293 (1946) ("***Howey***") at pp. 289-299).

[195] In deciding *Pacific Coast Coin*, supra, the Supreme Court of Canada relied upon a decision of the Supreme Court of Hawaii to craft a risk capital approach to defining an investment contract. The Hawaiian Court stated that:

> [T]he salient feature of securities sales is the public solicitation of venture capital to be used in a business enterprise … This subjection of the investor's money to the risks of an enterprise over which he exercises no managerial control is the basic economic reality of a security transaction.
>
> (*State of Hawaii, Commissioner of Securities v. Hawaii Market Center, Inc.* 485 P. 2d 105 (1971) at p. 3)

[196] As formulated by the Supreme Court of Canada, the test for the existence of an "investment contract" thus requires:

(1) an investment of money;

(2) with an intention or expectation of profit;

(3) in a common enterprise, in which the fortunes of the investor are interwoven with and dependent upon the efforts and success of those seeking the investment or of third parties; and

(4) where the efforts made by those other than the investor are undeniably significant ones, those essential managerial efforts which affect the failure or success of the enterprise.

(Pacific Coast Coin, above, at p. 11 (Q.L.))

[197] The application of the investment contract test formulated by the Supreme Court of Canada in *Pacific Coast Coin* must be consonant with the important public policy goals and mandate of the Commission. To achieve the purposes of the *Act*, the definition of "investment contract" must embody a flexible rather than a static principle, one that adapts to the countless investment schemes devised by those who seek to use others' money on the promise of profits (*Pacific Coast Coin*, above, at p. 10 (Q.L.)).

(e) Meaning of Distribution of Securities

[198] Subection 53 (1) of the *Act* provides that no person or company shall trade in a security if the trade would be a distribution of the security unless a preliminary prospectus and a prospectus have been filed and receipted by the Director.

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

[200] The meaning of distribution flows from the policy of the *Act* which is to provide full disclosure relating to a security to an investor before the security is purchased:

> Distributions are trades in securities in which the information asymmetry between the buyer and the seller is likely to be at its greatest, with the buyers having the greatest risk of being taken advantage of. If a trade constitutes a distribution, the issuer is required to assemble, publicly file and distribute to all buyers an informational document known as a prospectus.
>
> (Jeffrey G. MacIntosh and Christopher C. Nichols, *Securities Law* (Toronto, Ontario: Irwin Law, 2002) at p. 59)

(f) Advising Without Registration

[201] Between January 22, 2009 and September 28, 2009, subsection 25(1)(c) of the *Act* provided that:

> No person or company shall,
>
> (c) act as an adviser unless the person or company is registered as an adviser,…
>
> …and the registration has been made in accordance with Ontario securities law….

[202] On September 28, 2009, the *Act* was amended. Subsection 25(1)(c) was repealed and replaced with subsection 25(3). It provides:

> 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 the business of, or hold himself, herself or itself out as engaging in the business of advising anyone with respect to investing in, buying or selling securities unless the person or company,
>
> (a) is registered in accordance with Ontario securities law as an adviser; …

[203] In *Doulis*, the Commission set out the law respecting advising in a Staff application for a Temporary Order:

> A person is acting as an adviser if the person (i) offers an opinion about an issuer or its securities, or makes a recommendation about an investment in an issuer or its securities, and (ii) if the opinion or recommendation is offered in a manner that reflects a business purpose[….]
>
> …As the Commission stated in *Costello, Re* (2003), 26 O.S.C.B. 1617 (Ont. Sec. Comm.), [t]he trigger for registration as an adviser is not doing one or more acts that constitute the giving of advice, but engaging in the business of "advising"[…]
>
> It is because advising involves offering an opinion or recommendation to others that the Act requires advisers to be registered with the Commission and to meet certain conditions as to their education and experience. In *Gregory & Co. v. Quebec Sec. Commission* (1961), 28 D.L.R. (2d) 721 (S.C.C.), at p. 725, the Supreme Court of Canada held that:
>
> > The paramount object of the Act is to ensure that persons who, in the province, carry on the business of trading in securities or acting as investment counsel, shall be honest and of good repute and, in this way, to protect the public, in the Province or elsewhere, from being defrauded as a result of certain activities initiated in the Province by persons therein carrying on such a business.
>
> *(Re Doulis* (2011), 24 O.S.C.B. 9597 at paras. 28-30)

V. ANALYSIS

(a) The Fraud Allegation

[204] Mr. McErlean's fraudulent activities flow from his interaction with three sets of investors – the Aquiesce investors, the German investors and Ms. LK. We find that Mr. McErlean represented to all the investors that their money would be segregated in a separate account and would be used as collateral for investments in guaranteed, high-return trading. None of the money from the three sets of investors was used for that purpose. None of the money was kept separate and apart from the Securus bank account as was represented to the investors. Steps were taken by Mr. McErlean through the use of fake screenshots and fake bank account numbers to deceive investors into thinking their funds were separate and secure. All of the investor funds were used by Mr. McErlean to pay personal expenses, to repay previous investors and to invest in private companies in which he or his family members had a financial interest.

[205] These dishonest acts caused investors' funds to be placed at risk or lost entirely. Funds were used to pay off personal expenses and repay previous investors. Other funds were used to make capital contributions into high-risk enterprises. It matters not whether these investments were successful, which they were not. His actions exposed the investors to risk. These actions constitute the *actus reus* of fraud.

[206] We infer from the totality of the evidence and find that Mr. McErlean's dishonest acts were deliberate and intentional. His actions were designed to deceive investors and were carried out with the knowledge that his dishonest acts could have the consequences of depriving the investors.

[207] We find Mr. McErlean to be an unreliable and untrustworthy witness. We agree with Staff's submission that he had to be aware of the terms upon which investors advanced their funds. Our ordinary life experience and common sense tells us that the investors would not surrender their funds to Mr. McErlean for the purposes to which they were put. Overseas investors, whether from the United States, Germany or Dubai, are highly unlikely to forward vast sums to someone whom they do not know without having been provided with the varied guarantees that Mr. McErlean dishonestly provided to them.

[208] We find no evidence of the viability of any of the businesses in which Mr. McErlean invested. Gary Nicholls said Radical Rods was breaking even. Warrior One folded due to the freeze order. No financial statements for any of the "viable businesses" were produced. As Staff points out, even if the businesses were flourishing, the acts of fraud took place by putting the investors' funds at risk and in deceiving investors by saying their funds were in a segregated account.

[209] In his written submissions, Mr. McErlean submits that the amounts he received from investors were loans. We reject this submission. None of the normal indicia of a loan can be found in the evidence. All Mr. McErlean's efforts were directed to persuading the investors their funds were safely segregated in a separate account to which only they had access.

[210] We reject entirely Mr. McErlean's evidence that the German intermediaries concocted fake evidence and forged his signature to implicate him in wrongdoing. We find he attempted to deceive the Panel. Nothing in the documentary evidence supports his claim that he is the victim of fraudulent conduct. We find the mental element of fraud to have been established.

(b) Trading Allegations

[211] We find that Mr. McErlean engaged in trading securities. The agreements between Aquiesce and investors and Securus and investors were investment contracts which are included in the definition of a security under the *Act*. Investors advanced the funds with the intention or expectation of profit. Fortunes of the investors depended upon the efforts of Mr. McErlean. His efforts affected the success or failure of those investments.

[212] Mr. McErlean traded in securities, including the agreements involving Ms. LK and ED, which amounted to a direct act of trading. He also acted in furtherance of a trade by controlling the accounts into which investor funds were deposited. He forwarded the account opening documentation to the intermediaries for investors to complete. He provided the necessary instructions to arrange for the transfer of funds to the bank accounts under his control, while generating fictitious sub-account numbers for the investors. He was not registered to trade securities nor was he exempted from the dealer registration requirement. He acted contrary to s. 25(1)(a) of the *Act* (pre-September 28, 2009) and s. 25(1) (on and post-September 28, 2009). We find Securus acted contrary to s. 25(1) of the *Act* on and post-September 28, 2009. We find the Respondents engaged in or held themselves out to be engaged in, the business of advising with respect to investing in buying or selling securities. Mr. McErlean did so, while not registered, nor exempt in accordance with Ontario securities law, contrary to s. 25(1)(c) of the *Act* (pre-September 28, 2009) and to s. 25(3) (on and post-September 28, 2009).

(c) Advising Allegations

[213] Mr. McErlean held himself out to be engaged in the investment business, invited investors to advance money to Aquiesce and Securus on the understanding that the money would be pooled and used to enable him to trade securities. Investors advanced funds to him which Mr. McErlean pooled and made investment decisions on behalf of those investors. Part of the funds invested in Aquiesce were transferred to the TD Waterhouse trading account 72YJ94 where he engaged in discretionary equities trading. Part of the Securus funds were invested in private companies following a discretionary investment decision made by Mr. McErlean.

(d) Trading without Prospectus Allegations

[214] The trades with investors were in securities which had not previously been issued. There was a distribution of securities, contrary to s. 53 of the *Act*.. Investors were entitled to know that their funds were going to be used to pay Mr. McErlean's relatives, his personal expenses, repay previous investors and invest in private companies in which Mr. McErlean or his family members had a financial interest. This knowledge would have possibly affected their investment decisions. Securus was obliged to file a prospectus with the Commission providing investors

full, true and plain disclosure of all material facts relating to the securities. We find Securus held itself out to be engaged in the business of advising with respect to investing in buying or selling securities contrary to s. 25(3) (on and post-September 28, 2009).

(e) Securus Liability

[215] Mr. McErlean was the directing mind of Securus, thus rendering Securus in breach of trading and advising allegations. In addition, Mr. McErlean's direction of Securus rendered him in breach of trading and advising allegations as well.

VI. CONCLUSION

[216] We find that:

(a) the Respondents engaged in or participated in an act, practice or course of conduct relating to securities that the Respondents knew, or reasonably ought to have known, perpetrated a fraud on any person or company, contrary to s. 126.1(b) of the *Act*;

(b) Mr. McErlean traded securities without being registered to trade securities and without an exemption from the dealer registration requirement, contrary to s. 25(1)(a) of the *Act*;

(c) between September 29, 2009 and August 12, 2010, without an exemption from the dealer registration requirement, the Respondents engaged in or held themselves out to be engaged in the business of trading securities without being registered in accordance with Ontario securities law, contrary to s. 25(1) of the *Act*;

(d) Mr. McErlean acted as an adviser without registration and without an exemption from the adviser registration requirement, contrary to s. 25(1)(c) of the *Act*;

(e) the Respondents, without an exemption from the adviser registration requirement, engaged in the business of, or held themselves out as engaging in the business of, advising with respect to investing in, buying or selling securities without being registered in accordance with Ontario securities law, contrary to s. 25(3) of the *Act*;

(f) the Respondents traded securities which was a distribution of securities without having filed a preliminary prospectus or a prospectus with the Director or having an exemption from the prospectus requirement, contrary to s. 53(1) of the *Act*;

(g) Mr. McErlean, as a director of Securus authorized, permitted or acquiesced in the conduct of Securus contrary to s. 129.2 of the *Act* and Ontario securities law.

Dated at Toronto this 19th day of July, 2012.

"Vern Krishna"	*"James D. Carnwath"*
Vern Krishna, Q.C.	James D. Carnwath, Q.C.